

**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

In the matter between:

KUMAH ERIC Applicant	22481/2016
NNAMDI OKAFOR CHIJOKE ("CHILOSE OKAFEN") Applicant	22482/2016
NASIR MOHAMMED Applicant	22393/20016
KWANDO KYERE Applicant	22392/2016
UGOCHUKWU ESEMONU FRANCIS ("FRANCIS JESEMONU") Applicant	22480/2016
AKOLIE PAUL OLILEANYI Applicant	22448/2016
ANEROBI SUNDAY (ANIROBI) Applicant	22449/2016
ONYENZE PHILIP Applicant	22537/2016

And

THE MINISTER OF HOME AFFAIRS

First Respondent

THE DIRECTOR GENERAL, DEPARTMENT
OF HOME AFFAIRS

Second Respondent

THE HEAD OF LINDELA REPATRIATIONS
FACILITY (BOSASA (PTY) LTD t/a LEADING
PROSPECTS TRADING)

Third Respondent

MINISTER OF POLICE

Fourth Respondent

THE CHIEF MAGISTRATE, KRUGERSDORP
MAGISTRATE'S COURT

Fifth Respondent

Summary: Applicants seek to invoke the provisions of the Refugees Act 130 of 1998 but have failed to furnish any factual basis for invocation of and reliance upon such legislation as was done in the matters of *Bula and others v Minister of Home Affairs and Others* 2012 (4) SA 560 (SCA) and *Ersumo v Minister of Home Affairs and Others* 2012(4) SA 581 (SCA). No court can attempt or purport to apply legislation which is of no relevance to the dispute at hand. Any party seeking relief in terms of legislation must satisfy the court as to jurisdiction, *locus standi*, applicability of the legislation in general and specific provisions thereof.

Four applicants aver no more than unidentified fears or risks of persecution without giving any basis for such risk or fear of risk, the nature which such persecution might have taken and by whom it might have been perpetrated. One applicant avers no more than the presence of religious conflict in his home village without giving any basis why he might or might not have been the intended victim of any such religious differences. One applicant details that he is a Christian and his family was attacked by Muslims but gives no indication that all Christians in Nigeria are subject to such attack and that there is no safety anywhere in that country. None of these applicants indicate that he holds a “well-founded” fear of being “persecuted by reason of his race, tribe, religion, nationality, political opinion or membership of a particular social group” and is “unable to avail himself of the protection of the country [of his nationality]” (See section 3(a) of the Refugees Act). Nor has any applicant indicated that there are “events seriously disturbing or disrupting public order in either a part or the whole of his country of origin” which compels him to leave his place of residence to seek refuge in South Africa. None of these applicants have given any indication that the possibility of persecution extends to them within the whole of their country of origin or nationality and that there is no safe place for them in Nigeria or Ghana or Pakistan.

One applicant was involved in a family dispute over land with an uncle which unhappy state of familial discord does not begin to bring him within the purview of Section 3 of the Refugees Act. His is a 'manifestly unfounded application'.

The confidentiality provisions of subsection 21(5) do not preclude disclosure of sufficient factual information to bring the applicants within the purview of the Refugees Act as was done in both *Bula supra* and *Ersumo supra*.

Four applicants made no application for temporary asylum permits notwithstanding residence in the Republic for periods ranging from five to nine months unlike the apparently 'meritorious' or 'genuine' applicants in *Bula supra* and *Ersumo supra* where the applicants had either been arrested on the day of arrival or within 26 days of the last attempt at making such application.

Two applicants were informed that their applications for asylum had been rejected and thereafter fled from the Department of Home Affairs, took no steps for appeal or review and elected not to pursue their remedies in terms of the legislation. Two applicants have had their applications rejected with one having taken the respondents on review on the basis that he is the victim of a family dispute over land and the other claiming that there is nothing to be reviewed or appealed since the rejection was not accompanied with reasons.

The applications for release were dismissed.

JUDGMENT

SATCHWELL J:

INTRODUCTION

1. It would seem that the court in the Gauteng Local Division allocated to hear applications on an urgent basis because such matters cannot be heard in accordance with the prescriptions of the Rules of Court or the Practice Directives has now become almost exclusively "a refugees' court". In this one week I have heard ten matters where the applicants claim the protection of the Refugees Act 130 of 1998 ('the Refugees Act') which obviously indicates that there are difficulties in the implementation of such legislation and also renders this court overburdened in one area of administrative law.

