REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

…….……..... ……
SIGNATURE **DATE**

CASE NO: 33905/2019

In the matter between:

O A **APPLICANT**

And

THE MINSTER OF HOME AFFAIRS **FIRST RESPONDENT**

THE DIRECTOR GENERAL -

DEPARTMENT OF HOME AFFAIRS **SECOND RESPONDENT**

LINDELA HOLDING FACILITY (BOSASA) **THIRD RESPONDENT**

JUDGMENT

WINDELL J:

INTRODUCTION

[1] This is an urgent application to declare applicant's continued detention unlawful and for his immediate release from detention to afford him the opportunity to apply for asylum. I am satisfied that the matter is urgent.

[2] The first and second respondents oppose the application and aver that the applicant is not a *bona fide* asylum seeker entitled to the protection afforded by the Refugees Act 130 of 1998 ("the Refugees Act"), and that he should be dealt with in terms of the Immigration Act 13 of 2000 ("the Immigration Act").

[3] The first question that therefore needs to be determined is whether the applicant has furnished this court with sufficient information to afford him protection under the Refugees Act and for the court to conclude that the Refugees Act applied to him.

THE FACTS

[4] In the applicant's founding affidavit the applicant made the following averments:

[4]

"I am an asylum seeker in the Republic of South Africa. I would face risk of persecution and danger to my life if I were to return to my country of origin.

[14]

Owing to my continued detention by the respondents:

(i) I am subjected to on-going violation of my life to human dignity, freedom of movement and rights against arbitrary detention;

(ii) I am exposed to the risk of deportation daily;

(iii) I am being detained unlawfully and without proper grounds in law;

(iv) I have been denied my rights in terms of the Constitution, The Refugees Act and the Immigration Act;

(v) I face a real risk of persecution and threat to my life, physical safety and freedom if I am forced to return to my country of origin.

[18]

I was forced to flee my country of origin as a result of persecution and in fear of my life.

[19]

I do not set out herein the details of my asylum due to the confidential nature of my claim. I am advised that the right to keep the contents of an asylum claim confidential is enshrined in section 21 (5) of the Refugees Act.

[20]

I entered South Africa sometime in 2016 after going through a number of countries in the likes of the Republic of Chad, Cameroon, Republic of Congo, DRC, Zambia and Zimbabwe.

[21]

I have been trying to obtain the asylum seeker permit but to no avail. I have on numerous occasions approached the Desmond Tutu Refugees Reception Office in Pretoria to file an application for asylum, but Immigration officers always turned me down.

[23]

I have just been travelling from one town to another in the quest for a legal document to sojourn in the Republic. That is travelling to the various Refugee Reception Offices in the likes of Musina, Durban, Cape Town, Port Elisabeth and the Desmond Tutu RRO in Pretoria.

[24]

I was arrested and detained at Saboswa Police Station until I was transferred to Lindela Holding Facility in Krugersdorp on the 3rd of September 2019. This can be confirmed by my Lindela Card……"

[5] In a letter from the applicant's attorneys, Tonie Okorie Attorneys, attached to the founding affidavit, the following was noted:

> *"O A is an adult male from Nigeria who came into the country in 2016 and was arrested in July 2019 he spent 30 days at the Police station and was later discharged to Lindela. A was arrested for being an illegal immigrant in the republic. He has no criminal record or pending cases."*

[6] In their answering affidavit the respondents not only denied that the applicant was forced to flee his country as a result of *"persecution and in fear of his life",* but also placed the following facts before court:

1. In terms of the records of the Department of Home Affairs, the applicant first entered the Republic with a relative's permit in 2010, which permit expired in November 2012. The permit was renewed and extended until November 2104. The applicant's purported relative was his spouse.

2. On 9 July 2019, the applicant was arrested in Siyabuswa for dealing in second hand goods without complying with statutory requirements.
3. The applicant was found guilty of the offence as well as illegally sojourning in the Republic.
4. In his plea to court for a lenient sanction, the applicant prepared a statement wherein he states that he entered the Republic with a valid passport and permit. He further stated that his permit expired in 2019 and that he did not apply for its renewal.
5. He stated that his reason for entering the Republic was to look for employment.
6. On 25 July 2019 the applicant was cautioned and discharged and his deportation order was signed.
7. Upon the applicant's arrival at Lindela an interview in terms of section 41 of the Refugees Act was conducted.
8. In terms of the interview the applicant indicated that he first entered the country in 2005 and that the purpose was to visit. He never expressed and intention to apply for asylum and he never indicated that his reasons for coming to South Africa was to seek asylum.

