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**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION – MTHATHA)**

Reportable/Not Reportable

Case no.: 3153/2024

Matter heard on: 08 August 2024

Judgment delivered on: 27 August 2024

In the matter between:

E[...] C[...] M[...]

Applicant

And

THE MINISTER OF HOME AFFAIRS

1st Respondent

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

2nd Respondent

**THE CHAIRPERSON OF THE STANDING
COMMITTEE FOR REFUGEE AFFAIRS**

3rd Respondent

**THE NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS**

4th Respondent

**THE MINISTER OF JUSTICE AND
CORECTIONAL SERVICES**

5th Respondent

JUDGMENT

ZONO AJ

Introduction

[1] This application came to this court by way of urgency pursuant to a directive issued on 23rd July 2024 directing this matter to be heard on 30th July 2024. On 30th July 2024 the matter was postponed to 06th August 2024 for the respondents to file their answering affidavits. In the 06th August 2024 the matter was further postponed for hearing on 08th August 2024 with the applicant to file replying affidavit. Both parties were placed on terms to file their respective heads of argument on 07th August 2024. On 08th August 2024 the matter was fully heard.

[2] The applicant seeks a relief along the following terms:

“1. The forms and services provided for in the Uniform Rules of this court and Practice Manual are dispensed with, so as far as needs be and this application is enrolled and heard on an urgent basis in term of Rule 6(12) (a) of the Uniform Rules and Practice Manual of this court

2. The first, Second and third respondents are directed to issue the applicant with a temporary asylum seeker permit in accordance with section 22(4) of the Refugees Act 130 of 1998 pending the finalization of the asylum application in terms of the Refugees Act 130 of 1998 and in terms of the Promotion of Administrative Justice Act 3 of 2000.

3. *Subject to the First, Second and third Respondents re-issuing the applicant with a temporary asylum seeker in accordance with section 22(4) of the Refugee Act, the respondents are interdicted from arresting, prosecuting, deporting and/or taking any further steps against the applicant for being illegally in the republic of South Africa, unless his asylum application has been lawfully and finally determined in terms of the Refugees Act 130 of 1998 and/ or in terms of the Promotion of Administrative Justice Act 3 of 2000.*

4. *The applicant's detention from 05th July 2024 in terms of section 49 of the Immigration Act 13 of 2002 is declared unlawful, Unconstitutional and is hereby set aside.*

5. *The respondents are directed to release the applicant from detention forthwith.*

6. *The respondents to pay the costs of this application jointly and severally, the one paying the other to be absolved on a scale as between attorney and client.*

7. *Granting the applicant further and/or alternative relief.*

[3] Stripped of all the verbiage and wordiness applicant's relief is multi-pronged: Firstly, this application is premised on the provisions of section 22(4) of the Refugees Act of 1998; under this relief the applicant seeks an order compelling the first, second and third respondents to issue him with a temporal Asylum Permit, pending finalization of the Asylum application

[4] Secondly the applicant seeks an interdictory relief in two forms: First, that the respondents be interdicted from arresting, prosecuting, deposing and/or taking any further steps against the applicant for being illegally within the borders

of this country, pending determination of his application for Asylum status. Second, that the respondents be compelled to forthwith release the applicant.

[5] In support of that relief the applicant posits the following background facts:

[6] The applicant is foreign national of Mozambican discern. He came into this country in May 2024 through Lebombo Border which is between South Africa and Mozambique. According to him he had a valid passport or travel documents that would allow him to stay in this country until 19th June 2024. His travel document is not part of the papers.

[7] He fled his country for fear of prosecution and fear for his life and that of his family, as he was involved in politics and became target of political violence in his country, so he alleges. It does not appear from the papers he came into this country with his family as his family life was part of the reason to relocate to this country to seek Asylum.

[8] He stayed at Flagstaff District within the area of jurisdiction of this court. After his arrival and upon his stay in this country, he was then advised that he must visit Home Affairs Offices Flagstaff to indicate why he was in South Africa, and he did so. He was advised on his arrival at Flagstaff that Immigration Officers are in Lusikisiki.

[9] Upon visiting Lusikisiki Home Affairs Offices in July 2024 he could not be attended to due to long queues. In fact, he went there only to enquire about Asylum Seeker permit. He states that he went there three times and due financial reasons he could not go there again. He mentions load shedding as another reason for the failure to get assistance at Home Affairs offices.

[10] The applicant states that he was arrested on 05th July 2024 in terms of Section 49 of Immigration Act for Contravention of Immigration Laws. It is at that

time that he explained to the Immigration Officer who was arresting him that he wishes to be assisted with an Asylum seeker application. He was never afforded opportunity to apply for Asylum temporal permit. The applicant is of the view that he should not have been arrested after he expressed his wish to apply for Asylum seeker status, he should instead have been assisted to apply for temporal permit.

[11] The applicant subsequently appeared in Flagstaff Magistrates court on 08th July 2024, represented by his attorney and expressed his intention to apply for Asylum seeker status and requested to be released from custody for purposes of making such application. Application to be released from custody was refused and the court informed him that he will be assisted while in custody. The applicant was remanded in custody until 24th July 2024.

[12] The applicant states that he instructed his attorney to pen a letter requesting that he be afforded an opportunity to apply for Asylum seeker permit and no response had been forthcoming. The relevant part of the letter dated 11th July 2024 reads as follows-

“We therefore, kindly request you to issue the Asylum seeker permit for the applicant E[...] C[...] herein.”

Ex Facie the allegations and the letter do not talk to each other. No request for an opportunity to apply for Asylum was made at applicant's instance. Instead applicant's attorney requested that the applicant be issued with Asylum seeker permit

[13] It is stated that on 16th July 2024 applicant's attorney got an opportunity to address the court to express applicant's intention to apply for Asylum seeker permit. The effect of this was that the applicant sought and applied to be released from custody but the court did not grant that application for the second

time. I may mention that it is not clear on the papers how that opportunity was obtained on 16th July 2024 as the matter was remanded to 24th July 2024.