2. I take the view that the liberty of the individual is always a matter of urgency¹ and accordingly I have heard each matter before me this week.
3. On the one hand, I have great concern that resort to the Refugees Act is being abused by persons who fail to give any indication why they fall within the purview of such legislation and the basis upon which they are entitled to ask for the protection of such legislation. On the other hand, I am concerned that many of these matters could be resolved by provision of administrative facilities such as establishment of offices of the Department of Home Affairs within the detention facilities where persons who wish to claim refugee status could be enabled to make the appropriate applications for asylum and to receive relevant advice.²
4. These applications were all brought as a matter of urgency. The respondent was represented in court but failed to conduct any enquiry or to prepare answering affidavits. Accordingly, the argument heard from respondents was based solely on those facts as may have been contained in the applicants' founding papers.
5. I note that, in these applications and in a number of others this week where I have handed down other judgments, the various respondents (such as The Minister and Director General of Home Affairs, The Head of Lindela, senior officials and employees of those respondents) were quite incapable of preparing and depositing on oath before a commissioner of oath to an answering affidavit. Mention was made of 'draft' affidavits but these, of course, unsigned and unsworn are not affidavits. Similarly, the office of the State Attorney appears incapable of preparing affidavits. In all the matters there was sufficient notice given before the urgent hearing. In other urgent applications which do not involve these respondents or this attorney, respondents can read and write, can formulate a defence if they have one, can prepare documents and can find a commissioner of oaths before whom the affidavit can be signed. This all seems to be beyond those whom are paid by tax payer's monies. In fact, documents were tendered in photocopy format without any affidavit indicating by whom they had been compiled, in whose possession they had been kept. Matters stood over from one day to another to enable the State Attorney to obtain documents which was sometimes not even done and if photocopies were available they were simply handed in without even an accompanying affidavit. In addition, a matter would be argued and then the court would be told that there was another document "somewhere", "not in this court" as

¹ Section 12(1)(b) of the Constitution guarantees the right to freedom and the right not to be detained without trial to both citizen and foreigners.

² As long ago as November 2011, the Supreme Court of Appeal in *Bula and Others v Minister of Home Affairs and Others* 2012 (4) SA 560 (SCA) referred to the "logistical logjam in the processing of applications for asylum of people detained at Lindela is in part due to the absence of a RSDO at Lindela. It is a problem that is easily resolved but it requires an act of will on the part of the department."

though it was possible for a court to have regard to same. I deplore this lack of enthusiasm for the practice of law on the part of the State Attorney and the lack of response by these respondents. In other matters, I have issued an order that the respondents (plus the State Attorney) prepare affidavits and attend at court to explain their failure to render service at all to the courts, those whom they detain and those whom they wish to deport. That is, in part, the background to these applications as well.

6. However, the founding affidavits of the applicants are singularly silent on virtually all essential issues such as:
 - a. The applicability of the Refugees Act. There is an absence of factual averment which would bring the applicant within the purview of the Act. In many cases there is no more than a bare allegation that the applicant is in fear of persecution but no factual basis is indicated therefore.
 - b. The means and duration and route of travel from applicant's home to the Republic which gives the court no indication why asylum was not sought at the first safe country reached by this traveller or whether or not the traveller boarded an aeroplane with a passport, visa and valid ticket.
 - c. Some applicants claim that it was their dearest wish to make application for asylum but that circumstances prevented them from so doing. They fail to indicate the years, months or dates when they made any such attempt(s) and what specifically prevented an unemployed traveller from persisting in any attempt to apply for asylum.
 - d. On occasion a temporary permit was granted in terms of section 22(1) but no details are given of such issue. Where the application was ultimately rejected, applicants are frequently silent as to the date of such rejection and when they were so informed.
 - e. One applicant is even silent as to the date and place of his arrest.
 - f. No applicant indicates the address where he was living prior to arrest, the source of his sustenance, where in the Republic he would live upon his anticipated release and whilst he would be pursuing applications for asylum, appeal or review. In other words, there is no indication where or how the Department of Home Affairs may maintain contact with these applicants.

