**REPORTABLE**

**IN THE HIGH COURT OF SOUTH AFRICA**

**(EASTERN CAPE, PORT ELIZABETH)**

**In the matter between:**

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| **ADBUL RAHIM** | **Plaintiff in case no. 2777/2010** |
| **HOSSAIN KAMAL** | **Plaintiff in case no. 2778/2010** |
| **ZAKIR HOSSAIN** | **Plaintiff in case no. 2780/2010** |
| **HARUN MOHAMMED** | **Plaintiff in case no. 2781/2010** |
| **MOHAMMED SALLA UDDIN** | **Plaintiff in case no. 2782/2010** |
| **ADBUL SHAMOL** | **Plaintiff in case no. 2783/2010** |
| **MUHBUB ALOM** | **Plaintiff in case no. 2784/2010** |
| **TOYOBUR RAHMAN** | **Plaintiff in case no. 2786/2010** |
| **SUMAN CHUDHURY** | **Plaintiff in case no. 2787/2010** |
| **MUSTAFI GURRAMAN** | **Plaintiff in case no. 2806/2010** |
| **EUNICE HAYFORD** | **Plaintiff in case no. 3238/2010** |
| **ZAIUR RAHMAN** | **Plaintiff in case no. 3411/2010** |
| **MD ALAP** | **Plaintiff in case no. 3532/2010** |
| **NORUL ALOM** | **Plaintiff in case no. 3706/2010** |
| **MAHE MINTU** | **Plaintiff in case no. 3707/2010** |

**And**

**MINISTER OF HOME AFFAIRS** **Defendant**

Coram: **Chetty J**

Dates heard: **16 October 2012 to 26 October 2012; 19 June 2013 – 21 June 2013**

Date delivered: **9 July 2013**

Summary: *Immigration – Act 13 of 2002 – Illegal foreigners – S 34(1) – Whether plaintiffs illegal foreigners – Whether prison or police cell a place determined by Director-General for foreigners' detention – State – Interpretation – Principles – Refugees Act – Temporary asylum seeker permit – Validity – Expiry thereof – Delict – Damages – Unlawful arrest and detention – Whether established*

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**JUDGMENT**

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**Chetty, J**

[1] The fifteen (15) plaintiffs are all foreign nationals; fourteen of them are Bangladeshis, save the eleventh, who is a Ghanaian. They instituted separate delictual actions for damages against the defendant alleging that each had been unlawfully arrested and detained by servants of the defendant acting in the course and scope of their employment. In the amended plea, the defendant denied the unlawfulness of both the arrest and detention, and pleaded that the plaintiffs had

been lawfully arrested and detained for deportation to their countries of origin pursuant to the provisions of s 34 of the ***Immigration Act***[1] (the **IA**). In replication, the plaintiffs alleged that (i) when they were taken into custody they were not informed (presumably by their arrestor) of the statutory provisions under which they were arrested; (ii) denied that the defendant had complied with the provisions of s 34 of the **IA** and, in the alternative, alleged that the immigration officials, in effecting the arrest, failed to consider the personal circumstances peculiar to each of them and effected the arrest in terms of a blanket policy to detain suspected illegal foreigners for the purpose of deportation without exercising their discretion.

[2] The trials had all been set down on divers dates, the same attorneys and counsel had been retained by the parties and the issues which fell for adjudication were identical. By direction of this Court the actions were consolidated for the purpose of trial.

[3] It is not in issue that the onus of proof, in regard to justification for the admitted arrest, rests on the defendant. As pointed out by Eksteen, J, in ***Thompson and Another v Minister of Police and Another***[2]

> The arrest itself is prima facie such an odious interference with the liberty of the citizen that *animus injuriandi* is thereby presumed in our law, and no allegation of actual subjective *animus injuriandi* is necessary (*Foulds* v. *Smith*, 1950 (1) SA 1 (AD) at p. 11). In such an action the plaintiff need only prove the arrest itself

[1] Act No, 13 of 2002
[2] 1971 (1) SA 371 (E) at p374H

> and the *onus* will then lie on the person responsible to establish that it was legally justified.