[14] The applicant states that he has satisfied all the requirements of interdict and contends that he is entitled to the relief sought in his notice of motion

[15] The application is opposed by the respondents. In so doing the first to fifth respondents have filed an answering affidavit deposed to by Ms Nomzolisa Siyanda Jelashe who describes herself as the Head of Immigration in Lusiskisiki Home Affairs in the OR Tambo Region Eastern Cape. Another answering affidavit deposed to by Samkele Nodada was filed only on behalf of the fifth respondent. Mr Nodada describes himself as the Head of Bizana Correctional Centre and an overseer of the administration for the whole Correctional Facility. Nodada's affidavit was supported by the affidavit of Bomikazi Daniso who is a female employee of the Department of Correctional Services situated at the Bizana Correctional Centre.

[16] Fifth respondents' case, as a detention facility is simple that on 08th July 2024 they received the applicant from the members of South African Police Services, for detention in their facility and that detention was justified by a warrant of detention signed by the Magistrate on the same date, which warrant was pursuant to an order of court. The warrant authorized them to receive the applicant in custody until 24th July 2024. On 24th July 2024 a further warrant of detention was issued and signed by the Magistrate following an order remanding the applicant in custody until 06th August 2024. The date of 06th August 2024 was the date on which this matter was set down on urgent basis.

[17] It is noteworthy from the detention warrants that no bail application had been made by the applicant in the Magistrates Court. The charges the applicant is facing are set out as follows: "*entering and remained in the Republic without having valid documents*". The fifth respondent's stance is that their conduct of

detaining applicant is lawful as it is authorized by the court order and a valid warrant.

[18] The second reason for fifth respondent's opposition is that there is no basis for a cost order to be sought against him let alone an attorney and client scale. That concludes summary of fifth respondent.

[19] Ms Jelashe, in her affidavit deposed to on behalf of the first to fifth respondent states that on 05th July 2024, Mr Matya who is an Immigration Officer, together with members of South African Police Service confronted the applicant at Flagstaff Main Road. After introducing himself to the applicant, he requested documentation that permits and legalises his stay in the Republic as he is a foreign national. The applicant produced a visa which patently expired on 17th June 2024.

[20] The applicant was then advised that his conduct of being in the country without valid documentation is in contravention of the provisions of section 49(1)(a) of the Immigration Act. Upon enquiry the applicant stated the reason why he is in the country. His reason was that he was working as a panel beater and could not leave the country due to a huge work load at his business. Mr Matya advised him that he was under arrest for contravention of the provision of section 49(1)(a) of Immigration Act and further advised of his Constitutional Rights.

[21] Verification process then took place through Operation Center and the results of that process confirmed that his visa had expired. It further showed applicant's multiple movements in and out of the country for a period exceeding (14) fourteen years.

[22] An interview of the applicant by Mr Matya was undertaken and the applicant cooperated. A questionnaire form was completed with the participation and cooperation of the applicant.

[23] From the questionnaire form the following information is discernible: Applicant's first entry into the Republic was in 1996 for purposes of study. On 18th May 2024 a Visa/permit was issued to him and it expired on 17th June 2024. The applicant is recorded to be self employed as a panel beater under the name and style R[...] Panel Beater at Spaqeni Administrative Area, Flagstaff, Eastern Cape. He has a girlfriend A[...] M[...] with whom he has two children, namely, J[...] M[...], female of 14 years of age and M[...] M[...] a female of 10 years of age. In 1999 he was deported while in Gauteng Province. Nothing in the questionnaire is demonstrable of the fact that he is an Asylum seeker. Nothing shows that he was rehabilitated notwithstanding that he was deported.

[24] The applicant was arrested and formally charged and ultimately detained in Flagstaff Police cells and he appeared in court on 08th July 2024. The first to fourth respondents strongly hold a view that applicant's detention was and is lawful. They resist the release of the applicant on the basis that such release will be tantamount to breaking the law as the applicant is still without any legal documentation entitling him to be in the country.

[25] It is contended that no interview in terms of section 21 of Refugees Act has been made, and it is in that interview that a good cause must be shown for applicant's stay in the country and that will pave way for the process of an application for Asylum status to be made in terms of section 22 of the Act. Simply put, if there is no good cause shown in the interview, an application for asylum may not be made. Applicant can be released after he has applied for Asylum Seeker Status.

[26] In the final analysis the respondent posits a case that applicant's case that he is an Asylum seeker is an afterthought and designed only to fit the facts of this case. The applicant is shown to have been in and out of this country, sometimes entering through Lebombo Border by foot. In October 2023 he entered the Republic but there is no entry of his exit or departure from the country.

[27] The respondent refutes that there are long queues in the Immigration section as they hardly receive immigrants seeking assistance from them as Asylum applications are done in Refugees Reception Office, the nearest of which is in Durban. Application for Asylum seeker status is made following an appointment. No appointment is shown to have been made.

[28] The first to fourth respondents concludes by saying the applicant has not satisfied the requirements of an interdict. The issue of urgency was raised in the papers but during argument first to fourth respondents abandoned that point.

The Legal Framework

[29] It is important to understand the relevant provisions that find application in this matter. The following provisions referred to by the applicant on the one hand, first to fourth respondents on the other in their papers, to wit, Refugees Act¹ as well as Immigration Act.² I must indicate from the onset that Refugees Act was amended with effect from 01st January 2020.

[30] Applications for Asylum are provided for in Section 21 of the Refugees Act. The applicant pins his faith on the provisions of Section 21(4) of the Refugees. As **Wallis JA**³ quoted with approval a dictum by **Lord Steyn**⁴ to

¹ Refugees Act No 130 of 1998

² Immigration Act No 13 of 2002.