7. Although there is a marked absence of relevant fact set out in these affidavits, each is replete with conclusions of law without setting out the factual basis for such conclusions. There is much repetition as to the provisions of the Refugees Act even when such provisions have no relevance to the particular application.³

FACTS ADDUCED IN SUPPORT OF INDIVIDUAL APPLICATIONS

8. Kumah

- a. Left Ghana in 2015 by unknown means.
- b. Arrived in the Republic of South Africa through Botswana on 28th August 2015.
- c. No application for asylum.
- d. Arrested on 12th May 2016.
- e. Claim that the provisions of the Refugee Act are of application because of “political and social persecution and in fear of my life”.

9. Nnamdi

- a. Left Nigeria in 2015 by unknown means.
- b. Arrived in Republic of South Africa in October 2015 via Maputo, Mocambique.
- c. No application for asylum.
- d. Arrested on 11th June 2016.
- e. Claims that that the provisions of the Refugee Act are applicable because “I “face a real risk of persecution and danger to my life”

10. Nasir

- a. Left Pakistan on an unknown date.
- b. Arrived in the Republic of South Africa at O. R. Tambo International Airport on 29th January 2016.
- c. Did not make an application for asylum.
- d. Arrested on 19th May 2016.
- e. His family in Pakistan has sent funds to meet the legal costs of this application.
- f. Claims that the provisions of the Refugee Act are of application to him because “I fled in fear of persecution” and he “was persecuted”.

11. Kwando

- a. Left Ghana on an unknown date by unknown means.
- b. Arrived in the Republic of South Africa in May 2015.

³ In Onyenze para 26 to 35 deals at length with applications for asylum in terms of section 21 when this is of no relevance since such application has already been made and granted and rejected.

- c. Applied for asylum which was rejected by the RSDO and which decision was upheld by the SCRA.⁴
- d. Arrested on 25th May 2016 and was then informed that the appeal had been dismissed.
- e. Has now brought an application for review in the Pretoria High Court.
- f. Claim that the provisions of the Refugee Act are of application because “both my parents died and left me with a big farm. In Ghana if you are young the elder people from your family they are the one who should take over the property. My uncle was the one who wanted to take over from my parents property but I refused. He tried to kill me but I managed to escape and reported him to the police but he will not be arrested. Then I was assisted by my pastor to leave Ghana because there was nothing which was done by the relevant authorities.”⁵

12. Ugochukwu

- a. Left Nigeria in February 2016 by unknown means.
- b. Arrived in the Republic of South Africa via Maputo, Mocambique in February 2016.
- c. No application for asylum was made.
- d. Arrested on 11th June 2016.
- e. Claims that the provisions of the Refugee Act are of application “as a result of political and social persecution and because I am in fear of my life”.

13. Akolie

- a. Left Nigeria on an unknown date by unknown means.
- b. Arrived in the Republic of South Africa “in September 2013” via Beitbridge.
- c. Applied for asylum on an unknown date. Was informed that the application had been rejected in March 2016. As a result “fled in fear of arrest” from the office of the Department of Home Affairs.
- d. Arrested on 23rd May 2016.
- e. Claims that the provisions of the Refugee Act are of application to him because “there was religious aggression and clashes in my place”.

14. Anerobi

- a. Left Nigeria on an unknown date by unknown means.
- b. Arrived in the Republic of South Africa via Beitbridge at the “end of 2010”.
- c. Applied for asylum on an unknown date. Was informed that the application had been rejected on an unknown date. As a result “fled in fear” from the offices of the Department of Home Affairs.

⁴ Paragraph 10 of founding affidavit.

⁵ Paragraph 19 of founding affidavit to review application.

- d. Arrested on 21st May 2016 without a permit.
- e. Has now brought an application for review in the Pretoria High Court.
- f. Claims that the provisions of the Refugee Act are of application to him because “I ran because of religious unrest in my place. I am a Christian and we were attacked by Muslims. I lost my family as a result.” and “I fled my country of origin for fear for my life due to religious aggression and clashes between us as Christians and Muslims in my place which resulted in the death of my family”.

