IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

Case No.: 3536/2016

Date Heard: 13 October 2016

Date Delivered: 18 October 2016

In the matter between:

OGWO CHUKWU OKOROAFOR	Applicant
and	
MINISTER OF HOME AFFAIRS	First Respondent
DIRECTOR GENERAL OF HOME AFFAIRS	Second Respondent

JUDGMENT

EKSTEEN J:

[1] The applicant is a Nigerian national who claims to have come to South Africa in order to seek asylum. He has been in South Africa for an extended period and it is common cause that he has never personally submitted an application for an asylum seeker permit. During 2016 he was encountered by an immigration officer under the Immigration Act, 13 of 2002 (herein the Immigration Act) and has been arrested as an illegal immigrant. He is currently in detention pending deportation. The applicant seeks his immediate release and certain ancillary relief as appears later herein so as to enable him to apply for asylum.

[2] There are numerous disputes of fact which arise on the papers. I think that it is fair to say that the respondents have established, with the assistance of a considerable volume of documentation, that the bulk of the averments made by the

applicant are patently false. In any event, the applicant seeks final relief and it is now well established that where disputes of fact arise on affidavits, a final order may only be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. (See **Stellenbosch Farmers' Winery Limited v Stellenvale Winery (Pty) Limited** 1957 (4) SA 234 (C) at 235E-G and **Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (A) at 634H-I.)

[3] The facts which are to be accepted for purposes of the adjudication of the present matter reveal that the first respondent entered South Africa on 9 June 2013 under a visitor's permit. The applicant's file at the Department of Home Affairs further contained a document purporting to be an asylum seeker temporary permit and purportedly issued in favour of the applicant on 9 December 2013. It is evident, *ex facie* the permit, that the conditions stated in the permit were acknowledged and accepted by one Hu Guiqin. In terms of the provisions of the Refugees Act, 130 of 1998 (herein the Refugees Act) an applicant for an asylum seeker permit is to report and apply personally and he must accept and agree the conditions stipulated in the permit. The immigration officer who investigated the applicant's circumstances, one Klaasen, therefore checked the permit number on the National Immigration System which contains a record of all the issued permits and numbers. He established that the permit in issue was allocated to a different permit holder and accordingly the permit in the applicant's file was fraudulently obtained.

[4] Klaasen established that on 7 February 2014 the applicant, armed with this fraudulent document, made an application for a change of his existing status as

envisaged in section 10(6) of the Immigration Act. He sought to change his status from a holder of a temporary asylum seeker permit to a relative's visa as contemplated in section 18 of the Immigration Act, subject to the condition that he reside with his South African life partner. The applicant was represented at the time by a registered immigration practitioner.

[5] Klaasen's investigations reveal that the application for a relative visa issued on the basis of a permanent life partner was also fraudulently sought and obtained in that no permanent life partner ever existed. He traced the alleged life partner and obtained an affidavit from her wherein she confirmed that she has never had a relationship with the applicant but was paid a certain amount of money in order to purport to marry him.

[6] In view of these circumstances Klaasen brought charges against the applicant in terms of the provisions of section 49 of the Immigration Act. Two charges were levelled against him relating to his presence in South Africa and the fabrication of documentation. The applicant pleaded guilty to both charges on 21 September 2016 and was duly convicted. In respect of the first count, he was sentenced to a fine of R1 000 or 1 (one) month imprisonment and on count two he was sentenced to 3 (three) months imprisonment without the option of a fine which was suspended for a period of three (3) years.

[7] Upon the applicant's release from prison following the payment of the fine referred to earlier Klaasen arrested the applicant in terms of the provisions of section 34 of the Immigration Act as an illegal foreigner. The applicant's constitutional rights

contained in section 35 of the Constitution were duly explained to him and he signed an acknowledgement of receipt thereof. Klaasen further delivered a notice to him apprising him that he had been declared an undesirable person as envisaged in section 30(1)(g) of the Immigration Act and explained the import thereof to him. A notice of a decision adversely affecting his rights in accordance with section 8(3) of the Immigration Act, including the reasons therefore and a notification of deportation as envisaged in section 34(1)(a) of the Immigration Act were handed to him and the content was explained to him. Klaasen contends that the applicant refused to sign the documentation as an acknowledgement of receipt thereof. In these circumstances, although the applicant had not specifically requested that the detention warrant be confirmed by a magistrate, Klaasen proceeded to have the warrant confirmed by a magistrate in terms of section 34(1)(b) of the Immigration Act. This was duly done on 23 September 2016.

