

THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

CASE NO. 1794/2020

In the matter between:

CASPER PINZIRAI

First Applicant

TAFDZWA TSENZERE

Second Applicant

ROGER MAFOTI

Third Applicant

GUIDE TSODZO

Fourth Applicant

and

MINISTER OF HOME AFFAIRS

First Respondent

DIRECTOR GENERAL: DEPARTMENT

OF HOME AFFAIRS

Second Respondent

JUDGMENT

RUGUNANAN, J

- [1] The four applicants are Zimbabwean nationals. The first, second and third applicants have been residing in South Africa since 2017, whilst the fourth applicant has been in the country since 2015. Except for the third applicant

who entered the country at the Beitbridge border post in 2015, it is not known how or under what circumstances the others entered the country.

- [2] The applicants' history and existence in South Africa is not disclosed, but on 23 July 2020 they were employed as truck drivers when immigration officials of the Department of Home Affairs ("the Department") encountered them in Gqeberha. None of them were in possession of a work visa issued in terms of the Immigration Act.¹ The first applicant was in possession of a work visa that was not issued by the Department. Consequent to being interviewed about their identity and status, the applicants were arrested under the Immigration Act.²
- [3] They were taken into custody without warrants, following a determination that each of them was an "*illegal foreigner*"³ and was in the country in contravention of section 49(1) of the Immigration Act. The applicants were detained for purposes of deportation to Zimbabwe and were respectively issued with a notification of deportation. In the opposing affidavit it is asserted that the applicants elected to await their deportation and that none of them wished to invoke the statutory review of the decisions to deport them.⁴ The applicants have not disputed this in reply.
- [4] Within 48 hours⁵ of being arrested the applicants appeared in person before a magistrate in chambers on 24 July 2020 for the purpose of deportation to be confirmed by warrant of the court.⁶ The magistrate conducted enquiries and made an order confirming the detention of each of them pending deportation. The second, third and fourth applicants countered by informing the magistrate of their intention to apply for asylum.

¹ Section 19 of Act 13 of 2002

² 13 of 2002

³ Section 1 of the Immigration Act defines a "foreigner" as an "individual who is not a citizen"; and an "illegal foreigner" as "a foreigner who is in the Republic in contravention of this Act".

⁴ The review procedures are provided for in section 8(1) and 8(4) of the Immigration Act

⁵ This accords with the order of the Constitutional Court in *Lawyers for Human Rights v Minister of Home Affairs and Others* 2017 (5) SA 480 (CC)

⁶ Section 34(1)(b) of the Immigration Act

The first applicant did not do so but it is clear on the version that he advances in the founding affidavit to this application that he is an aspirant for seeking asylum.

- [5] On 1 September 2020 a rule *nisi* issued out of this court.⁷ This resulted in the applicants being released from detention. They now seek confirmation of the rule *nisi*, effectively seeking orders interdicting the respondents from causing them to be removed from South Africa, and permitting each of them to make applications for asylum. In summary, the respondents' opposition to the relief claimed by the applicants leans on the assertion that: (i) none of them has made out a case for "*good cause*" in seeking asylum; (ii) the magistrate, having made no order permitting them to apply for asylum, effectively made a decision which the applicants have not challenged, nor have they challenged the magistrate's order confirming their detention for purposes of deportation; and (iii) the first applicant is a prohibited person in terms of section 29(1)(f) of the Immigration Act.
- [6] The Refugees Act⁸ has been amended with effect from 1 January 2020. Simultaneously on that date, new regulations published on 27 December 2019 in Government Gazette 42932, Government Notice R1707 came into effect. The new regulations repealed, *inter alia*, the previous regulation 2 published on 15 September 2000 in Government Gazette 21573, Government Notice R938.⁹

⁷ The order essentially provided that the Second Respondent show cause why the following order should not be made final (all *sic*):

- "3.1 It is declared that the continued detention of the Applicants is unlawful;
- 3.2 The Second Respondent or any official(s) duly authorised by the Second Respondent be and hereby directed to immediately release the Applicants from unlawful detention;
- 3.3 The Second Respondent or any officials duly authorised or acting under the instruction of the Second Respondent, be and hereby interdicted from removing the Applicants or causing the Applicants' removal from the Republic of South Africa pending final determination of their respective asylum claims including exhaustion of the appeal and review remedies;
- 3.4 Directing the Second Respondent to accept the respective asylum applications of the Applicant's as soon as reasonable practical to do so, and issue the Applicants with asylum visas in terms of section 22 of the Refugees Amendment Act 33 of 2008."