[4] Although the legality of the plaintiffs' detention was rather cryptically placed in issue in the pleadings, its ambit was considerably widened during the cross-examination of various witnesses called by the defendant when the propriety of the conditions in which the plaintiffs were held in the St Albans, and the North End prisons and the police stations was pertinently placed in issue. In actions for damages for wrongful imprisonment too, our courts have adopted the principle that such infractions are *prima facie* illegal. Once the imprisonment has been admitted or proved the onus rests upon the defendant to allege and prove the existence of grounds in justification.

[5] In ***Minister of Justice v Hofmeyer***[3], Hoexter, JA, considered the question whether the propriety of the conditions in which a detainee had been detained could render the detention unlawful. After an exhaustive analysis of case law, and in particular, the dissenting judgment of Corbett, JA, in ***Goldberg and Others v Minister of Prisons and Others***[4], the learned judge stated the following at 139H-142C: -

> "The dissenting judgment of Corbett JA begins at 38 *in fin*. The learned Judge of Appeal pointed out (at 39A-C) that, although counsel for the appellants, in presenting his case to the Court, had disavowed reliance upon the common law, the common-law

[3] 1993 (3) SA 131 (AD)
[4] 1979 (1) SA 14 (A)

position of a sentenced prisoner and the general effect thereon of the Prisons Act and the prison regulations had been debated to some extent at the Bar; and that he was therefore minded to make 'some tentative observations in this connection'. Following immediately thereon, Corbett JA made the remarks quoted by King J as the second classic statement. I shall refer to what Corbett JA said in the passage concerned as 'the *residuum* principle'. At 39C-E the following observations were made:

'It seems to me that fundamentally a convicted and sentenced prisoner retains all the basic rights and liberties (using the word in its Hohfeldian sense) of an ordinary citizen except those taken away from him by law, expressly or by implication, or those necessarily inconsistent with the circumstances in which he, as a prisoner, is placed. Of course, the inroads which incarceration necessarily make upon a prisoner's personal rights and liberties (for sake of brevity I shall henceforth speak merely of "rights") are very considerable. He no longer has freedom of movement and has no choice in the place of his imprisonment. His contact with the outside world is limited and regulated. He must submit to the discipline of prison life and to the rules and regulations which prescribe how he must conduct himself and how he is to be treated while in prison. Nevertheless, there is a substantial *residuum* of basic rights which he cannot be denied; and, if he is denied them, then he is entitled, in my view, to legal redress.'"

And concluded by saying: -

"For these reasons I would respectfully express my agreement with the general approach reflected in the *residuum* principle enunciated by Corbett JA in the *Goldberg* case. Moreover, in seeking to identify or to circumscribe basic rights, I would approve the critical approach adopted by Corbett JA in the *Goldberg* case in regard to the efficacy or otherwise of a test based upon the distinction between 'comforts' on the one hand and 'necessities' on the other hand. In this field of inquiry, so I consider, the line of

demarcation between the two concepts is so blurred and so acutely dependent upon the particular circumstances of the case that the distinction provides a criterion of little value. An ordinary amenity of life, the enjoyment of which may in one situation afford no more than comfort or diversion, may in a different situation represent the direst necessity. Indeed, in the latter case, to put the matter starkly, enjoyment of the amenity may be a lifeline making the difference between physical fitness and debility; and likewise the difference between mental stability and derangement. I therefore also respectfully endorse the following remarks (at 41F-H) in the dissenting judgment in the *Goldberg* case:

'It is said that a prisoner has no right to study or to access to libraries or to receive books; that these facilities are privileges not rights, comforts not necessities. To my mind, this is an over-simplification. To test the position, suppose that an intellectual, a university graduate, were sentenced to life imprisonment and while in gaol was absolutely denied access to reading material - books, periodicals, magazines, newspapers, everything; and suppose further that there was no indication that this deprivation was in any way related to the requirements of prison discipline, or security, or the maintenance of law and order within the prison and that, despite his protests to the gaol authorities, he continued to be thus denied access to reading material. Could it be correctly asserted that in these circumstances he would be remediless? That all he could do was to fret for the comforts which he was denied?'"