[8] It is common cause that whilst the applicant was detained pending deportation legal representation was arranged through a relative who is resident in South Africa. His legal representative visited him in detention and after consulting with the applicant advised the immigration officers that the applicant intended to apply for asylum and accordingly requested his release and the issue of a permit in terms of Regulation 2(2) of the regulations published in terms of the Refugees Act. The immigration officers, however, refused.

[9] Regulation 2(2) of the regulations provides:

> "(2) Any person who entered the Republic and is encountered in violation of the Aliens Control Act, who has not submitted an application pursuant to subregulation 2(1), but indicates an intention to apply for asylum shall be issued with an appropriate permit valid for 14 days within which they must approach a Refugee Reception Office to complete an asylum application."

(The Aliens Control Act has been repealed and the Immigration Act substituted therefor.)

[10] Regulation 2(2) has been the subject of scrutiny of the Supreme Court of Appeal on numerous occasions. In **Bula and Others v Minister of Home Affairs and Others** 2012 (4) SA 560 the Supreme Court Appeal held that it was not incumbent upon an individual to indicate his intention to apply for asylum at the time of his arrest. Where an attorney subsequently advised the Department of Home Affairs of the intention of the individual to apply for asylum he is entitled to be treated in terms of Regulation 2(2), to be freed from detention and to be issued with an appropriate permit valid for fourteen days within which he is obliged to approach a Refugee Reception Office. The applicant accordingly contends that he is entitled to be issued with a Regulation 2(2) permit.

[11] The respondents, however, contend that the applicant is precluded from submitting an application for an asylum seeker permit by virtue of the provisions of section 4 of the Refugees Act. The material portion of section 4 provides:

> "**Exclusion from refugee status**
>
> (1) A person does not qualify for refugee status for the purposes of this Act if there is reason to believe that he or she-
>
> (a) …

> (b) has committed a crime which is not of a political nature and which, if committed in the Republic, would be punishable by imprisonment; …"

[12] The respondents argue that the undisputed facts reveal that the applicant was convicted of two crimes committed in the Republic of South Africa relating to contraventions of the Immigration Act and was sentenced to three months imprisonment without the option of a fine, suspended for a period of three years.

[13] It is contended therefore firstly that on a proper interpretation of section 4(1)(b) of the Refugees Act it should be read to refer not only to offences committed outside of the Republic of South Africa but also to offences committed in South Africa; and secondly that the Immigration officers correctly concluded that applicant is therefore not entitled to apply for an asylum seeker permit.

[14] In support of the latter contention I have been referred to the judgment of **Abdi v Minister of Home Affairs** 2011 (3) SA 37 (SCA) at 48A-B where Bertelsmann AJA stated:

> "The Department's officials have a duty to ensure that intending applicants for refugee status are given every reasonable opportunity to file an application with the relevant refugee reception office — unless the intending applicant is excluded in terms of s 4 of the Act."

[15] The Supreme Court of Appeal in Abdi's matter were not called upon to consider the interpretation of section 4 of the Act and did not attempt an interpretation thereof. I do not consider that the Supreme Court of Appeal attempted thereby to lay down a rule of law that any person who may fall into one of the

categories set out in section 4 is precluded from making application for asylum and the dictum appears to me to be obiter.

[16] In further support of this contention and the contention that section 4(1)(b) relates not only to offences committed outside of the Republic of South Africa but also to offences committed in the Republic, I was referred to the unreported judgment in this Division of **Ozoekwe v Minister of Home Affairs** (case no. 2674/2008 delivered on 26 February 2009. In **Ozoekwe**, Jones J referred to section 4(1)(b) of the Refugees Act and at para [7] stated:

> "The applicant suggested that he is not hit by the exclusion because the section applies only in the event of the commission of a crime in the country of origin and not in the Republic. In my opinion that interpretation of the section is so absurd as to be preposterous; if a crime is committed in the Republic and if it is punishable here with imprisonment, it falls within the section just as much as it would have if it were committed elsewhere. The result is that the respondents' officials need not have considered the applicant's application for asylum at all. He had no right to bring it."