⁸ 130 of 1998

⁹ Regulation 2, as it previously existed read:

- [7] The applicants assert that they are refugees *sur place*,¹⁰ and contend that they are unable to return to Zimbabwe because they would be subject to persecution by its government. They contend that various human rights violations have taken place in their country of origin over decades and that the government of the day is intolerant of freedom of expression, peaceful dissent and basic human rights.¹¹ Although the bald versions as regards the applicants' fears of persecution do not instil confidence that they are *bona fide* asylum seekers, none of the applicants has made an application for asylum, and no decision has been made about their eligibility for asylum, this court cannot be dismissive of their claims on that basis. From what follows in this judgment the process designed by the Refugees Act must be allowed to unfold.

THE STATUS OF THE MAGISTRATE'S ORDER / DECISION

- [8] It is now trite that once a foreign national indicates an intention to apply for asylum, the regulatory framework of the Refugees Act is triggered.¹² It matters not whether the person is an "*illegal foreigner*" under the Immigration Act and liable to deportation, the provisions of the Refugees Act intercede and provide imperatively that, despite that status, the individual is safe from detention¹³, and their claim to asylum must first be

"2(1) An application for asylum in terms of section 21 of the Act:

- (a) must be lodged by the applicant in person at a designated Refugee Reception Office without delay;
- (b) must be in the form and contain substantially the information prescribed in Annexure 1 to these Regulations; and
- (c) must be completed in duplicate.

- (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."

¹⁰ Refugees *sur place* are an internationally recognised category of refugees who enter the country of refuge on one basis and thereafter supervening events in their country of origin involuntarily render them refugees. *Ruta v Minister of Home Affairs* 2019 (2) SA 329 (CC) at paragraph [51]

¹¹ Founding affidavit, pages 1-11

¹² *Bula and Others v Minister of Home Affairs and Others* 2012 (4) SA 560 (SCA) at paragraph [72]

¹³ *Nwankwo v Minister of Home Affairs and Others* [2020] ZAGPJHC 377 at paragraph [6]; wherein the provisions of section 21(4) of the Refugees Act have been considered; *Ruta v Minister of Home Affairs* 2019 (2) SA 329 (CC) at paragraph [16]

processed under the Refugees Act.¹⁴ The foundation for this is section 2 of the Refugees Act.

[9] The section states:

“2. *General prohibition of refusal of entry, expulsion, extradition or return to other country in certain circumstances*

Notwithstanding any provision of this Act or any other law to the contrary, no person may be refused entry into the Republic, expelled, extradited or returned to any other country or be subject to any similar measure, if as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where-

- (a) *he or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership or a particular social group; or*
- (b) *his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing public order in any part or the whole of that country.”*

[10] The section encapsulates two concepts:

- (i) it enacts a prohibition; and
- (ii) it affirms the purpose and intent of a principle – that of *non-refoulement*, the safeguard that a person fleeing persecution or threats to “*his or her life, physical safety or freedom*” should not be made to return to the country inflicting it.¹⁵

¹⁴ *Ruta*, paragraph [43], *Nwankwo*, paragraph [10]

¹⁵ *Ruta v Minister of Home Affairs supra* at paragraph [24], and see paragraphs [25]-[27] and [30] on how on becoming a constitutional democracy South Africa became a state party to various international instruments and protocols which embraced the rights of asylum seekers and the principle of *non-refoulement*.

- [11] The principle overrides and prevails over the Immigration Act.¹⁶ In practical terms all asylum seekers are protected by the section and the protection applies as long as the claim to refugee status has not been finally rejected after a proper procedure under the Refugees Act.¹⁷ In sum, once the procedures in the Refugees Act have been followed through and a proper determination on the merits of an application to seek asylum is completed, only then does the Immigration Act apply.¹⁸
- [12] This approach to the legislation does not provide what the Constitutional Court *per* Cameron J in *Ruta v Minister for Home Affairs* called, “a sweethearts’ charter for bogus asylum seekers or an open door for non-refugees”¹⁹. The comment by the learned judge emanated from his observation that foreign nationals do not have the right to enter South Africa, to remain in the country or to reside anywhere therein.²⁰ The Refugees Act contains “hard-headed and practical” mechanisms designed for genuine refugees and authentic asylum seekers.²¹ It is unnecessary to repeat the analytical aspects of the judgment which informed the sentiments expressed by the learned judge, save that this court unreservedly endorses those sentiments.²²
- [13] Seeing that section 2 of the Refugees Act prevails over the Immigration Act, the respondents’ contention that the unchallenged detention order by the magistrate under the Immigration Act bars reliance on the Refugees Act, is unsustainable. So too, is the contention that the magistrate’s decision in not ordering that the applicants be permitted to apply for asylum should be set aside on appeal or review before the Refugees Act may be resorted to.