15. Onyenze

- a. Left Nigeria in August 2014 by unknown means.
- b. Arrived in the Republic of South Africa in August 2014.
- c. Applied for asylum, temporary permits were granted and extended of which the latest was extended until 18th August 2016.
- d. Arrested on an unknown date when not in possession of any asylum permit.
- e. Attached to the application is a memorandum from the Department of Home Affairs date 28th June 2016 confirming the application for and the granting of a permit extended until 18th August 2016 and a memorandum from the Department of Home Affairs reflecting the photograph of the applicant, his personal details and that the status of his application for asylum was “final rejection – RSDO decision upheld by SCRA”.
- f. Claims that the provisions of the Refugees Act are applicable because he was “forced to flee Nigeria August 2014 as a result of political and social persecution and in fear of my life”

THE LAW

Applicability of the Refugees Act

- 16. It is trite that it is not within the power of nor the functions of this court, hearing this particular application, to determine the merits of an application for asylum in terms of the Refugees Act.
- 17. However, no court can attempt or purport to apply legislation which is of no relevance to the dispute in hand. Any party seeking relief in terms of the Road Accident Act 56 of 1996, the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998, the Wills Act 7 of 1953, the Consumer Protection Act 68 of 2008, the National Credit Act 34 of 2005 or any other legislation must satisfy the court as to jurisdiction, *locus standi*, applicability of the legislation in general and specific provisions thereof. An application which seeks the protection of and the implementation of the Refugees Act is no different.

18. In the seminal matters of *Bula and Others v Minister of Home Affairs and Others* 2012 (4) SA 560 (SCA) and *Ersumo v Minister of Home Affairs and Others* 2012 (4) SA 581 (SCA) the Supreme Court of Appeal made it clear that the factual basis justifying and entitling resort to the provisions of the Refugees Act must be placed before the court. In *Bula supra* at paragraph [4] the applicants claimed to be members of an identified political party in their country of origin, the status of that party was one in and opposition, the specific steps which had been taken against the applicants by reason of their membership of that party in opposition. In *Ersumo supra* at paragraph [1] the applicant claimed to have been imprisoned in a named prison as well as tortured by an identified group of persons, for political reasons. In both cases, the Supreme Court of Appeal was furnished with details of the route undertaken by the applicants on their journey towards the Republic – the one was a lengthy journey by foot and the other involved a stop in an intervening country which, for given reasons, was not thought to be a ‘safe haven’.
19. In short, as was concluded by the court in *Ersumo supra* at paragraph [7], there was “sufficient material to indicate the applicant may have a valid claim to refugee status”.⁶
20. The referral to conditions suffered by the applicants in their countries of origin by the Supreme Court of Appeal in both of the above matters was not to prejudge or even express a preliminary view on the substantive application for asylum. It was necessary for the court to be satisfied that the application was one which could invoke consideration of and application of the Refugees Act. Absent fundamental and necessary averments, it is difficult to know on what basis any court could rely upon the Refugees Act for determination of the application and the dispute before it.
21. In the matters presently before myself, there is a singular absence of disclosure on the part of the applicants. I am not provided with even a foretaste of such information as was made available to the Supreme Court of Appeal.
22. Four applicants (Kumah, Nnamdi Nasir, Ugochukwu) aver no more than “risk of persecution” without giving any basis for such risk or fear of risk , the nature which such persecution might have taken and by whom it might have been perpetrated. One applicant (Akolie) avers no more than the presence of religious conflict in his home village without giving any basis why he might or might not have been the intended victim of any such religious differences. One applicant (Anerobi) details

⁶ Contrary to the submission by the legal representative for Onyenze that *Ersumo supra* is authority for the proposition that it is ‘impermissible’ for a court to enquire into the question of the applicant’s status as a refugee – the court (at paragraph 7) specifically stated that it was unnecessary to address such a submission.

that he is a Christian and his family was attacked by Muslims but gives no indication that all Christians in Nigeria are subject to such attack and that there is no safety anywhere in that country.