[17] In considering the provisions of section 4(1)(b) I am mindful thereof that, sitting as a single judge in this Division, I am bound by the judgment of Jones J unless I am convinced that he had clearly erred. It appears, however, on a perusal of the judgment that Jones J's remarks were confined to section 4(1)(b) viewed in isolation.

[18] In seeking to interpret statutory provisions regard should be had to the context in which the words are used in the Act as a whole and the surrounding circumstances relating to the apparent scope, purpose and limits of the Act as well

as its background (compare **Jaga v Dönges NO and Another; Bhana v Dönges NO and Another** 1950 (4) SA 653 (A) at 662H.) Chapter 1 of the Refugees Act deals with the interpretation, application and administration of the Act.

[19] When regard is had to the structure of Chapter 1 of the Act it emerges that section 2 deals with general prohibitions of the refusal of entry, expulsion or extradition or the return to another country of an arriving illegal immigrant in certain circumstances. Section 3 deals with the requirements to qualify for refugee status. Section 4 relates to the exclusion from refugee status of an arriving foreigner whilst section 5 relates to the cessation of refugee status after the arrival of the foreigner.

[20] Section 6 of the Act enjoins the court in interpreting the Act to have due regard to various international conventions, including, the OAU Convention governing the specific aspects of refugee problems in Africa (the OAU Convention of 1969). It is significant that sections 2, 3, 4 and 5 of the Refugees Act are the mirror image of paragraphs 1-5 of Article 1 of the OAU Convention of 1969.[1] In particular

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[1] Article 1, as quoted by the Supreme Court of Appeal in **Adbi v Minister of Home Affairs,** *supra*, provides:

"Definition of the term "Refugee"

1. For the purposes of this Convention, the term refugee shall mean every person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events is unable or, owing to such fear, is unwilling to return to it.

2. The term refugee shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.
3. In the case of a person who has several nationalities, the term a country of which he is a national shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of which he is a national if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.
4. This Convention shall cease to apply to any refugee if: *(a)* he has voluntarily re-availed himself of the protection of the country of his nationality, or, *(b)* having lost his nationality, he has voluntarily reacquired it, or, *(c)* he has acquired a new nationality, and enjoys the protection of the country of his new nationality, or, *(d)* he has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution, or, *(e)* he can no longer, because the circumstances in connection with which he was recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality, or, *(f)* he has committed a serious non-political crime outside his country of refuge after his admission to that country as a refugee, or, *(g)* he has seriously infringed the purposes and objectives of this Convention.
5. The provisions of this Convention shall not apply to any person with respect to whom the country of asylum has serious reasons for considering that:
   - *(a)* he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
   - *(b)* he committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
   - *(c)* he has been guilty of acts contrary to the purposes and principles of the Organization of African Unity;
   - *(d)* he has been guilty of acts contrary to the purposes and principles of the United Nations.

section 4 of the Refugees Act gives effect to paragraph 5 of Article 1 of the OAU Convention of 1969. As alluded to earlier section 4 of the Refugees Act deals with circumstances which exist upon the arrival of the foreigner in his country of refuge while section 5, by contrast, deals with circumstances which arise after his arrival and which causes his refugee status to cease. In the circumstances I consider that section 4(1)(b) clearly refers to an offence committed prior to the arrival of the foreinger in his country of refuge which, had that crime been committed in the Republic of South Africa, would have been punishable by imprisonment. I am fortified in this view by the provisions of paragraph 5(b) of the OAU Convention of 1969 which stipulates that the Convention shall not apply to any person with respect to whom the country of asylum has serious reason for considering that:

> "(a) …;
> (b) he committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee."

[21] Moreover, it seems to me that the interpretation contended for by the respondent would give rise to the absurdity that no illegal foreigner could then ever qualify for a permit in terms of Regulation 2(2) because his mere illegal presence in South Africa constitutes an offence in terms of section 49(1)(a) of the Immigration Act which is punishable on conviction with imprisonment not exceeding two years.