[7] The applicant seeks final relief in motion proceedings. The principles enunciated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1] is applicable, namely that the application is to be adjudicated on the respondents' version, together with those allegations made by the applicant which were not disputed by respondents. Whilst the applicant's founding affidavit is riddled with unsubstantiated, bald and vague averments, the respondents have filed a comprehensive answering affidavit,

[1] 1984 (3) SA 623 (A) at 634H - I

with annexures, containing damning allegations against the applicant. The applicant has seen fit not to file a replying affidavit and the allegations made by the respondents therefore stand uncontroverted. Taking into consideration the nature of the allegations made against the applicant, I am not surprised.

[8] The applicant has a duty to place true facts before the court, especially when it is presented with a contrary version in an answering affidavit. The applicant's affidavit contains glaring inaccuracies and falsehoods and his conduct is abusive of the processes of court. His application should be dismissed for this reason alone. But, even if his founding affidavit would have been able to stand scrutiny, he had failed to plead the basic jurisdictional facts to afford him the protection of the Refugees Act.

THE LAW

[9] Section 2 of the Refugees Act provides that no person may be returned to any other country, if as a result of such return, such person may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group, or his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or the whole of that country.

[10] In *Saidi v Minister of Home Affairs*[2], the Constitutional Court ("the CC") held that all other provisions of the Refugees Act are subordinate to those of section 2. It emphasised that courts must adopt a purposive reading of statutory provisions as one of the purposes of the Refugees Act is to give effect within the Republic to the relevant international legal instruments, principles and standards relating to refugees. At paragraph [29] Madlanga J, writing for the majority, stated:

> *"The paramount importance of protecting genuine refugees from expulsion is highlighted in the introduction of the Refugee Convention, which says:*
>
> > *"The principle of non-refoulement is so fundamental that no reservations or derogations may be made to it. It provides that no one shall expel or return ("refouler") a refugee against his or her will, in any manner whatsoever, to a territory where he or she fears threats to life or freedom."*

[11] In *Ruta v Minister of Home Affairs*[3], the CC affirmed the overarching importance of section 2 and stated as follows:

> *"[24] This is a remarkable provision. Perhaps it is unprecedented in the history of our country's enactments. It places the prohibition it enacts above any contrary provision of the Refugees Act itself - but also places its provisions above anything in any other statute or legal provision. That is a powerful decree. Practically it does two things. It enacts a prohibition. But it also expresses a principle: that of non refoulement, the*

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[2] 2018 (4) SA 333 (CC) at [27].

[3] 2019 (2) SA 329 (CC)

concept that one fleeing persecution or threats to "his or her life, physical safety or freedom" should not be made to return to the country inflicting it."

APPLICABILITY OF THE REFUGEES ACT

[12] The question that needs to be determined is whether it is sufficient for an applicant to merely state that he or she wants to apply for an asylum without pleading, at the very least, the jurisdictional facts set out in section 2 of the Refugees Act.

[13] It is trite that it is not within the power of, nor the function of the courts to determine the merits of an application for asylum in terms of the Refugees Act, but that it is for the Refugee Status Determination Officer to do so. The Supreme Court of Appeal ("the SCA") in *Bula,*[4] *Arse,*[5] *Ersumo*[6] and in *Abdi*[7], held, in each of these cases, that the applicants enjoyed the protection of the Refugees Act and ordered their release from detention. The correctness of these decisions was recently affirmed by the CC in *Ruta* where it was held that the Immigration Act determines who is an "illegal foreigner" liable to deportation, and the Refugees Act, and that statute alone, determines who may seek asylum and who is entitled to refugee status. The CC also stated emphatically that any delay in applying for asylum, no matter how long, will not diminish an applicant's entitlement to apply.