23. None of these applicants indicate that he holds a “well-founded” fear of being “persecuted by reason of his race, tribe, religion, nationality, political opinion or membership of a particular social group” and is “unable to avail himself of the protection of the country [of his nationality]”.⁷ Nor has any applicant indicated that there are “events seriously disturbing or disrupting public order in either a part or the whole of his country of origin” which compels him to leave his place of residence to seek refuge in South Africa.⁸
24. None of these applicants have given any indication that the possibility of persecution extends to them within the whole of their country of origin or nationality and that there is no safe place for them in Nigeria or Ghana or Pakistan.
25. One applicant (Kwando) was involved in a family dispute over land with an uncle which unhappy state of familial discord does not begin to bring him within the purview of Section 3 of the Refugees Act. His is a ‘manifestly unfounded application’.
26. None of the applicants indicate their means of travel nor the route followed in the journey to the Republic. One (Nasir) apparently arrived by aeroplane (and presumably with an airticket, passport and visa) from Pakistan; two (Nnamdi and Ugochukwu) arrived via Maputo (presumably with airticket, passport and visa) from Nigeria; two (Anerobi and Akolie) arrived via Zimbabwe (presumably with airticket, passport and visa) from Nigeria; one (Kumah) arrived via Botswana (presumably with airticket, passport and visa) from Ghana; one (Kwando) arrived from Ghana and one (Onyenze) arrived from Nigeria and no detail of neither applicant’s intervening journey is given.
27. The legal representatives who argued these applications before me throughout the week relied upon the ‘confidentiality’ provisions of section 21(5) of the Refugees Act to the effect 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. Such reliance is misplaced to found the argument that this provision precludes the need for the applicants to furnish any information whatsoever pertaining to those fundamental issues dealt with in section 3 of the Refugees Act.

⁷ Section 3(a).

⁸ Section 3(b).

28. Reliance upon those provisions of section 21(5) are not of assistance to justify the failure to furnish any material basis to enable applicants to invoke the provisions of the Refugees Act. This application before me is not an 'asylum application' as referred to in section 21(5), this is not a hearing before the Refugee Appeals Authority or any other body established in terms of the Refugees Act. This is an application before the High Court and the applicant is seeking certain relief provided for in both our common law (*interdict de homine liberendo*) and in a wide variety of legislation (ranging from the Constitution of the Republic of South Africa 1996 to the Promotion of Administrative Justice Act 3 of 2000).
29. If an applicant seeks to invoke the provisions of any legislation, then the applicant must place before this court sufficient factual evidence to call such legislation into consideration and perhaps application. Absent any information which would bring an applicant within the purview of the Refugees Act and perhaps offer an applicant the protection of the Refugees Act, it is difficult to see how a court could begin to apply that legislation to the dispute in question.
30. The facts set out in Kwando indicate that his application to this court for protection in terms of the Refugees Act is "manifestly unfounded" as contemplated in the Act.
31. None of the applicants have disclosed sufficient information to even attempt to meet the standard applied in the *Bula supra* and *Ersumo supra* matters.

Failure to Apply for Asylum

32. Four applicants (Nasir, Ugochukwu, Kumah, Nnamdi) made no application for a temporary asylum permit as provided for in terms of section 22 of the Refugees Act. Insofar as any of them averred that they had encountered difficulties in making such an application, each was noticeably vague on the point – unlike *Ersumo supra* where dates and places were given to the court.
33. The legal representatives for these applicants relied upon the authorities of *Bula supra* and *Ersumo supra* in support of the submission that all applicants who wish to make an application for asylum may do so whenever it may take his fancy. That is not the guidance and direction offered in those judgments of the Supreme Court of Appeal.
34. In *Bula supra*, the applicants arrived in Johannesburg on 16th June 2011 and were arrested that very day. They had had no opportunity at all to make any application for a temporary asylum permit before they were actually arrested. In *Ersumo supra*, the applicant had been granted an asylum transfer permit, had made attempts on

identified dates to make an application for asylum and the court found that there had been no more than a lapse of 26 days from the last attempt to apply for asylum and his arrest.

