

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No: 037352/2023

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES/NO

SIGNATURE:

DATE: 11/5/2023

In the matter between:

DURAN KAHYE MOHAMUD

First Applicant

SALAMATU IBRAHIM

Second Applicant

NASIR ABDELLA HUSSEN

Third Applicant

MOHAMMED SABAJ MIAH

Fourth Applicant

MULUKEN PAWLOS LAMBEBO

Fifth Applicant

ROBAL ABKEY

Sixth Applicant

KABIRU TUNDE AKINDELE

Seventh Applicant

PROMISE OGOMEBULEM

Eighth Applicant

MD ROSHIDUL ISLAM

Ninth Applicant

MAMO MESERET DABA

Tenth Applicant

EAR HOSSAIN

Eleventh Applicant

and

THE MINISTER OF HOME AFFAIRS

First Respondent

**THE DIRECTOR GENERAL: THE DEPARTMENT
OF HOME AFFAIRS**

Second Respondent

JUDGMENT

[1] In this matter eleven Applicants from different parts of the country approach the court for urgent relief. They are all asylum seekers who have three things in common:

1.1 Upon entering South Africa, they applied for asylum. They were granted temporary asylum seeker permits but their applications for asylum were rejected and their subsequent appeals failed;

1.2 Each of the Applicants then applied for judicial review of the decision declining their application for asylum, but these applications have not been finalised.

1.3 As their permits have expired, each of them faces the daily risk of arrest, since they are without papers justifying their presence in South Africa. Without an extension of their permits, they are at risk of arrest and deportation. Without such a permit, they are not able to seek employment.

[2] The application was heard on 10 May 2023. The substantive relief sought in the Notice of Motion, save to have the matter heard urgently, reads as follows:

“2. *That the second respondent’s (i.e. The Director General of the Department of Home Affairs) failure to make available applicants’*

records held under File Numbers MUSSOM000061014, PTAGHA000220316, PTAETH002660514, VRA/004628/99, PTAETH002360719, PTAETH001631118, PTANGA001650113, PTANGA009010515, PTAEGD004491018, PTAETH000460619 and PTABDG002671019 which were requested in terms of Section 18(1) of the Promotion of Access to Information Act, 2000 (Act 2 of 2000) (PAIA) is reviewed.

3. *An order directing the respondents to make such records available within 14 (fourteen) days of the order.*
4. *An order directing the second respondent to extend the applicants' asylum seeker temporary visas pending the finalisation of the judicial review applications under case numbers 18922/2020, 83471/19, 2159/22, 37110/22, 34683/22, 34682/22, 27986/21, 33422/22, 31063/22, 33420/22.*
5. *The respondents are ordered to pay the costs of this application on the party and party scale jointly and severally, the one paying the other to be absolved."*

[3] At the hearing of the matter counsel for the Applicant correctly abandoned the PAIA relief due to the pending applications for judicial review (sec 7 of Act 2 of 2000). The documents sought must be obtained in terms of the Uniform Rules of Court. In none of the matter mentioned, has the matter progressed to the stage where the Rule 53 record has been provided.

[4] During argument it became apparent that not all the applications for judicial review are on record with the State Attorney and that there may be an issue with the service of the judicial review applications referred to in Prayer 4 of the notice of motion.

[5] The First Applicant recounts his experiences as an asylum seeker from Somalia. He came to South Africa in 2014 fleeing Somalia for fear of

persecution. On arrival in South Africa, he went to the Desmond Tutu Refugee Reception Office where he was issued with an asylum seeker temporary visit with reference MUSSOM000061014. In December 2019 he went to the Refugee Reception Office in Musina to extend his Visa and was told that his application for asylum had been rejected and that he had to leave the country.

- [6] In March 2020 he sought the assistance of an attorney who assisted him in drafting and launching a review application under case number 18922/2020. The review application was served on the Department of Home Affairs on 19 March 2020 by service on the State Attorney. Lockdown then followed and the Department of Home Affairs extended all permits which would expired during lockdown and thereafter. In August 2022 he learned that the extensions for asylum seeker temporary permits were now done online. He lodged his application for the extension of his permit on 20 September 2022. He has not received an asylum permit, nor a reply from the Department of Home Affairs.
- [7] On 15 August 2022 he submitted a PAIA request, requesting the documents in his file from the Department of Home Affairs.
- [8] On 25 January 2023 he went to the Musina Refugee Reception Office to enquire about his application. He was advised to submit valid court orders (and not merely a notice of motion) as well as a valid notice of set down for the hearing of the review application. Upon his return he consulted his attorney. He was advised that the Respondents had failed to comply with Rule 53 as well as with his PAIA request.
- [9] His attorneys sent a letter of demand to the Department of Home Affairs on 6 February 2023 demanding the record, but there was no response. The other applicants have similar facts.
- [10] In terms of Section 27A of the Refugees Act, 130 of 1998 an asylum seeker is entitled to a formal written recognition as an asylum seeker in the

prescribed form, pending finalisation of his or her application for asylum. An asylum seeker is further entitled to remain in the Republic pending the finalisation of his or her application for asylum. He further has a right not to be unlawfully arrested or detained, and has the rights contained in the Constitution insofar as they apply to asylum seekers.