³ Minister of Home Affairs and others v Scalabrini Centre, Cape Town and others 2013 (6) SA 421(SCA). 2, 2013 (4) ALL SA 571 SCA Para 89

⁴ R V Secretary of the State for the Home Affairs Department Ex Parte Daly [2001] UKHL26; [2001] 3 ALL ER 433 (HL) at 447 A

underscore a legal position that “*in law, context is everything*,”⁵ I set out to deal with the provisions.

[31] Section 21(4) of the Refugees Act provides as follows:

Application for asylum

21.(1)

(2)

(3)

(4) Notwithstanding any law to the contrary, no proceedings may be instituted or continued against any person in respect of his or her unlawful entry into or presence within the Republic if-

(a) such person has applied for asylum in terms of subsection (1), until a decision has been made on the application and, where applicable, such person has had an opportunity to exhaust his or her rights of review or appeal in terms of Chapter 4; or

(b) such person has been granted asylum.

[32] Secondly, the applicant seeks a temporal Asylum permit and in so doing he relies on the provisions of section 22 (4) Refugees Act.

[33] Section 22(4) of the Refugees Act provides:

“(1)

⁵ Aktiebolaget Hassle and Another v Thomed (Pty) Ltd 2003 (1) SA 155 SCA Para 1

(2)

(3)

(4) The permit referred to in subsection (1) must contain a recent photograph and the fingerprints or other prints of the holder thereof as prescribed.” This provision does not provide support for the relief sought by the applicant in this regard.

[34] For the sake of completion reference is made in which applicant’s papers to section 2 of the Refugees Act, which section deals with general prohibition of refusal of entry, expulsion, extradition or return to other country in certain circumstances. The section provides.

“2. 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 of 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 or disrupting public order in either part or the whole of that country.”

[35] It is common cause that the applicant was arrested in terms of section 49(1)(a) of the Immigration Act, which reads as follows:

“49(1) (a) Anyone who enters or remains in the Republic in contravention of this Act shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding three months.

[36] The provision of section 49(1)(a) of the Immigration Act should aptly be read with the provision of section 41 of the same Act which provide as follows:

(1) When so requested by an Immigration officer or a police officer any person shall identify himself or herself as a citizen, resident or foreigner when so requested by an Immigration officer or a peace officer, and if on reasonable grounds such immigration officer or a police officer is not satisfied that such person is entitled to be in the Republic, such Immigration Officer or a peace officer may take such a person into custody without a warrant and if necessary detain him or her in a prescribed manner and place until persons prima facie status or citizenship is ascertained.”

[37] Section 48 of the Immigration Act provides:

“No illegal foreigner shall be exempt from a provision of this Act or be allowed to sojourn in the Republic on the grounds that he or she was not informed that he or she could not enter or sojourn in the Republic or that he or she was admitted or allowed to remain in the Republic through error or misrepresentation, or because his or her being an illegal foreigner was undiscovered.

[38] Section 10 of the Immigration Act provides for temporary residence permit in the following words:

“10. (1) Upon admission, a foreigner may enter and sojourn in the Republic only if in possession of a temporary residence

(2) Subject to this Act, upon application and upon prescribed examination at the port of entry, one of the temporary residences set out in sections 11 to 23 may be issued to a foreigner.

(3) If issued outside the Republic, a temporary residence is deemed to be of force and effect only after an admission.

(4) A temporary residence is to be issued on condition that the holder is not or does not become a prohibited or an undesirable person.

(5) For good cause, as prescribed, the Department may attach reasonable individual terms and conditions to a temporary residence.

(6) Subject to this Act, a foreigner may change his or her status while in the Republic.”

[39] Section 29 of the Immigration Act provides for prohibited persons in the following words:

“29. (1) The following foreigners do not qualify for a temporary or a permanent residence permit:

(a)....

(b)....

(c) anyone previously deported and not rehabilitated by the Department in the prescribed manner.”

Both section 10 (1) on one hand and Section 29 (1) (c) on the other serve as a loadstar in this matter. The effect of deportation of the applicant shall be pivotal and central in the determination of this matter.

[40] During discussion hereunder it will be apparent that the Refugees Act 130 of 1998 was superseded and amended by Refugees Amendment Act which came into effect from 01st January 2020 and updated on 04th January 2023. Some of the provisions relied upon by the applicant was slightly and cosmetically amended.

Common Cause Facts

[41] It is common cause that the applicant is an undocumented foreigner of Mozambican discern. In the questionnaire the applicant declared that he entered the Republic in 1996 for purposes of study. He was deported in Gauteng Province. It is not gainsaid that the applicant entered the Republic by foot on 06th June 2010. On 11th October 2023 he entered South Africa through Lebombo Border and there is no record of his departure. He came again to this country in 18th May 2024 with a Visitor's Visa which expired on 17th June 2024. It is important to note that the applicant came into this country as a visitor and not for any other reason for a specified period of time. It is further common cause that the applicant failed to report within five (5) days of his entry into the Republic.

[42] When the applicant was confronted with the Immigration Officers and members of South African Police Service on 05th July 2024, he was arrested in terms of Section 49(1)(a) of Immigration Act and was formally charged and detained in Flagstaff South African Police cells. He appeared in court on 08th July 2024. The applicant was remanded in custody until 24th July 2024. On 24 July

2024 the applicant was remanded in custody until 06th August 2024 which date was the date of hearing of this matter on urgent basis. On this date all the necessary papers had already been filed and it is for that reason it is unknown from the papers what transpired in court on 06th August 2024. In fact, the challenge was directed at the detention that was precipitated by and consequent upon decisions taken on or before 08th July 2024 and 24th July 2024.

[43] The applicant pertinently states that he was charged for contravention of Immigration law of this country, in particular for being in the country illegally in terms of section 49 of Immigration Act 13 of 2002.

[44] In his first appearance in Flagstaff Magistrate's Court on 08th July 2024, the applicant pertinently contends that his attorney sought a relief in terms of which he is released for him to be afforded an opportunity to apply for Asylum status as he had an intention to do so. The learned Magistrate indicated that he would not be released from custody. The net and practical effect of the contention is that an application on behalf of the applicant for his release consequent upon by his arrest and detention on 05th July 2024 was made and refused by and in the Flagstaff Magistrates Court.