[6] It is apparent from the aforegoing discourse that where the conditions of a detainee's/prisoner's confinement amount to a denial of such person's fundamental personality rights, such an infraction could, *per se*, render the detention unlawful. Cognisant of the onus thus resting upon it, the defendant adduced evidence from a number of witnesses to attest to the fact that not only was the arrest justified by operation of law but that the conditions in which the plaintiffs had been detained in the prisons and police cells did not violate any of their fundamental rights so as to

render the detention unlawful. Although none of the plaintiffs testified, during argument, Mr *Beyleveld* submitted that the evidence adduced by the defendant was wholly insufficient to discharge the onus resting upon it to prove that (i) the plaintiffs were illegal foreigners, (ii) upon arrest, each of the plaintiffs was appraised of his/her constitutional rights, (iii) the plaintiffs were lawfully detained in a place determined by the Director-General, (iv) their conditions of detention subscribed to lawful minimum standards, and (v) that, in any event, the immigration officials who arrested the plaintiffs failed to exercise any discretion whatsoever. The argument advanced requires a thorough analysis of s 34(1), which, under the rubric, "***Deportation and Detention of illegal foreigners"***, provides as follows: -

> **"34 Deportation and detention of illegal foreigners**
> (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 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."

[7] Mr *Beyleveld* argued that *ex facie* the aforegoing provisions, in order to establish the lawfulness of the arrest, the defendant had to prove not only that the plaintiffs were illegal foreigners but that the institutions in which they had been incarcerated were places determined by the Director-General of Home Affairs for their detention. As part of his armoury on the latter requirement, he relied principally on the unreported judgment of Raulinga, J, in ***Lawyers for Human Rights v Minister of Safety and Security and 17 Others***[5] (**SMG**) and the acquiescence, under cross-examination, by immigration officials called by the defendant, to the proposition put to them that they were not aware that the prisons/police station cells in which the plaintiffs had been detained were places which had been determined by the Director-General as institutions in which the plaintiffs could lawfully be detained. I propose to deal *seriatim* with each of the submissions advanced on behalf of the plaintiffs.

**Were the plaintiffs illegal foreigners**

[8] The submission that the defendant failed to discharge the onus to prove that the plaintiffs were illegal foreigners is a spurious one and proceeds from a false

[5] Case No, 5824/2009 (North Gauteng Province)

premise. In terms of s 22(1) of the ***Refugees Act*** (***RA***)[6], a refugee reception officer is obliged, "***pending the outcome of an application for asylum"***, to issue an asylum seeker with an asylum seeker permit subject to any condition as may be endorsed thereon by the refugee reception officer. The ***RA*** provides the machinery for the consideration of an application for asylum and for any appeal or review of an adverse decision. Consequently, and cognisant of the prolixity of the process, the legislature made provision in s 22(3) for the extension of the permit. It provides as follows: -

> "(3) 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."

The reference to subsection (1) therein expressly connotes that the extension is granted "***pending the outcome of the application"***.

[9] Nonetheless, Mr *Beyleveld* strenuously argued that in any event the temporary permits only expired at midnight on the date reflected thereon as the expiry date. I interpolate to say that each of the standard asylum seeker temporary permits makes provisions for the insertion by an immigration official of the expiry date of the temporary permit. Although both of the immigration officials who arrested the plaintiffs, Messrs *Simakade* and *Ntezo*, were browbeaten into agreeing with the assertion made by Mr *Beyleveld* during cross-examination that the plaintiffs' permits were valid on the date of their arrest, such concession does not inure to the plaintiffs

[6] Act No, 130 of 1998

benefit. An assertion put by a cross-examiner, during his cross-examination of a witness, is not evidence nor does it acquire such status by the witness' silence or non-refutation of what is put. Upon a proper construction of s 34(1) the permits are valid pending the outcome of the application and lapse upon final rejection. The evidence adduced conclusively established that each of the plaintiffs' applications for asylum had been refused by the refugee status determination officer, a decision subsequently ratified by the failure of the review and appeal procedures. None of the applicants availed themselves of the appeal procedure envisaged by s 26 of the **RA** and the rejection of the application for asylum rendered them illegal foreigners liable for deportation in terms of s 34(1) of the **IA**.