35. I am mindful that the court in *Ersumo supra* makes it abundantly clear that the regulations, though referring to making an application “without delay”, give no time periods within which an application must be made and that the legislation makes no reference to “the duration of the illegal presence”.⁹ Both *Bula* and *Ersumo supra* make it clear that any illegal foreigner must be permitted to apply for asylum.
36. But the Supreme Court of Appeal does not appear interpret the legislation or regulations to allow an indefinite and unlimited period for an illegal foreigner to seek to invoke the protection of the Refugees Act when it finally suited him so to do. In *Bula supra* the applicants had been in the Republic for an identified period of one day without making an application. In *Ersumo supra* the applicant had made several attempts to make the application and 26 days had elapsed before the arrest occurred.
37. In the cases before me, the applicants (who have failed to make the necessary applications from time of arrival in the Republic to time of arrest) had been in the Republic for lengthy periods – Nnamdi for eight months, Ugochukwu for four months, , Kumah for nine months, Nasir for four months.
38. In *Ersumo supra* the court placed special reliance upon a phrase in *Abdi and Another v Minister of Home Affairs and Others* 2011 (3) SA 37 (SCA) to the effect that “intending applicants for refugee status are given every reasonable opportunity to file an application with the relevant refugee reception office”¹⁰. [my underlining]. It cannot be said that these applicants have not had every reasonable opportunity – extending from four to nine months – to make any application which they may have genuinely wished to make.
39. Of course, the findings of the Supreme Court of Appeal were against the backdrop that “there is nothing to indicate that a meritorious application may be refused merely on the grounds of delay in making the application” (at paragraph [15] of *Ersumo supra*) and (at paragraph [72] of *Bula supra*) that “The purpose of subsection 2 is clearly ensure that where a foreign national indicates an intention to apply for asylum, the regulatory framework of the RA kicks in, ultimately to ensure that genuine asylum seekers are not turned away”. In the present cases there is nothing to indicate any merit in any of the applications for asylum.

⁹ Paragraph 16 of *Ersumo supra*.

¹⁰ Paragraph 22.

Failure to Exhaust Remedies

40. Two applicants (Anerobi, Akolie) made applications for asylum in terms of section 21 of the Refugees Act and were granted temporary permits in terms of section 22. However, when they were advised that their applications had been rejected they did not pursue an appeal or take the matter on review. They disappeared. They abandoned the procedures created in terms of the Refugees Act.
41. Both applicants claim they 'fled' the Department of Home Affairs because they feared arrest. The result was that they elected to participate no further in the system provided to enable refugees to be granted asylum status. They 'fled' and, in so doing, ceased to participate in the process and failed to utilise the remedies then available to them.
42. It was submitted by respondent's legal representative that these applicants accepted the decision of rejection of the asylum application by reason of the flight and the failure to take any steps to challenge same. I cannot agree with this. The flight is an indication that the decision was not accepted, that the applicant wanted to stay in the Republic and not return to his place of origin. This was not acceptance of a decision but avoidance of both the decision and the implications thereof.

Rejection of Application

43. Not only did two (Anerobi and Akolie) of the applicants flee from the office of the Department of Home Affairs when they were informed that their applications for asylum had been rejected. One applicant (Kwando) has had his application rejected and he had lodged a review with the Pretoria High Court. Another applicant (Onyenze) was granted a permit which was extended until 18th August 2016 but it now emerges that this application has been rejected.
44. The legal representative for Onyenze offered a multi-faceted argument. I note that, for some reason, in these 'refugee' applications legal representatives do not subject themselves to the discipline of preparing heads of argument which would focus the argument, identify the issues to be determined or highlight the authorities.
45. As I understand the argument, it is that there is a piece of paper which cannot be identified as such and which cannot be given the status of a 'rejection' because no reasons are attached thereto. Until a valid decision has been taken and reasons given by the Director-General in terms of section 24A of the Refugees Act and the decision upheld by the Director-General, there is no decision, nothing to review, nothing which would trigger the necessity for any appeal or review or other action on the part of the applicant.

46. It is correct that section 24(4) of the Refugees Act requires the Refugee Status Determination Officer to “furnish written reasons to the applicant within five working days after the date of the rejection”. Such reasons must obviously be furnished by the functionary making such decision – the Refugee Status Determination Officer. In the event that such official has failed or refused to furnish such reasons as required by legislation, this does not mean that there is no decision as counsel has argued. There is a decision although it may not have been accompanied by or followed by reasons. The decision may, of course, be challenged on the basis that it is unsupported by reasons. That may be grounds for successful review or appeal. But it cannot mean that there is no decision, no rejection and that such can simply be ignored.¹¹
47. I have some difficulty in understanding the reference in counsel’s oral argument to duties imposed on no one other than the Director General in terms of Section 24A of the Refugees Act. The copy of the legislation which is availed to me by the library of the High Court does not have a section 24A and it would appear that the 2008 amendments have not yet commenced operation.
48. Furthermore, the legal representative for the applicant Onyenze submitted that the permit granted to the applicant endures until and only expires on 18th August 2016. It is argued that, until such date, the applicant is entitled to utilise same and is lawfully within the Republic. Insofar as section 22(5) of the Refugees Act permits such a permit to be withdrawn, this may only be done by the Minister.
49. Notwithstanding, that the Minister is empowered by this Act to delegate his powers, this argument fails to have regard to the provisions of section 22(1) of the Act. An ‘asylum seeker permit’ must be granted by a Refugee Reception Officer “pending the outcome of an application in terms of section 21(1)”. That permit allows the applicant “to sojourn in the Republic temporarily” [my underlining].
50. The subsection gives two indications of the temporary and dependant and contingent nature of the permit. It is a permit which must be issued “pending” the outcome of an application and it is only a permit to reside in the Republic on a “temporary” basis. Once the application is no longer pending, the permit ceases to have utility since the purpose for which and the condition upon which the permit was granted has ceased to exist. Issue of the permit is of limited duration and is contingent upon the happening of the event – which event materialises once there is rejection of the application.