Discussion: Effect of the Magistrates Court Orders

[45] Applicant's in his papers does not contend that the decisions by the Magistrates Court were set aside. The decisions are still extant and are not challenged herein.

[46] It bears repetition that an application for the release of the applicant from custody was suitably made. An application for the release of the application from custody is quintessentially an application challenging applicant's detentions. It is now common cause that challenge was not successful and applicant's application for him to be released was refused.

[47] During argument applicant's Counsel was invited to comment if it is legally kept and sound to make a fresh application for the release of the applicant when there are at least more than one orders by or made in the Flagstaff Magistrates Court refusing the same application. The court was advised that it has jurisdiction to grant an order releasing the applicant.

[48] I am mindful of the fact that this point was not pertinently raised by the respondents in their papers. However, that point is apparent on the papers of all the parties, especially if regard is had to the applicant's and sixth respondent's papers.

[49] The Constitutional Court⁶ in **Cusa held** that:

"67. These principles are, however, subject to one qualification. Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, mero motu, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality. Accordingly, the Supreme Court of Appeal was entitled mero motu to raise the issue of the Commissioner's jurisdiction and to require argument thereon

[50] In the light of the fact that the point of the existence of the unchallenged court orders remanding the applicant in custody, contemporaneously refusing applicant's application to be released is apparent on the papers, I am of the view that it was correct that I invited parties, especially applicant's Counsel to make submissions thereon as that is a point of law having a bearing on the Rule of law.

⁶ Cusa v Tau Ying Metal Industries and others 2009 (2) SA 204 CC
Para 67

[51] Even if it can be said that respondents' failure to expressly and pertinently raise in their papers the issue of the existence of an unchallenged court order remanding the applicant in custody, *ipso facto* refusing application for the applicant's release constituted a concession, that concession would not be binding to this court if it is found to be incorrect in law. In what follows I deal crisply with legal concession in case one may seek to equate respondents' failure to pertinently raise the point in the papers with a concession.

[52] The Constitutional Court⁷ in **Matatiele Ngcobo J** writing for the majority held that:

*"67. Here, we are concerned with a legal concession. It is trite that this Court is not bound by a legal concession if it considers the concession to be wrong in law..... This Court firmly rejected the proposition that it is bound by an incorrect legal concession, holding that "if that concession was wrong in law [it] would have no hesitation whatsoever in rejecting it." Were it to be otherwise, this could lead to an intolerable situation where this Court would be bound by a mistake of law on the part of a litigant. The result would be the certification of law or conduct as consistent with the Constitution when the law or conduct in fact is inconsistent with the Constitution."*⁸

[53] It is arising from applicant's founding papers that during his first appearance in Flagstaff Magistrate's Court an application for his release from custody was made and same was refused and as a corollary of such refusal the applicant was remanded in custody. It is further apparent on the papers, especially on the fifth respondent's answering papers that the applicant was remanded in their facility.

⁷ Matatiele Municipality v President of the Republic of South Africa 2006 (5) SA 47 (CC) Para 67

⁸ Electoral Commission of South Africa v Speaker of the National Assembly and others 2019 BCLR 89 (CC) Para 79-80

[54] Section 165(5) of the Constitution provides that “*An order or decision issued by a court binds all persons to whom and organs of state to which it applies.*” The Magistrates Court orders refusing the release of the applicant and consequently remanding him in custody are binding not only on the applicant, but also on the fifth respondent which is an organ of state keeping the applicant in detention.

[55] All orders of court whether correctly or incorrectly granted have to be obeyed until they are properly set aside.⁹ An order of court of law stands until set aside by a court of competent jurisdiction.¹⁰ Until that is done, the court order must be obeyed even if it may be wrong¹¹. There is presumption that the judgment is correct¹². Most importantly a person may be barred from approaching the court until he has obeyed an order of court that has not been properly set aside.¹³ “*In **Somali Association of South Africa**, Ponnann J* in his unanimous judgment held that “*no democracy can survive if court orders can be shunned and trampled. Litigants have duly not frustrated their enforcement by court of Constitutional Rights.*”¹⁴

[56] The reason, in my view why a litigant must be barred from approaching a court other than the one where the order was granted, when that court order has not been set aside, is simple that such conduct is tantamount to *forum shopping*. Approaching another court when validity of the court order in the Magistrates Court is not impugned and there is no intention of impugning it leads to an

⁹ Master of the High Court Northern Gauteng High Court, Pretoria v Motala 2012 (2) SA 325 (SCA) Para 11

¹⁰ Bezuidenhout v Petensie Sitrus Beherend Bpk 2001 (!) SA 224 (E) at 229 B-C; MEC for Economic Affairs, Environmental and Tourism v Krusenga 2018 (6) SA 264 (CKHC) at 277 C

¹¹ Culverwell v Beira 1992 (4) SA 490 (W) at 494 A-C

¹² MEC for Economic Affairs, Environmental and Tourism v Krusenga 2010 (4) SA 122 SCA; Makings v Makings 1958 (1) SA 338 (A) at 349

¹³ Minister of Home Affairs v Somali Association of South Africa 2015 (3) SA 545 SCA at 570F-571A Para 34; Byliefedt v Redpath 1982(1) SA 702 (A) at 714

¹⁴ Gauteng Gambling Board and another v MEC for Economic Development, Gauteng 2013 (5) SA 24 (SCA) Para 52; Minister of Home Affairs and others v Somali Association of South Africa, Eastern Cape (SASAEC) and Another 2015 (3) SA 545 Para 35

ineluctable conclusion that the litigant is engaged in a *forum shopping*, which conduct is unacceptable. The court is approached to grant a contradictory order in the face of a valid binding orders, which conduct is undesirable as it adversely affects legal certainty.