**Were the institutions in which the plaintiffs were held upon arrest, places determined by the Director-General for their detention?**

[10] Mr *Beyleveld* next submitted that upon a proper construction of s 34(1), the place determined for the detention of an illegal foreigner had to be designated as such by the Director-General as found by Raulinga J in ***SMG***. As a precursor to considering the validity of the submission and, a fortiori, the correctness of the finding in ***SMG***, it is apposite to restate the cardinal rules of construction of a statute laid down by Stratford, JA, in ***Bhyat v Commissioner for Immigration***[7] where the learned judge said the following: -

> "The cardinal rule of construction of a statute is to endeavour to arrive at the intention of the lawgiver from the language employed in the enactment. That is a trite statement of the law, but does not

[7] 1932 AD 125 at p129

> assist us to ascertain the intention when the language has made it obscure. Hence there has been evolved a number of subsidiary rules of construction, which are enunciated and applied in the decisions of our own Courts and in those of Great Britain. Sometimes perhaps one finds one of these rules over emphasised and sometimes another, but, all must yield in the last resort to the intention of the Act to be gathered from a consideration of its provisions in their entirety. It is now settled law both here and in England, though formerly it was not, that in the process of ascertaining intention it is permissible to have regard to the title of the Act. "It has been held, that you cannot resort to the title of an Act for the purpose of construing its provisions. Still, as was said by a very sound and careful judge, 'the title of an Act of Parliament is no part of the law, but it may tend to show the object of the Legislature "*per* LORD MACNAGHTEN in *Fenton v Thorley & Co.* (1903, A.C at p. 447). This view has been more than once adopted in our Courts and as recently as last year: see *South African Railways and Harbours v Edwards* (1930, A.D at p. 5). But there is undoubtedly an older and less qualified rule of construction and that is that in construing a provision of an Act of Parliament the plain meaning of its language must be adopted unless it leads to some absurdity, inconsistency, hardship or anomaly which from a consideration of the enactment as a whole a court of law is satisfied the Legislature could not have intended."

[11] As I shall in due course elaborate upon, I find myself in respectful disagreement, not only with the reasoning of Raulinga J, but moreover, the meaning which he ascribes to the provision in question. Principally, the relief which the applicants sought in ***SMG*** was for a declaratory order that the use of the Soutpansberg Military Grounds as a detention facility for the incarceration and subsequent deportation of illegal foreigners in terms of the Act was unlawful. The judgment records that the defendant, the Minister of Safety and Security, had

negotiated and obtained permission from the South African National Defence Force to utilise the Soutpansberg Military Grounds as a holding facility for illegal immigrants and regarded it as an extension of the Musina police station. It is furthermore apparent from the judgment that during the hearing, the defendant conceded that the Soutpansberg Military Grounds did not conform to the minimum standards for detention encapsulated in annexure "B" to the Immigration Regulations. In the course of his judgment, and after reproducing the provisions of s 34(1) in full, the learned judge said the following: -

> "As already discussed above the interpretation of the relevant provisions of the Immigration Act should be contextualised within the final Constitution. The interpretation should be such that the Immigration Act alleviate hardships rather than worsen them. It is for that reason that the designation of any facility used for the purpose of deportation of illegal foreigners must be determined by the Director-General of Home Affairs before it is used for that purpose. It therefore means that although the police officers are in terms of section 41(1) of the Immigration Act, also vested with the power to arrest and detain illegal foreigners, they are, however, tasked to do so in terms of section 34 of the Act. The SAPS concedes that it detains and deports illegal foreigners from the SMG. Detention and deportation of illegal foreigners can only be done in a manner and at a place determined by the Director-General."

[12] It is apparent from the terms of the judgment that as an aid to interpreting the provision, the judge sought guidance in the Constitution and Immigration Regulations, in particular, the provisions of s 28(1) to (5) and annexure "B" thereto, the minimum standards of detention. What he omitted to do was to look at the clear

language of s 34 in its totality to determine what the intention of the legislature was. Had he done so, as I shall in due course advert to, the need to embark upon a largely irrelevant enquiry would not have arisen. The question whether an earlier statute or regulations framed thereunder may be used as an interpretative aid is trite - it is impermissible for a court to have recourse to regulations to interpret a statute under which it is framed. As was pointed out by van Heerden, J, in ***In re Milne***[8], where the learned judge, in holding that it was impermissible to do so, said at p731B-D: -

> "As Lord RADCLIFFE remarked *In re MacManaway* 1951 AC 161 at 177 with reference to subsequent enactments throwing light upon the meaning of an earlier one, it was -
>
> "well to remember that the one thing which at least is certain amid a good deal that is speculative is that those who framed and enacted the earlier statute, the meaning of which is in question, could by no possibility have foreseen in what terms those who framed and enacted the later statute were destined to express themselves".
>
> These remarks apply, perhaps more strongly, when the subsequent enactment is of a subordinate nature and even more so when it is in the form of regulations."