[4] *Bula v Minister of Home Affairs* 2012 (4) SA 560 (SCA)
[5] *Arse v Minister of Home Affairs* 2012 (4) SA 544 (SCA)
[6] *Ersumo v Minister of Home Affairs* 2012 (4) SA 581 (SCA)
[7] *Abdi v Minister of Home Affairs 2011 (3) SA 37 (SCA).*

[14] The facts in *Bula, Ersumo, Arse, Abdi and Ruta* are all fairly similar: The applicants fled their home countries and would be persecuted, or their lives would be endangered, if they returned to their home country because of their tribal and/or political affiliation. In *Bula*, nineteen Ethiopians fled their home country to escape political persecution and in fear of their lives, and walked for a year through Kenya, Tanzania and Mozambique before arriving in South Africa. The appellants were all supporters of the opposition political party in Ethiopia, the Oromo Liberation Front and as such they were pursued, threatened and in some cases severely injured by the police and members of the ruling Ethiopian Peoples' Democratic Front. Because of the confidential nature of the allegations, and relying on the provisions of section 25 of the Refugees Act, no further specific details were provided. In *Arse* the appellant was an Ethiopian citizen who, according to his founding papers, fled from Ethiopia because of persecution by reason of his tribal affiliation and political opinion. In *Abdi* the appellants fled from Somalia to the Republic and were granted refugee and asylum seeker status in the Republic. It was not disputed that Somalia was a failed or dysfunctional state that is unable to maintain public order or protect the lives of its citizens and that the appellants' lives would be in danger if they were to be forced to return to that country. In *Ruta* the respondent was a Rwandan national allegedly employed as a soldier in the Rwandan army. He entered the Republic in 2014 as a soldier in its exiled armed struggle against the then Rwandan government. In 2015 he was told, in effect, that he was to kill someone from a rival party. He was not willing to do so and approached the Directorate for Priority Crime Investigation, the Hawks, and disclosed his mission to them. The applicant was then placed in witness protection. He was moved around South Africa by the Hawks and during this time abortive efforts were made to secure refugee status for the applicant.

[15] In *Ersumo* the applicant had left Ethiopia because of a well-founded apprehension of being persecuted for his political opinions, and because of that fear, he was unwilling to return to Ethiopia. The court was satisfied that there was *"sufficient material to indicate [the applicant] may have a valid claim to refugee status"* and that being so the court did not have to consider *"whether he could have succeeded if less had been placed before the court."*

[16] The facts of *Ruta, Bula, Arse, Ersumo and Abdi* are wholly distinguishable from the facts *in casu*. In all these matters the applicants pleaded the necessary jurisdictional facts to bring them under the purview of section 2 of the Refugees Act. The applicant in the present matter, however, failed to set out any facts which would bring him within the ambit of the Refugees Act. The applicant also relied on section 21 (5), the 'confidentiality' provision of the Refugees Act. Section 21(5) provides that *"the confidentiality of asylum applications and the information contained therein must be ensured at all times"* save when the Refugee Appeals Authority may, in certain circumstances, allow any person or the media to attend and report on such hearing. The respondents reliance on section 21 (5) does not preclude the applicant from the need to furnish any information whatsoever pertaining to those fundamental issues dealt with in section 2 of the Refugees Act.

[17] A party seeking the protection of the Refugees Act must, at the very least, plead the jurisdictional facts set out in section 2 of the Refugees Act to enable the court to find that resort to the Refugees Act is justified. The necessity for setting out the

factual basis is not so that the court can consider the merits of the application for asylum but in order to satisfy the court that the application is one which could invoke consideration and application of the Refugees Act. Absent fundamental and necessary averments it is impossible for this court to determine the application and the dispute before it. Furthermore, taking into account the particular facts of this matter, it is difficult to escape the conclusion that the application to this court was an abuse of court process.

[18] In *Saidi,* the CC reiterated that this is not about non-return for the sake of it, but that it is about not returning asylum seekers to the very ills **– recognised as bases for seeking asylum** (my emphasis) – that were the reason for their escape from their countries of origin. The applicant has not disclosed sufficient information to meet the standard applied in *Bula, Ersumo, Abdi, Arse* and *Ruta* and is not entitled to the protection of the Refugees Act.

WARRANT OF DETENTION

[19] At the hearing of the application the applicant submitted that even if the court should find that the applicant is not afforded the protection of the Refugees Act, that his detention was unlawful as there is no valid warrant of detention. It was submitted that if there was no valid warrant, the applicant should be released summarily. As this aspect was not specifically dealt with by the applicant in the founding affidavit, leave was granted to the respondents to file a supplementary affidavit dealing with this aspect.