[57] For, it is well settled in our law that until a decision is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked.¹⁵ Although this *dictum* was used in the context of administrative actions, by parity of reasoning it applies with equal or more force in court orders or judicial pronouncements.

[58] The legal consequences that the court orders of the Flagstaff Magistrates Court will continue to produce is that the applicant is lawfully detained in terms thereof until they are set aside. Were it to be otherwise there would be no legal certainty and an order to the contrary would engender a confusion, inconsistency and legal uncertainty. On this ground alone the applicant must be non-suited. Applicant's detention is not unlawful in the light of the orders of the Magistrates Court.

[59] An order for the release of the applicant is in the nature of mandatory interdict or a *mandamus*, which must satisfy all the requirements of a final interdict. There are three requisites for the grant of a final interdict, all of which must be present:¹⁶

“(a) A clear right on the part of the applicant

(b) An injury actually committed or reasonably apprehended.

¹⁵ Ouderkraal Estates' (Pty) Ltd v City of Cape Town and others 2004 (6) SA 222 (SCA); 2004 (3) ALL SA 1 Para 26; South African Broadcasting Corporation SOC Ltd and others v Democratic Alliance and others 2016 (2) SA 522 (SCA), 2015 (4) ALL SA 719 SCA Para 45

¹⁶ Setlogelo v Setlogelo 1914 AD 221 at 227

(c) the absence of any satisfactory remedy available to the applicant.”

[60] The third requirement of absence of satisfactory remedy is obviously not satisfied in this regard. Authorities are replete that an order of court is enforceable, applicable and had binding force until it is set aside by a court of competent jurisdiction.¹⁷ The remedy available to the applicant is to approach a court of competent jurisdiction in appropriate proceedings for an order setting aside the court order of the Flagstaff Magistrates court. That is quintessentially the remedy available to the applicant affording him the same relief sought in paragraphs 4 and 5 of notice of motion. The present proceedings are not proceedings challenging or seeking to set aside the court order of the Flagstaff Magistrates Court.

[61] I accordingly find that the relief sought in paragraphs 4 and 5 of the notice of motion are incompetent and cannot be granted. The application concerning the release of the applicant is unsuccessful. The applicant is lawfully detained in terms of the orders of the Flagstaff Magistrates Court which have not been set aside.

Immigration Act and Refugees Act (Amendment Included)

[62] Even if I am wrong in holding that the applicant is lawfully detained because of the court orders which refused applicant's application to be released and consequently remanding him in custody, there is in my view another basis upon which the relief concerning the release of the applicant cannot succeed.

[63] The applicant contends that on 05th July 2024 he was *“arrested, charged and detained for contravention of Immigration Laws of this country,”* in particular, so the contention goes, *“for being in the country illegally in terms of section 49 of the Immigration Act 13 of 2002.”* From this contention there is no dispute that the

¹⁷ Section 165(5) of the Constitution; Authorities referred to above

applicant is illegally in this country. There is no dispute further that the applicant was arrested and detained in terms of the Immigration Laws.

[64] Section 41 of Immigration Act provides:

“When so requested by an Immigration officer or a police officer any person shall identify himself or herself as a citizen, resident or foreigner when so requested by an Immigration officer or a peace officer, and if on reasonable grounds such immigration officer or a police officer is not satisfied that such person is entitled to be in the Republic, such Immigration Officer or a peace officer may take such a person into custody without a warrant and if necessary detain him or her in a prescribed manner and place until persons prima facie status or citizenship is ascertained.”

[65] On the facts of this case, upon being requested by an Immigration Officer Mr Matya, who was accompanied by members of South African Police Services, the applicant identified himself as a foreign national of Mozambican discern. Upon this identification the Immigration officer, Mr Matya was not satisfied on reasonable grounds that the applicant was entitled to be in the Republic. No documents permitting him to be in the Republic were produced and in fact the applicant himself understands himself to be in the Republic illegally. The applicant after a process of interview had taken place was arrested and subsequently detained.

[66] Necessary conditions that must exist before an administrative power can be exercise, are referred to as jurisdictional facts. In the absence of such preconditions or jurisdictions the administrative authority effectively has no power to act at all.¹⁸ The jurisdictional facts that must exist before an Immigration Officer

¹⁸ Kimberly Junior School and another v Head of Northern Cape Education, Department and others 2010 (1) SA 217 (SCA), 2009 (4) ALL A 135 (SCA) Para 11

or a police officer can take a foreigner into custody and detain him or her without a warrant are the following:

“(a) An immigration Officer must request any person to identify him or herself.

(b) person so requested shall identify himself or herself

(c) the Immigration Officer must, on reasonable grounds, not be satisfied that such person is entitled to be in the Republic.”

Once these jurisdictional facts are satisfied, the Immigration Officer can exercise his power to take a foreigner into custody and detain him or her. It is gleaned from the applicant's papers that these jurisdictional facts did exist. On this basis applicant's custody or detention was and is justified.

[67] It is, at this stage appropriate to advert to the provisions of the Refugees Amendment Act as amended with effect from 01st January 2020, and to the relevant Regulations. Section 4(1) of the Refugees Amendment Act deals with exclusions from refugee status in the following relevant manner:

“(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).....

(i) has failed to report to the Refugee Reception Office within five days of entry into the Republic as contemplated in section 21, in the absence of compelling reasons, which may include hospitalisation, institutionalisation or any other

compelling reason: Provided that this provision shall not apply to a person who, while being in the Republic on a valid visa, other than a visa issued in terms of section 23 of the Immigration Act, applies for asylum.”

[68] Section 21(1) of the Refugees Amendment Act deals with applications for asylum and incorporate the following relevant provisions:

“(1) (a) Upon reporting to the Refugee Reception Office within five days of entry into the Republic, an asylum seeker must be assisted by an officer designated to receive asylum seekers”

It is manifest from the papers that the applicant resurfaced in this country in May 2024 through Lebombo Border. No report within five days contemplated in section 4(1)(i) and section 21(a) of the Refugees Amendment Act was made and five days had long elapsed at the time of his arrest in July 2024. Applicant was excluded for Refugee status.