[13] This finding restated a principle of law expounded by Holmes, JA, in ***Chief Registrar of Deeds v Hamilton-Brown***[9] where the learned judge stated the legal position thus: - **". . . a regulation cannot determine the interpretation of a statutory provision."**

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[8] 1984 (1) SA 727

[9] 1969 (2) SA 543 AD at 547H ". . . a regulation cannot determine the interpretation of a statutory provision."

[14] As adumbrated hereinbefore, the language employed in s 34(1) is clear and unambiguous. The subsection cannot be interpreted in isolation but contextually. Section 34 is posited under the rubric, ***"Deportation and detention of illegal foreigners"*** which, together with ss 32, 33, 35 and 36 constitute the ***"Enforcement and Monitoring"*** provisions of the **IA**. There is a clear indication in subsection (7)[10], 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.

[15] Although s 34(1)(e) merely prescribes that an illegal foreigner ***"shall be held in detention in compliance with minimum prescribed standards protecting his or her dignity and relevant human rights***", Yakoob, J, in ***Lawyers for Human Rights v Minister of Home Affairs***[11] remarked that the subsection ***"refers to prescribed standards of detention which again suggests a state facility"***. A similar interpretation as to the place envisaged in s 34(1) was adopted in ***Jeebhai and Others v Minister of Home Affairs and Another***[12] where Cachalia, JA, stated as follows: -

> "The detention contemplated in s 34(2) must be by warrant addressed to the station commissioner or head of a detention

[10]"(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."

[11] 2004 (4) SA 125

[12] 2009 (5) SA 54 (SCA) at para [24]B

> 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."

[16] 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.

[17] As adumbrated hereinbefore however, the conditions under which the plaintiffs were incarcerated in the prisons and police cells was assailed as constituting a violation of their fundamental rights which, it was contended, *per se*, rendered their detention unlawful. It is common cause that certain of the plaintiffs (the St Albans detainees) were incarcerated at the St Albans prison whilst others were held at the Kwazakhele police cells, and the eleventh plaintiff, at the female section of the North End prison. Mr *Japie Sampson (Sampson)*, was the officer commanding the facility in which the St Albans detainees were incarcerated. His evidence that the latter were kept apart from criminal offenders and under conditions which did not deleteriously violate any of their basic rights was challenged under cross-examination by Mr *Beyleveld* and the suggestion was repeatedly made that their incarceration violated virtually all of their fundamental rights. *Sampson* refuted the allegations in the strongest terms. There is, to my mind, no substance to the

assertions put to *Sampson* under cross-examination – they are based entirely upon speculative hypotheses unsupported by any direct testimony. Lieutenant *Davids'*, the community service commander at the Kwazakhele police station, testimony, likewise stands uncontroverted. The import of his evidence was that although the conditions under which the Kwazakhele detainees were kept were not ideal, they nonetheless conformed to acceptable standards.

**The alleged failure to notify the plaintiffs of their rights**

[18] The legality of the plaintiffs' arrest was moreover assailed on the basis that they were: -

(i) not informed upon their arrest or immediately thereafter of their rights delineated in s 34(1)(a) and (b);

(ii) not informed, promptly or otherwise, in a language they could understand of their rights in terms of s 35 of the Constitution;

(iii) they were not advised, promptly or otherwise, of their rights in terms of s 36(1)(b) of the Vienna Convention on Human Relations, 1963; and

(iv) warrants, substantially corresponding to Form 28 of Annexure "A" of the Immigration Regulations, were not issued in respect of the detention of certain of the plaintiffs.

[19] It was submitted that, *ex facie* certain of the standard forms used by the immigration officials which encompassed the Constitutional rights, (s 35), and bore the plaintiffs' signatures, the date and time reflected on the ***"certificate by detainee***" and that of the interpreter, differed. In their testimony, both *Simakade* and *Ntezo* testified that, given the passage of time which had elapsed since their interviews with the plaintiffs, they had no independent recollection of any of the interviews and relied entirely on the information contained in the various documents bearing their respective signatures. I unreservedly accept their evidence that they were able to communicate with the plaintiffs who fully understood the import of the various rights and warnings conveyed to them, and that, in those instances where the documents themselves contained anomalous entries, they took the added precaution of enlisting the assistance of the interpreters to once more advise the plaintiffs of their constitutional rights. During his cross-examination of both *Simakade* and *Ntezo*, Mr *Beyleveld*, in seeking to lay the basis for the argument that the s 34 rights had not been conveyed to the plaintiffs on arrest, pointed to certain incongruities on the notification of deportation forms.