[20] Section 34 (1) of the Immigration Act deals with deportation and detention of illegal foreigners. The section reads as follows:

> *"(1) Without the need for a warrant, an immigration officer may arrest an illegal foreigner or cause him or her to be arrested, and shall, irrespective of whether such foreigner is arrested, deport him or her or cause him or her to be deported and may, pending his or her deportation, detain him or her or cause him or her to be detained in a manner and at a place determined by the Director-General, provided that the foreigner concerned-*
>
> *(a) shall be notified in writing of the decision to deport him or her and of his or her right to appeal such decision in terms of this Act;*
>
> *(b) may at any time request 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."*

[21] The respondents filed a supplementary affidavit wherein it is averred that there was a valid warrant of detention permitting the continued detention of the applicant. Attached to the supplementary affidavit were the following documents:

1. "*WARRANT OF DETENTION OF ILLEGAL FOREIGNER"* dated 26 July 2019.

2. *"WARRANT OF DETENTION"* dated 26 July 2019 signed by the Additional Magistrate at Siybuswa Magistrate's Court.

3. "APPLICATION TO COURT FOR EXTENSION OF DETENTION AND AUTHORISATION BY COURT FOR THAT EXTENSION" dated 20 August 2019, confirming the extended detention of the applicant.

[22] The order of the magistrate dated 20 August 2019 does not specify for what period the detention was extended for. There is also no indication that there was an application for the extension of his detention after 20 August 2019. The applicant is therefore, for these two reasons alone, released with immediate effect.

[23] There is, however, another issue that needs to be resolved. That issue concerns the declaration of invalidity of section 34 (1)(b) and (d) by the CC in the matter of *Lawyers for Human Rights v Minister of Home Affairs and Others.*[8]

THE INVALIDITY OF SECTIONS 34(1(b) and (d) OF THE IMMIGRATION ACT.

[8] 2017 (5) SA 480 (CC)

[24] On 29 June 2017, the CC, in the matter of *Lawyers for Human Rights v Minister of Home Affairs and Others,*[9] declared section 34 (1)(b) and (d) inconsistent with sections 12 (1) and 35 (2)(d) of the Constitution and hence, invalid. The declaration of invalidity was suspended for 24 months from the date of the order to enable Parliament to correct the defect. In paragraph 4 of the order the CC ordered that:

> *"4. Pending legislation to be enacted within 24 months or upon the expiry of this period, any illegal foreigner detained under s 34(1) of the Immigration Act shall be brought before a court in person within 48 hours from the time of arrest or not later than the first court day after the expiry of the 48 hours, if 48 hours expired outside ordinary court days.*
>
> *5. Illegal foreigners who are in detention at the time this order is issued shall be brought before a court within 48 hours from the date of this order or on such later date as may be determined by a court.*
>
> *6. In the event of Parliament failing to pass corrective legislation within 24 months, the declaration of invalidity shall operate prospectively."*

[25] The 24 months expired on 29 June 2019. Counsel for the respondents confirmed during the hearing that the Immigration Act has not been amended during the suspension period. From the available sources at present it would appear that Sections 34(1)(b) and (d) are invalid and there are no other sections in the Immigration Act warranting the further detention of an illegal immigrant after his or her initial appearance in court.

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[9] 2017 (5) SA 480 (CC)

[26] The applicant *in casu* has been released and the validity of his detention is moot. However, it is, in my view, in the interests of justice necessary to consider the position of illegal immigrants in the position of the applicant. In *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa*[10] the court said:

> "*It is by now axiomatic that mootness does not constitute an absolute bar to the justiciability of an issue. The court has a discretion whether or not to hear a matter. The test is one of the interests of justice. A relevant consideration is whether the order that the court may make will have any practical effect either on the parties or on others. In the exercise of its discretion the court may decide to resolve an issue that is moot if to do so will be in the public interest. This will be the case where it will either benefit the larger public or achieve legal certainty."*

[26] Counsel for both the applicant and the respondents are requested to make submissions on this issue before 25 November 2019. In addition, this court will issue directions inviting any interested parties to be joined as *amici* of the court and to make submissions. In particular, I will invite submissions from Lawyers for Human Rights, who argued for the declaration of invalidity of sections 34(1)(b) and (d) in *Lawyers for Human Rights v The Minister of Home Affairs,* as well as from the Minister of Justice and Correctional Services.

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L. WINDELL

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

[10] 2005 (4) SA 319 (CC).

APPEARANCES

Counsel for appellant:	Adv. TL Dikolomela
Instructed by:	Tony Akorie Attorneys
Counsel for respondents:	Nthabiseng Thokoane
Instructed by:	Office of the State Attorneys Johannesburg
Date matter heard:	11 October, 22 October 2019 and 1 November 2019
Judgment date:	1 November 2019