[69] Regulation 7 of the new Regulations is fundamentally important for it provides as follows:

“7. 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, including

(a) fingerprints;

(b) photograph;

(c) names and surname;

(d) date of birth and age;

(e) nationality or origin; and

(f) habitual place of residence prior to travelling to the Republic. and must be issued with an asylum transit visa contemplated in section 23 of the Immigration Act.”

There is clearly an interplay between the Immigration Act and Refugees Amendment Act and for proper construction they need to be considered conjunctively.

[70] Section 49(1)(a) of the same Immigration Act criminalises an act of entering or remaining in the Republic in contravention of the Act and prescribes a sentence for those offenders. The section is worded as follows:

“Everyone who enters or remains in the Republic in contravention of this Act shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding three months.”

[71] Section 10 (1) of the Immigration Act provides:

“10. (1) Upon admission, a foreigner may enter and sojourn in the Republic only if in possession of a temporal residence.

(2) Subject to this Act, upon application and upon prescribed examination at the port of entry, one of the temporary residences set out in sections 11 to 23 may be issued to a foreigner”

The provisions are squarely in sync with Regulation 7 of the new Regulations titled “*Asylum Transit Visa*”. An intention of becoming an asylum in this country is

declared not at any other place, but at the port of entry. A temporal residence or asylum transit visa is issued to the foreigner in those circumstances for a specific purpose of making an application for asylum. An application for asylum must be made within five (5) days of entry. It is an imperative legislative requirement that foreigner's failure to report to Refugee Reception Office within Five days of entry into the Republic excludes the asylum seeker for asylum status and disqualify him for Refugee status. No compelling reasons by the applicant for having failed to do what the law requires of him. Compelling reasons includes the reasonableness of the explanation given by the asylum seeker. Reasons must be coherent and tangible. No reasonable explanation was given. Long queues and high taxi fares are not tangible reasons.

[72] It is common cause that the applicant was once deported in 1999 in Gauteng and was never rehabilitated. Infact it is the first to fourth respondents who brought this important fact to the court's attention, and that was not denied by the applicant in the replying affidavit. It means that atmost good faith was lacking on the part of the applicant notwithstanding that it was required. By virtue of that deportation in 1999 the applicant became a prohibited person in the Republic.

[73] Section 29 of the Immigration Act provides for prohibited persons, and it provide thus:

"29. (1) The following foreigners do not qualify for a temporary or a permanent residence permit:

(a)....

(b)...

(c) anyone previously deported and not rehabilitated by the Department in the Prescribed manner.”

[74] The applicant manifestly does not have a permit required by the legislation. It is equivocally clear that the applicant does not only lack in possession of the permit, he also does not qualify for any permit in this country. If he is released from custody, he will perpetually roam the street of the country as an illegal immigrant as no rehabilitation process has been initiated on his behalf or at his instance. There will be no virtue in releasing the applicant even for purposes of applying for permit as he is disqualified from getting one by operation of the law. He is also excluded in terms of section 4(1)(i) of the Refugees Amendment Act and disqualified for Refugees status.

[75] Provision of the Immigration Act are imperative. Where a statute provides words of exclusive nature such as only such provisions are peremptory.¹⁹ Section 10 of Immigration Act is imperative as it is exclusive in nature. It strictly requires, in limited terms, foreigners in possession of temporal residence permit to enter and sojourn in the Republic.

[76] Section 29(1) of Immigration Act regards any person who does not qualify for a temporal or a permanent residence permit as a prohibited parson. A person who was previously deported and not rehabilitated is regarded as a prohibited person. His stay in the Republic is inherently prohibited. **Innes CJ**²⁰in **Schierhout** observed as follows:

“It is a fundamental principle of law that a thing done contrary to the direct prohibition of the law is void and of no effect but must be regarded as never having been done – and that whether the law giver has expressly so decreed or not; the mere prohibition operates to nullify the act.”

¹⁹ LAWSA Vol 25 Part 1, Page 399 Para 366

²⁰ Schierhout v Minister of justice 1926 AD 99 at 109

Disqualification in section 4(1)(i) of Refugees Amendment Act is equally imperative.

[77] Section 41 of the Immigration Act is couched, as well in imperative and is enacted as a remedial measure to the prohibited acts by the foreigners. The purpose of Section 29 and 41 of the Immigration Act reads with section 4(1)(i) of Refugees Amendment Act, is to circumvent presence or prevent a foreigner who is a prohibited person to be on the streets of this country. It is for that reason releasing an illegal Immigrant is generally unlawful. **Jafta J**²¹ in **Cools Ideas** observed:

“77..... It is a basic principle of our law that a court can never lend its aid to the enforcement of an illegal act.”

It is an illegal act to be in the country without the necessary documentation and as an illegal immigrant, which act cannot be enforced.

[78] In **Pottie**²² **Fagan JA** pointed out that:

“The usual reason for holding a prohibited act to be invalid is not the inference of an intention on the part of the legislature to impose a deterrent penalty for which it has not expressly provided, but the fact that recognition of the fact by the court will bring about or give legal sanction to very situation which the legislature wishes to prevent.”