¹⁶ *Ruta*, paragraphs [32]-[33]

¹⁷ *Ruta*, paragraph [29]

¹⁸ *Ruta*, paragraph [54] *Nwankwo*, paragraph [11]

¹⁹ Footnote 11 *supra* at paragraph [40]

²⁰ *Ruta*, paragraph [37]

²¹ *Ruta*, paragraphs [39]-[40]

²² *Ruta*, paragraphs [30]-[47]

“GOOD CAUSE”

[14] The new regulations 8(3) and 8(4) provide that:

“(3) Any person who upon application for asylum fails at a Refugee Reception Office to produce a valid visa issued in terms of the Immigration Act must prior to being permitted to apply for asylum, show good cause for his or her illegal entry or stay in the Republic as contemplated in Article 31(1) of the 1951 United Nations Convention Relating to the Status of Refugees.

(4) A judicial officer must require any foreigner appearing before the court, who indicates his or her intention to apply for asylum, to show good cause as contemplated in subregulation (3).”

[15] *Good cause* is common to both subregulations. It is derived from Article 31(1) of the United Nations Convention Relating to the Status of Refugees (“the UN Convention”), which states (underlining added):

“The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where the life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.”

[16] In heads of argument it was submitted for the respondents that the *good cause* requirement allows for judicial oversight in identifying and eliminating, at an early stage, unmeritorious claims for asylum especially when the cry for asylum is raised once the law catches up with an illegal foreigner. This contention is insupportable. The sole power and duty to determine whether an applicant for asylum should be afforded refugee status under the Refugees Act, lay with the Refugee Status Determination

Officer.²³ The process legislated in that Act is bureaucratic; the court has no involvement in determining the likely outcome of an application for asylum, save that its role is that of an adjudicator of the legality of that process.²⁴

[17] An additional argument relied on by the respondents is that the requirement of *good cause* seeks to discourage undue delay by foreign nationals seeking asylum by sojourning illegally in the country for long periods of time; and that they are now obliged to enter the country legally at a designated port of entry where they must declare their intention to apply for asylum whereafter they will be issued with an asylum transit visa under section 23(1) of the Immigration Act.

[18] The immediate answer to the first leg of the argument is that delay is not a bar to a belated application for asylum.²⁵ As for the second leg, the proper context is regulation 7.

[19] Quoting in relevant part, the regulation provides that:

“Any person who intends to apply for asylum must declare his or her intention, while at a port of entry, before entering the Republic and provide his or her biometrics and other relevant data as required (a) ... (f) and must be issued with an asylum transit visa contemplated in section 23 of the Immigration Act.”

[20] In *Mwale v The Minister of Home Affairs and Another*, the court’s disposition appears to have been that the right to apply for asylum is now strictly limited to a port of entry as stipulated in the above regulation.²⁶ But elsewhere in the judgment it appears that the court did acknowledge that

²³ *Ruta*, paragraph [4]. See also *Gorhan v Minister of Home Affairs* [2016] ZAECPHC 70 at paragraphs [11]-[17] and *Mapingure v The Chairperson Standing Committee for Refugee Affairs* [2021] ZAECPHC 18 for the procedure in the determination of the status of persons seeking asylum.

²⁴ *Nwankwo*, paragraph [15]

²⁵ *Nwankwo*, paragraph [12], and see *Ruta*, at paragraphs [16]-[19] and the list of cases from the Supreme Court of Appeal cited therein

²⁶ Unreported Case No. 1982/2020 ECLDPE, 22 September 2020, at paragraph [30]

there may be an exception to entry *via* official ports of entry.²⁷ The Refugees Act implicitly covers asylum seekers who do not enter through official ports of entry.²⁸ This conclusion is impelled by section 2 which underscores the principle of *non-refoulement*. And it must follow by the same conclusion that the Refugees Act prevails as the governing legislation²⁹ and is not subordinated by the regulation. Respectfully, this is the point of departure with *Mwale*. It is by no means suggested herein that the regulation loses functionality or efficacy. It holds good - and it must be applied in those instances where *bona fide* persons seeking asylum enter the country at a port of entry.

- [21] Adverting to the regulations; they do not ascribe a meaning to *good cause*. One has a sense that the expression must be informed by the UN Convention. On this premise, it may be hypothesised that what regulation 8(4) requires is that a foreigner who appears before court and indicates their intention to apply for asylum need only show “*good cause for their illegal entry or presence*” without being required to narrate their claim to asylum.
- [22] The applicants dispute that they were called upon to show *good cause* as required by the regulations when they appeared before the magistrate. The respondents’ answering affidavit indicates that the magistrate questioned them to establish *good cause* and that he made no order referring them to apply for asylum. By not making such an order the magistrate made a decision which effectively ruled against such a referral for lack of *good*