[22] For these reasons I consider that the dictum by Jones J in **Ozoekwe** is clearly incorrect. When due regard is had to the background to the Refugees Act

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For the purposes of this Convention, the Contracting State of Asylum shall determine whether an applicant is a refugee.

and the intended scope of Chapter 1 thereof, which is to give effect to the OAU Convention of 1969, as is apparent from section 6 of the Refugees Act, I do not think that to give effect to the ordinary English meaning of section 4(1)(b) is necessarily absurd or preposterous.

[23] In any event, section 4 provides that a person does not qualify for refugee status for purposes of the Act "if there is reason to believe" that certain circumstances exist. It is by no means a precise measure which may be determinable by any individual. Similar terminology appears in sections 10 and 12 of the Insolvency Act, 24 of 1936, which drove De Beer JP in **Sachs Morris (Pty) Limited v Smith** to describe the provision as an "abstruse metaphysical conception". (See **Sachs Morris (Pty) Ltd v Smith** 1951 (3) SA 167 (O) at 171A.) It is certainly a matter upon which individuals might differ. This gives rise to the question as to who would be entitled to decide that there is reason to believe that a foreigner is excluded from refugee status. Paragraph 5 of Article 1 of the OAU Convention of 1969 provides that the provisions of the Convention will not apply to a person in respect of whom "the country of asylum has serious reason for considering that" certain circumstances exist. It concludes by recording that it is for "the contracting state of asylum" to determine whether the applicant is a refugee.

[24] When regard is had to the structure of the Refugees Act, and more particular Chapter 2 thereof, an applicant seeking asylum must make an application at a refugee reception office in person (section 21(1)). The refugee reception officer is obliged to accept the application from the applicant. (Section 21(2)(a).) At the time when an application is made the applicant is required to provide his fingerprints or

other prints taken in a prescribed manner and, if he is older than 16 years to provide two photographs of himself with such dimensions as may be prescribed (section 21(3)). The refugee reception officer may then conduct such enquiries as she or he deems necessary in order to verify the information furnished in the application. (Section 21(2)(c).) Once an application has been received in terms of section 21 the refugee reception officer is obliged to issue the applicant with an asylum seeker permit. (Section 22(1).) Section 22(6) however provides that the Minister may at any time withdraw an asylum seeker permit if-

> "(a) … (c);
> (d) the applicant is or becomes ineligible for asylum in terms of section 4 or 5."

[25] Section 4, as I have alluded to earlier, deals with circumstances where the applicant is ineligible on arrival and section 5 deals with circumstances where he becomes ineligible. Of significance, however, is that only the Minister may withdraw the permit. I do not lose sight of the fact that the Minister is entitled to delegate his functions (see section 7 of the Refugees Act), however, such functions must still be exercised and performed in accordance with directions of the Minister and the Minister may himself still perform those functions. This provision sits comfortably with paragraph 5 of the OAU Convention of 1969.

[26] What does not sit comfortably with the provisions of the Refugees Act or the OAU Convention of 1969 is the notion that an individual immigration officer, appointed under the Immigration Act, or any other law enforcement officer, is entitled to decide, as Klaasen did in this case, that "there is reason to believe" that a

foreigner is disqualified in terms of section 4(1)(b) of the Refugee Act, no matter what the strength of the evidence before him. The decision does not lie with him.

[27] In the circumstances and for the reasons set out above I consider that the argument on behalf of the respondents in respect of section 4(1)(b) is unsound.

[28] The respondents do not however confine their argument to section 4 of the Refugees Act. It is contended, in the alternative, that the applicant expressly waived his right to apply for asylum when he sought a change of status. As a holder of a temporary asylum seeker permit, albeit fraudulently obtained, he must be taken to have been aware of his rights to apply for asylum when he chose to apply for a change in status. He was, after all, assisted by an immigration practitioner who would have explained his rights to him and, so the argument goes, he therefor expressly waived his rights to apply for asylum by submitting an application for a change of status.

[29] In the alternative, it is argued that he had tacitly waived his rights for asylum through the following conduct which it is argued is inconsistent with an intention to enforce a right to apply for asylum.