[79] Section 49(1)(a) of the Immigration Act criminalizes an act of entering and remaining in the Republic in contravention of the Act. The law cannot and does not countenance an ongoing illegality which is also a criminal offence. To do so,

²¹ Cools Ideas 1186 CC v Hubbard and another 2014 (4) SA 474 (CC) Para 77

²² Pottie v Kotee 1954(3) SA 719 (A) at 726H-727A

would be to subvert the doctrine of legality and to undermine the rule of law. Courts have a duty to ensure that doctrine of legality is upheld. The courts have a concomitant duty to uphold the doctrine of legality, by refusing to countenance an ongoing statutory contravention and criminal offence.²³

[80] In a nutshell provision of Immigration Act and Refugees Amendment Act, especially those referred to above are peremptory and they require exact compliance. A statutory requirement construed as peremptory needs exact compliance for it to have the stipulated legal consequence and any purported compliance falling short of that is a nullity.²⁴

[81] Section 165(2) of the Constitution enjoins the courts as they are vested with judicial authority to apply and enforce the law in the following imperative terms:

“The courts are independent and subject only to the Constitution and law, which they must apply impartially and without fear, favour or prejudice.” In interpreting and expatiating on this **Jafta J** ²⁵observed as follows:

“99. In our democratic order, it is the duty of courts to apply and enforce legislation like the Housing Protection Act. If the validity of legislation is not impugned, there can be no justification for not enforcing it, let alone giving legal effect to prohibited conduct.”

[82] This matter concerns and turn into sharp focus to the interpretation of statutes. **Wallis JA**²⁶ in the unanimous judgment of **Endumeni Municipality** observed that:

²³ Lester v Ndlambe Municipality and another 2014 (1) ALL SA 402 (SCA); 2015(6) SA (SCA) Para 23, 24, 27 and 28

²⁴ Shalala v Klerksdorp Town Council and another 1969 (1) SA 582 (T) at 587 A-C; LAWSA Vol 25 Page 399 Para 366

²⁵ Cools Ideas 1186 CC v Hubbard and another 2014 (4) SA 474 (CC) Para 99

²⁶ Natal Joint Municipal Pension Fund v Endumeni Municipality 2012(4) SA 593 SCA Para 18

“18. Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School. The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors.¹⁵ The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The ‘inevitable point of departure is the language of the provision itself’, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.

[83] The purpose and context of the Immigration Act and Refugees Amendment Act is to prohibit undocumented foreign Immigrants into the country. A different interpretation may lead to an absurdity.²⁷

[84] The applicant seeks refugee on the provisions of Refugees Act 130 of 1998. In relying on the provisions of this Act he seeks relief set out in paragraph 2 and 3 of the notice of motion. He seeks an order directing first, second and Third respondents to issue him with a temporary Asylum seeker permit pending finalization of Asylum application. For that relief he relies on the provisions of section 22 (4) of the same Act.

[85] A further relief is a pure interdict against arrest, prosecution, deportation and taking any steps against him for being illegally in the Republic. Ordinary principles of interdict will apply to determine this relief. I will deal with this one later. In what follows I deal with the provisions of section 22(4) of the Act. Anterior to that I re iterate that the old Refugees Act was amended by Refugees Amendment Act and it is not relevant and operative.

[86] Section 22(4) of the Act does not entitle the applicant to any temporary asylum seeker permit. All it does it prescribes the requisites that must be contained in the permit referred to in subsection 1. Reliance on this provision for a temporary asylum seeker permit is misplaced and cannot entitle the applicant to the relief he seeks. Where a litigant relies upon a statutory provision, it is not necessary to specify it, but it must be clear from the fact alleged by the litigant that the section is relevant and operative.²⁸ The section relied upon²⁹ does not avail the applicant to the relief he is seeking. That militates against the cause of

²⁷ Cools Ideas 1186 CC v Hubbard and Another 2014 (4) SA 474 (CC) Para 28

²⁸ Bato Star Fishing (Pty) Ltd v Minister of Environmental affairs and Tourism and others 2004(4) SA 490(CC),2004(2) BCLR 687 (CC) Para 27

²⁹ Yannakou v Apollo Club 1974 (1) SA 614 (A) at 623 F-H

action; whether a cause of action is properly identified. Section 22(4) of the Refugees Amendment Act provide:

“22(4) The visa referred to in subsection (1) may, pending the decision on the application in terms of section 21, from time to time be extended for such period as may be required.” This matter is not about extension of a visa.

[87] If the order can be granted in the form it is sought, compelling the administrative functionary to perform functions in terms of an inapposite and incorrect provision, the functions performed will obviously be invalid. In **Liebenbeg NO** ³⁰**Jafta J** held *“In our law, administrative functions performed in terms of an incorrect provisions are invalid, even if the functionary is empowered to perform the function concerned by another provisions.”* The existence of an apposite and correct provision does not rescue the function from invalidity. Accordingly, the relief is incompetent.³¹

[88] However, section 22(4) makes reference to section 22(1) of the same Refugees Act. In any event for a proper context subsection (1) and (4) are ineluctably required to be read together. Section 22(1) of the Act reads as follows:

“22. (1) The Refugee Reception Officer must, pending the outcome of an application in terms of section 21(l), issue to the applicant an asylum seeker permits in the prescribed form allowing the applicant to sojourn in the Republic temporarily, subject to any conditions, determined by the Standing Committee, which are not in conflict with the Constitution or

³⁰ Liebenberg No v Bergriver Municipality and others 23 (5) SA 246 Para 93

³¹ Nxumalo v The president 2014 (12) BCLR 1457 (CC) Para 14; Zuma v Democratic Alliance and others; Acting National Director of Public Prosecutions and another v Democratic Alliance 2018 (1) SA 200 (SCA) Para 58

international law and are endorsed by the Refugee Reception Officer on the permit.”

[89] Refugees Amendment Act is not materially different from the old Act. Section 22(1) deals with asylum seeker visa as follows:

“(1) An asylum seeker whose application in terms of section 21 (1) has not been adjudicated, is entitled to be issued with an asylum seeker visa, in the prescribed form, allowing the applicant to sojourn in the Republic temporarily, subject to such conditions as may be imposed, which are not in conflict with the Constitution or international law.

[90] A permit contemplated in these provisions can only be issued if the jurisdictional requirements exist, without which the power to issue the temporal asylum permit or visa cannot be exercised by the decision-maker.³²The first precondition that must exist is the application for asylum that must be pending at the time of an application for temporary asylum seeker permit or visa

[91] At the risk of repetition these provisions refer to an application made in terms of section 21(1). Section 21(1) of old Act reads as follows:

“An application for asylum must be made in person in accordance with the prescribed procedures to a Refugee Reception Officer at any Refugee Reception Office.”