[20] It is indeed so that in certain instances, the dates on the warrants of arrest, notification of deportation notices and the certificates by the interpreters, do not correspond. There is however no statutory requirement that the s 34(1)(a) and (b) rights be communicated to an illegal foreigner upon his arrest. It is evident from the wording of subsection (c) which provides for the notification to be given ***"when possible, practicable and available in a language that he or she understands"*** that the legislature recognised the very real possibility that an interpreter may not be readily available upon arrest.

[21] Both the interpreters, messrs *Hoossain* and *Mansoor's* impartiality, and a fortiori, reliability as witnesses, was assailed during their cross-examination and both were confronted with sworn affidavits ostensibly emanating from them and bearing their signatures, (exhibits "1D" and "1E"). Therein, both admitted to complicity with officials in the employ of the defendant, to record false information detrimental to the plaintiffs which, in the final analysis, would adversely affect the success of their application for asylum. Their veracity was sought to be impugned by calling Mr *Mijanur Rahman Wahied*, (a.k.a *Sohail*), one of the leaders of the expatriate Bangladeshi community residing in Port Elizabeth. It is unnecessary, for purposes of this judgment, to consider his testimony in any detail. Suffice it to say, his evidence is palpably untrue and I have no doubt that the two sworn statements were prepared by him and did not emanate from *Hoossain* or *Mansoor*. Cursory examination of the statements reveal that they are identical and gives the lie to *Wahied's* evidence that he merely acted as their amanuensis. I reject his evidence in totality and accept *Hoossain* and *Mansoor's* evidence that they signed the statements under duress. I furthermore accept their evidence that in all the instances they interpreted, they did so honestly and conscientiously.

**Exercise of discretion**

[22] Both *Simakade* and *Ntezo* testified that although s 34 vested them with the power to arrest an illegal foreigner, they nonetheless were aware that they nonetheless retained a discretion whether or not to arrest and detain the plaintiffs. *Simakade's* evidence was as follows: -

But there are processes on deporting the person, so which I consider firstly if the person, for example, I take a decision to deport him, I don't just take a decision to deport him. There are some considerations that need to take place whether to see if because indeed obviously the person is illegal. But then I have to take consideration to see whether the person will leave the country on his own or he has the passport or he's voluntarily willing to leave the country by himself. That means in that case he doesn't have to be detained or arrested in order for him to be deported. And secondly in a case the consideration which I take for a person who is unable to leave the country by himself, so therefore another consideration whereby that person obviously he has to be deported, but then the question of detention it relies on or maybe determining more on the status of the applicant in terms of checking that this applicant has applied for other permits except for the asylum which is sect. 22 permit. In a case whereby like the plaintiff maybe is married to a South African citizen, or he's got relatives and all such things. So in cases like that I don't deport them but I will still detain them for the purpose of getting the proof or whatever the reason may be before I take the decision to deport them. And secondly I take into consideration on the process take into consideration the personal circumstances of the plaintiff, whether the plaintiff has got fixed assets; he's got lawful employment; or he's got assets and all that. But in none of all these cases that I've dealt with, these eight cases, none of them confirmed to me that he has got assets or he is married to a South African citizen and therefore wishes to change the status from asylum seeker to use the (indistinct) permit. And also there was none of them who confirmed that they are conducting their lawful businesses, etc. etc. So that's where I took the decision to deport them, sorry to detain them for the

> purpose of deportation, ja. So that's how the process goes"

*Ntezo's* evidence mirrored that of *Simakade*. It is clear from the aforegoing reproduction of the evidence that the decision to arrest and deport the plaintiffs was not arbitrary but effected against the background of all material factors.

[23] I am satisfied that the defendant has discharged the onus resting upon it and, in the result the following order will issue:

**The action instituted by each of the plaintiffs is dismissed with costs, such costs to include the costs of two counsel.**

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**D. CHETTY**

**JUDGE OF THE HIGH COURT**

**APPEARANCE:**

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