¹¹ See *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* [2004] 3 All SA 1; 2004 (6) SA 222 SCA.

51. Should the applicant choose to pursue the matter and decide to appeal a decision or take a decision upon review, then the applicant may be granted another temporary and contingent permit pending the outcome of such appeal or review.
52. Applicant Onyenze has no right to a permit subsequent to rejection of his application and no entitlement to insist that the temporary permit remains available to him until August 2016.

COSTS

53. Costs was a matter of some concern to all parties.
54. In each case the initial arrest and detention was certainly lawful. Each applicant is a foreigner. Only two of them had ever been granted "an asylum seeker permit" in terms of section 22 (1) of the Act. Onyenze was not in possession of his permit when he was apprehended and therefore there was no unlawfulness in apprehending him since he was then unable to indicate that he had ever been granted such a permit. Kwando was arrested when he was informed that his application for asylum had been rejected.
55. In a number of cases, the applicants' legal representatives had written to respondents giving them notice of the perceived unlawfulness of the detention of the applicants and demanding their immediate release. It is argued that, failing release and with opposition to the applications before me, that costs should be awarded in favour of the applicants and against the respondents.
56. The difficulty is the failure on the part of the applicants to give sufficient material indication as to the basis upon which they are or should be entitled to be treated in terms of the Refugees Act.
57. I deplore their lengthy detention. But I cannot order their release. It is difficult to conceive into what fate or circumstance such release could be ordered. I have not been given any lawful basis upon which I can order that any permit be furnished to them. No such purpose or any foundation in law has been adverted to. The result of their release would be without apparent purpose. They would be 'illegal foreigners' who could lawfully be rearrested even before they had left the gates of Lindela Detention Centre. If they managed to get beyond the gates of Lindela they would be without any documentation to allow them to lawfully remain in this country. They would be subject to the vagaries of living an illegal and underground life always on the verge of arrest.

58. They are currently in custody at Lindela detention centre awaiting deportation. That deportation should not be delayed. It must be implemented forthwith since these applicants cannot be deprived of their liberty by reason of administrative incapacity on the part of the respondents.

ORDER

59. An order is made as follows:

- a. The applications are dismissed.
- b. The question of costs is postponed to enable full argument to be heard as set out below.
- c. The respondents plus the Head of Home Affairs for Gauteng plus the State Attorney are to prepare affidavits, attend at court on a date to be arranged to explain the failure or inability of all respondents and legal representatives to act in accordance with the Law as set out above, to explain their failure or inability to work in a manner that enables urgent applications to be dealt with as prescribed by the Rules of Court and to enable this court to decide whether costs *de bonis propriis* should be paid in these matters by any employee or functionary personally rather than the taxpayer.

DATED AT JOHANNESBURG 08TH JULY 2016

SATCHWELL J

Counsel for Applicants Kumah, Nnamdi and Ugochukwu: Mr Mathebula.

Attorneys for Applicants: Ntiyiso Mathebula Attorneys.

Counsel for Applicants Nasir and Kwando: Mr Petla.

Attorneys for Applicants Nasir and Kwando: Mzamo Attorneys.

Counsel for Applicants Akolie and Anerobi: Mr Mkata

Attorneys for Applicants: Mkata Attorneys.

Counsel for Applicant Onyenze: Adv Dikolomela

Attorneys for Applicant: Melford Monway Attorneys.

Counsel for First Respondent: Adv I Lebeko.

Attorneys for First Respondent: Office of the State Attorney.

Dates of hearing: 05th, 06th and 07th July 2016.

Date of judgment: 08th July 2016.