[92] Section 21(1)(b) of the new Act deals with the application for asylum as follows:

“(b) An application for asylum must be made in person in accordance with the prescribed procedures to a Refugee Status Determination Officer at

³² Paola v Jeeva No 2004 (1) SA 396 (SCA) Para 11, 14 and 16

any Refugee Reception Office or at any other place designated by the Director-General by notice in the Gazette.” Here too, no material differences are apparent from the old act. Provisions provide for the first jurisdictional fact that must be satisfied before a power to issue a temporary asylum seeker permit may be exercised. That jurisdictional fact is the existence of the application for asylum that has not been adjudicated. It is apparent on the applicant’s papers that an application in terms of section 21(1) for asylum seeker permit had not been made at the time of his arrests and detention. Infact the applicant categorically contends that he wants to be released solely for him to make such an application. Plainly the basis for this application is the lack of a jurisdictional fact to be granted temporary asylum seeker permit. If there is no application for asylum pending adjudication as a necessary prerequisite, no temporary asylum seeker permit may be issued.

[93] The relief sought in paragraph 3 and 4 of the notice of motion can, as well not be granted for lack of a necessary jurisdictional facts or necessary preconditions. In the absence of such necessary preconditions or jurisdictional facts the administrative authority effectively has no power to act at all³³. Jurisdictional facts refer broadly to preconditions or conditions precedent that must exist prior to the exercise of the power and procedures to be followed, or formalities to be observed when exercising the power.³⁴ These facts are jurisdictional because the exercise of power depends on their existence or observance as the case may be.³⁵

[94] Lastly on this aspect, both section 21(1) and section 22(1) of both Acts impose a duty on a particular functionary to exercise the power to issue asylum seeker permits. For purposes of this matter the Refugee Reception Officer or

³³ Kimberly Junior School and another v Head of the Northern Cape Education Department and others 2010 (1) SA 217 (SCA) Para 11

³⁴ MEC for Health Eastern Cape and another v Kirland Investments (Pty)Ltd 2014 (3) SA (CC) Para 98

³⁵ Cora Hoxter: Administrative Law in South Africa, 2nd Edition Page 290

Refugee Status Determination Officer is the statutorily appointed functionary to exercise power to issue temporary asylum seeker permits. It is not the Minister and the Director General of the Department of Home Affairs that are empowered to issue temporary asylum seeker permits. The Refugee Reception Officer or Refugee Status Determination Officer is not joined as a party in the present proceedings. The functionary is therefore a necessary party to be joined. An order directing that a temporary asylum seeker permit must be issued is incompetent in the absence of a statutorily appointed decision-maker who is a necessary party. For this reason, again the relief cannot be granted.

[95] A party is a necessary party to be joined in the proceedings if he has a direct and substantial interest in the matter.³⁶ On the facts of this case and for the reason that the party statutorily empowered to exercise a power to issue the permit concerned is not a party before court, and for the facts that, even if that party was joined, it is manifestly clear that the necessary preconditions for the exercise of power have not been satisfied, the relief sought in paragraph 2 and 3 of the notice of motion cannot be granted.

[96] Accountability is a central value of our Constitution.³⁷ This means that our law must be developed and interpreted in a manner that ensures that all bodies exercising public power are held accountable. However, it also means that court should be slow to infer the delegation of power to bodies that cannot be held directly accountable through ordinary political processes.³⁸ This is not out of kilter with the Uniform Rules of court governing joinder of necessary parties.

[97] In the amalgam of all the facts in this case it is plain that granting an order in circumstances where the public official would not have power to exercise in terms of the empowering provision would be lending its aid to the enforcement of

³⁶ *Amalgamated Engineering Union v Minister of Labour* 1949 (3) 637 (A) at 651

³⁷ *Rail Commuters Action Group and others v Transnet Ltd t/a Metrorail and others* 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 CC Para 73-76

³⁸ *AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council and another* 2007 (1) SA 343 (CC) Para 89

an illegal act, an act this court is eschewed from.³⁹ A court can give a licence to public officials to break the law or to act contrary to the dictates and prescribed requirements of the law. That would be antithetical to the doctrine of legality which the court must ensure that it is observed and upheld.⁴⁰ That order would bring about or give legal sanction to the very situation the legislature wishes to prevent.⁴¹

[98] Refugee Reception Officer or Refugee Status Determination Officer, on the facts of this case, would not have power to issue the temporary asylum seeker permit. It is a fundamental tenet of our law that the doctrine of legality which requires that power should have a source in law is applicable whenever public power is exercised. Public power can only be validly exercised if it is clearly sourced in law.⁴² The law in the present circumstances does not empower the relevant official or functionary to issue temporary asylum permit.

[99] The interdict sought in paragraph 3 of the notice of motion was dependant upon granting of paragraph 2 of the notice of motion. Because paragraph 2 of the notice of motion does not succeed, the whole edifice which include, paragraph 3 of the notice of motion collapses. Once relief for temporary asylum seeker permit collapses, the interdict piggy backed thereon naturally falls away.

[100] Having said all the above I find that applicant's application in its entirety cannot succeed and as a corollary it must fail. There is no reason for costs not to follow the result.

Order

[101] In the result I make the following order:

³⁹ Cools Ideas 1186 CC v Hubbard and another 2014 (4) 474 (CC) Para 77

⁴⁰ Lester v Ndlambe Municipality and another 2015 6) SA 283 SCA Para 24

⁴¹ Pottie v Kotze 1954 (3) SA 719(A) at 726 H-721A

⁴² AAA Investments (Proprietary) Limited v Micro Finance Regulatory Council and another 2007 (1) SA 343 (CC) Para 68

101.1 The application is dismissed with costs.

Zono AJ
Acting Judge of the High Court

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