1. He arrived in the Republic of South Africa on 9 June 2013;
2. he initially entered the Republic on a visitor's visa;
3. he thereafter obtained a fraudulent temporary asylum seeker permit valid until June 2014;
4. in February 2014 the applicant applied to change his status from that of temporary asylum seeker to the holder of a relative's visa;

5. the relative's visa was fraudulent in that the applicant did not enter into the life partnership upon which the visa was based; and

6. a period of three years expired from when the applicant entered the country when he, for the first time indicated an intention to apply for asylum.

[30] The respondents accept that they bear the onus to prove a decision by the applicant to abandon the right to apply for asylum and that he had knowledge of his right to apply for asylum when the waiver took place. I do not consider that the respondents have discharged this onus. The overwhelming probabilities suggest that the applicant obtained a fraudulent asylum seeker permit upon entry into the country in order to evade the attentions of immigration officers. His application to change his status was equally fraudulent and directed again at misleading immigration officers. It does not follow, in my view, that he thereby necessarily intended to convey that he would not avail himself of the opportunity to apply for an asylum seeker permit if his endeavours to evade the attention of the immigration officers failed. In **Ersumo v Minister of Homer Affairs and Others** 2012 (4) SA 581 (SCA) the Supreme Court of Appeal again considered the provisions of Regulation 2(2). Wallis JA summarised the position at 589G-590A as follows:

> "No distinction is drawn between one type of illegal presence and another. In other words, it makes no difference whether the individual entered the country and never sought an asylum transit permit, or whether they obtained such a permit and allowed it to lapse by not reporting to a refugees reception office. Nor is there any reference to the duration of the illegal presence, or to any mitigating factors, such as poverty, ignorance of these legal requirements, inability to understand any of South Africa's official languages, and the like. There is also no reference to aggravating factors, for example, that their illegal entry was deliberate and that they have deliberately sought to avoid the attentions of the

> authorities. Regulation 2(2) applies to any foreigner encountered in South Africa, whose presence in this country is illegal. It says, as this court held in *Bula*, that any such person who then indicates an intention to apply for asylum must be issued with an asylum transit permit, valid for 14 days, and permitted to apply for asylum."

[31] What does emerge from this passage is that whatever schemes an illegal foreigner may have devised to escape the attentions of the authorities, it would not disqualify him from obtaining a Regulation 2(2) permit. An extended illegal presence in South Africa similarly does not disqualify him from insisting upon the delivery of a Regulation 2(2) permit when detected. In all the circumstances therefore I do not consider that the respondents have established that the applicant ever took a decision to abandon the right to apply for asylum.

[32] Finally, there remains the issue of costs. As alluded to earlier the present is not merely a matter which is resolved by the application of the principles set out in **Plascon-Evans Paints** *supra*. In the present matter the respondent has comprehensively refuted the entire history attested to by the applicant under oath and has annexed documentary evidence clearly indicative thereof that the applicant has intentionally attempted to mislead this court. On this basis the respondents argue that I should, as a token of disapproval, disallow the applicant's costs. I consider that there is merit in this argument.

[33] In the result, I make the following order:

1. It is declared that the applicant's detention is unlawful.

2. The second respondent is directed, in terms of Regulation 2(2) of the Regulations in terms of the Refugees Act, 130 of 1998, forthwith to issue the applicant with an appropriate permit valid for fourteen (14) days within which the applicant must approach a Refugee Reception Office and complete an asylum application.

3. Upon being furnished with such a permit the applicant will be entitled to his immediate release from detention and shall not thereafter be subject to detention in terms of either the Refugees Act or the Immigration Act for as long as the said permit remains valid or he is in possession of a valid asylum seeker temporary permit.

4. The first and second respondents are directed, upon completion of an asylum application within the said fourteen (14) days, to accept the applicant's asylum application and to issue him with an asylum seeker temporary permit, in terms of section 22 of the Refugees Act, pending the final determination of his application for asylum, including the exhaustion of his rights of review or appeal in terms of Chapter 4 of the Refugees Act.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Applicant: Adv C Pask instructed by JCM Attorneys, Port Elizabeth

For Respondents: Adv J Nepgen instructed by The State Attorney, Port Elizabeth