- [11] An application for asylum is made in terms of section 21(1)(b) and an applicant is entitled to an asylum seeker visa pending adjudication of the application (section 22(1)).

- [12] The rights of asylum seekers served before the Constitutional Court in **Saidi v Minister of Home Affairs** 2018(4) SA 333 (CC). The Court found (at para [13]) that the Refugees Act had the purpose of preventing the return of asylum seekers to the dangers that they were fleeing (“non-refoulement”).

- [13] An asylum seeker visa issued to asylum seekers in terms of section 22(1) has two purposes. Firstly, it would evidence a right of the asylum seeker to stay in the Republic of South Africa- i.e. its production would avoid arrest as an illegal immigrant. Secondly, it would enable an asylum seeker to seek employment in order to care for his needs. In **Saidi** the question was the duration of such a visa and whether the Refugee Reception Officer had a discretion to extend an expired visa where a judicial review of the decision to refuse asylum was pending.

- [14] At para [43] the Constitutional Court found that, pending finalisation of judicial review, the Refugee Reception Officer must extend the permit automatically. In fact, he had no discretion in this regard (para [42]).

- [15] The Department of Home Affairs opposed the application on the basis of a lack of urgency. It was contended that there was an undue delay and that urgency was self-created. However, refugees with no documentary proof evidencing their right to be in South Africa, are at constant risk of arrest and deportation. Further, without documentary proof evidencing their right to be in South Africa, they could not secure lawful employment. I am satisfied that

the application is sufficiently urgent as asylum seekers face this risk on a daily basis. If they were arrested and deported, any pending judicial review would be academic. If asylum seekers were deported in such circumstances, before finalisation of their applications for judicial review, it would undermine the non-refoulement (non- return) purpose of the Refugees Act.

- [16] The Department of Home Affairs contended that it did not have record of each of the review applications referred to. It expressed a fear that asylum seekers could abuse their right to extensions of their permits by merely issuing judicial review applications, without any intention of following through on such applications.
- [17] There is a risk of abuse of the process if this were to occur. An asylum seeker would merely have to prove that there is a judicial review application pending in order to obtain indefinite rights to be present in the Republic. In order to avoid this risk, the judicial review applications would have to be served on at least the State Attorney. Certain of the Applicants have done so. Having scrutinised the returns of service that they have filed, it appears that some of them had served on the Chairperson of the Refugee's Appeal Board or on the Chairperson of the Standing Committee for Refugee Affairs. Whilst these persons were Respondents in the application and required service, the applicants did not in all instances serve on the State Attorney as well.
- [18] The fact that there are pending judicial review applications, issued by the Registrar and served by the sheriff on certain of the parties, is sufficient to entitle the Applicants to the relief they seek. The risk of abuse will be averted if the judicial review applications are served on the Department of Home Affairs by serving at the State Attorney. The State Attorney could then monitor progress or lack thereof and report this to the Department of Home Affairs.

[19] I do not fully address the other points on which the Department of Home Affairs opposed the application, since none of them have merit. So, for example, it was contended that the Applicants have not complied with Rule 53 in this urgent application. This application is however not a Rule 53 application at all. Nothing further needs to be said in this regard.

[20] In the premises, I am satisfied that the Applicants are entitled to relief. Upon service of their review applications on the State Attorney, or proof of service in the past, such Applicants would be entitled to an extension of their asylum seeker visas.

[21] I therefore make the following order:

1. The Applicants are directed to serve their applications for judicial review on the State Attorney, or to supply proof to the State Attorney of previous service of their application on the State Attorney.
2. The Department of Home Affairs is directed to extend the asylum seeker visas of each of the Applicants who has complied with para [1].
3. Such extension shall remain valid until finalisation of their respective judicial review applications.
4. The Respondents are ordered to pay the costs of the application jointly and severally, the one paying the other to be absolved.

EC LABUSCHAGNE AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: this judgment was prepared and authored by the judge whose name is reflected and is handed down electronically and by circulation to the parties/their

legal representatives by email and by uploading it to the electronic file of this matter on Case lines. The date for handing down is deemed to be 11 May 2023.

APPEARANCES

FOR THE APPLICANTS: ADV. N MTHEMBU

FOR THE RESPONDENTS: ADV. JM MIHLANGA

HEARD ON: **10 MAY 2023**

DATE OF JUDGMENT: 11 MAY 2023