²⁷ See paragraph [28] of the judgment. The exception is conveyed by the court’s reference to section 21(1)(B) of the Refugees Act; it reads: “*An applicant who may not be in possession of an asylum transit visa as contemplated in section 23 of the Immigration Act, must be interviewed by an immigration officer to ascertain whether valid reasons exist as to why the applicant is not in possession of such visa.*”

²⁸ This is conveyed by a reading of section 21(1)(B) *supra* and section 4(1)(h) which by necessary implication recognises alternate entry: “(1) *An asylum seeker does not qualify for refugee status for the purposes of this Act if a Refugee Status Determination Officer has reason to believe that he or she*

(a)...(g);

(h) having entered the Republic, other than through a port of entry designated as such by the Minister in terms of section 9A of the Immigration Act, fails to satisfy a Refugee Status Determination Officer that there are compelling reasons for such entry”

²⁹ *Ruta*, paragraph [53]

cause, which decision, the respondents maintain, must stand since the applicants have not challenged it on appeal or review.³⁰

- [23] This argument has been dealt with elsewhere and requires no further comment. However, two points are made: (i) the Refugees Act intercedes and prevails over the Immigration Act as soon as a person announces their intention to seek asylum (*Ruta*); and (ii) the regulation does not cloak a judicial officer with the authority to refuse such a person the opportunity to apply for asylum (to do so would be synonymous with *refoulement*); the regulation plainly requires the judicial officer to enquire whether *good cause* exists for the person's entry and stay in this country.

THE FIRST APPLICANT'S EXCLUSION FROM THE ASYLUM SEEKING PROCESS

- [24] Section 29(1)(f) of the Immigration Act declares that a foreigner found in possession of a fraudulent visa, passport, permanent residence permit or identification document, is a prohibited person and does not qualify for a port of entry visa, admission into the country, a visa or a permanent residence permit.
- [25] In the course of the interview regarding his identity and status³¹, it was established that the first applicant was in possession of a work visa, a document not issued by the Department. In the answering affidavit it is asserted that the document is fraudulent. For that reason the respondents contend that the first applicant is excluded from the asylum seeking process and liable to deportation under the order confirmed by the magistrate.

³⁰ Answering affidavit, page 82, paragraphs [43]-[44]

³¹ Section 41 of the Immigration Act

- [26] A supporting affidavit in terms of section 212(3) of the Criminal Procedure Act³² is attached to the answering affidavit. Section 212(3) relates to the question as to whether anything has been registered under any law or whether any fact or transaction has been recorded under a particular law. The section essentially provides that any affidavit by “*the person upon whom the law in question confers the power or imposes the duty to register such matter or to record such fact or transaction*” shall be admissible (on its mere production) and shall be *prima facie* proof of its contents.³³
- [27] The deponent states that she is “*a Deputy Director in the Department of Home Affairs, employed in the Directorate: Permit Functional Services and Visa Management at the Head Office of the Department*”. She indicates that the document purporting to be a work visa is fraudulent since no record of its issue exists. There is no indication that she is the person falling within the description of the statutory jurisdictional qualification.
- [28] It follows that the conclusion to the effect that the first applicant’s work visa is a fraudulent document is left unsubstantiated where no primary facts have been proffered to establish the relevant jurisdictional requirement. On its own, the conclusion is hearsay. Thus, it cannot be unequivocally determined if the first applicant is a prohibited person.
- [29] If this is correct, it seems rational that the first applicant’s simple claim to asylum appears to be sufficient to grant him access to the application process legislated in the Refugees Act.³⁴ This deduction is informed by recognising the principle of *non-refoulement* and the first applicant’s assertion that he is a refugee *sur place*. Consistent with *Ruta* (and the line of cases from the Supreme Court of Appeal referred to therein), it is obvious that the internal processes (and remedies) of the Refugees Act should first

³² Act 51 of 1977. The supporting affidavit is attached to the answering affidavit as Annexure “C”

³³ Schwikkard Van Der Merwe, *Principles of Evidence*, second edition at page 273

³⁴ *Nkwankwo*, paragraph [12] and [32]

be exhausted before recourse may be had to the Immigration Act. The same applies for the other applicants.

CONCLUSION

[30] The grounds of opposition relied on by the respondents do not justify denying the applicants the relief which they seek. The respondents did not deal with the *non-refoulement* principle which lies at the core of this application. Consequently the applicants have made out a proper case for the confirmation of the rule *nisi* and the following order is made:

30.1 The rule *nisi* issued on 1 September 2020 is confirmed.

30.2 The first and second respondents are ordered, jointly and severally, to pay the applicants' costs.



S. RUGUNANAN
JUDGE OF THE HIGH COURT

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Date heard: 19 August 2021

Date Delivered: 18 January 2022

This judgment was handed down electronically by circulation to the abovementioned legal representatives by email. The date and time for hand-down is deemed to be 09h30 on 18 January 2022.