IN THE HIGH COURT OF SOUTH AFRICA GAUTENG

LOCAL DIVISION, JOHANNESBURG

Case No: 40089/2019

1)REPORTABLE: Yes/No

(2)OF INTEREST TO OTHERS JUDGES: Yes/No

(3)REVISED

25 November 2019 _____

DATE SIGNATURE

In the matter between:

A, Z	**First Applicant**
T, K	**Second Applicant**
A, S	**Third Applicant**
And	
THE MINISTER OF HOME AFFAIRS	**First Respondent**
THE DIRECTOR GENERAL,	**Second Respondent**
DEPARTMENT OF HOME AFFAIRS	

AFRICAN GLOBAL GROUP (PTY) LTD **Third Respondent**

JUDGMENT

Molahlehi J

Introduction

[1] The Applicants instituted this urgent application seeking an order declaring their continued detention at the Lindela, detention centre to be unlawful and that they should be immediately released. They are Ethiopian nationals and asylum seekers in the Republic of South Africa.

[2] They state in their founding affidavit that they arrived in South Africa on the 10 August 2019 via Beit Bridge border post. They, according to the deponent to the founding affidavit, fled from Ethiopia in fear of persecution.

[3] On arrival in South Africa, they sought shelter from their countrymen at Makhado, Limpopo. They on several occasions unsuccessfully tried to apply for asylum at the Refugee Reception Centre.

[4] The immigration officers and the police arrested the applicants on 3 October 2019, during an operation in Makhado. They explained to the arresting officers both in Mkhado and at Lindela that they were asylum seekers and needed an opportunity to make their applications. The officers rejected their explanation and request. They state in their founding affidavit that they did not set out the grounds for their alleged persecuted in Ethiopia as according to them, such information is confidential in terms of s 21 (5) of the Refugees Act (RA).

[5] The Applicants were transported from Makhado to Lindela in Krugersdorp on the 5 November 2019 for deportation to their country of origin.

[6] The Respondents opposed the application. They after acknowledging that the provisions of s 21(5) provide for the confidentiality of asylum applications and the information contained therein, they contended that such a requirement does not preclude them from the need to furnish any information whatsoever about those fundamental issues in section 2 of the RA. They claimed that the application stands to fail because it does not disclose the grounds of persecution if the Applicants were to be deported to Ethiopia. The grounds of persecution are generally:

> "race, religion, nationality, political opinion or membership of a particular social group, or 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 part or the whole of that country."

[7] The deponent to the answering affidavit in support of the allegation that the application stands to fail because the Applicants did not set out the jurisdictional facts relevant to sustain their application stated in paragraph 6.1 that:

> "6.1 A party seeking the protection of the Refugees Act must, at the very least, plead the jurisdictional facts set out in section 2 of the Refugees Act to enable the Court to find that resort to the Refugees Act is justified. The necessity in setting out the factual basis is not so that the Court can consider the merits of the application for asylum but in order to satisfy the Court that the application is one which could invoke consideration and application of the Refugees Act.

Absent fundamental and necessary averments, it is impossible for the Court to determine the application and dispute before it.

6.2 Although section 21 (5) provide(s) for the confidentiality of asylum applications and information contained therein must be ensured at all times. However, such provision does not preclude from the need to furnish any information whatsoever about those fundamental issues in section 2 of the Refugees Act."

[8] Furthermore, the Respondents contended in the answering affidavit that the application stands to fail because, at the time of their arrest, they informed the Immigration officer that they were in the country for vacation. In this respect, the Interviewing Questionnaire in terms of s 41 (1) of the Immigration Act read with Regulation 32 was attached to the answering affidavit.

[9] In support of the above proposition, the Respondents relied on the unpublished case of Liban Velaquez Rivero Vincente' Gauteng Division, Pretoria.[1] The copy of that judgment was handed in Court. The Court, in that case, dealt with an Applicant who had been found to have fraudulently obtained a permit. The Court dismissed the application on the bases that unlike the number of cases referred thereto, the applicants failed to avail information necessary to sustain the claim.[2]

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[1] Case no 27934/2019.

[2] See the cases of Ruta v Minister of Home Affairs[[2] (CCT02/18) [2018] ZACC 52; 2019 (3) BCLR 383 (CC); 2019 (2) SA 329 (CC) (20 December 2018), Bula and Others v Minister of Home Affairs and Others, (589/11) [2011] ZASCA 209; [2012] 2 All SA 1 (SCA); 2012 (4) SA 560 (SCA) (29 November 2011),*Arse v Minister of Hobeme Affairs* and Others, (25/2010) [2010] ZASCA 9; 2010 and Abdi and Another v Minister of Home Affairs and Others, (734/2010) [2011] ZASCA 2; 2011 (3) SA 37 (SCA); [2011] 3 All SA 117 (SCA).

In other words, the Court found that the Applicant in that case failed because he did not disclose the grounds upon which he alleged that he was or would be persecuted if he was to be returned to his country of origin.

Legal principles

[10] Section 2 of the RA provides for a general prohibition of refusal of entry, expulsion, extradition or return to another country of a person who has entered South Africa in the circumstance where he or she may be persecuted if returned to such a country. The section reads as follows:

> "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 another 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."

[11] Regulation 2(2) of the RA, provides:

> "any person who entered the Republic and is encountered in violation of the Aliens Control Act, who has not submitted an application pursuant to sub-regulation 2(1), <u>but indicates an intention to apply for asylum shall be issued with</u>

an appropriate permit valid for 14 days within which they must approach a Refugee Reception Office to complete an asylum application." (my emphasis).

[12] Any person who upon arrest by the authorities indicate the intention to apply for asylum is entitled to be released and be issued with a temporary asylum seeker permit in terms of s 22 of the RA.

[13] Section 22 imposes an obligation on the officials of the Department of home affairs to issue a temporary permit to a person who upon arrest indicates that he or she intends to apply for asylum permit.[3]

[14] The statute further requires that:

> "The Refugee Reception Officer must, pending the outcome of an application in terms of section 21(l), issue to the Applicant an asylum seekers' permit in the prescribed form allowing the Applicant to sojourn in the Republic temporarily, subject to any condition, determined by the Standing Committee, which are not in conflict with the Constitution or international law and are endorsed by the Refugee Reception Officer on the permit."

[15] Section 21 (4) of the RA provides:

> "(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 35 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 (6) such person has been granted asylum."

[3] See Yene Woldemeskel at all v Minister of Home Affairs and Others (589/11) [2011] ZASCA 209 (29 November 2011).

[16] As indicated earlier in this judgment the officials of the Department of home affairs or other government officials must ensure that a foreigner who is encountered in the country is assisted in making an application for asylum once that person indicates the intention to do so. [4] There are no time frames within which an application for asylum needs to be made by an asylum seeker. An Applicant is entitled to assistance in making an application for asylum even after his or her arrest.[5] The consequences of an application for asylum is that s 21 (4) of the RA prohibits the institution of proceedings against a person who has applied for asylum pending finalisation of that process and this include deportation.

[17] Section 21 (4) provides:

> "(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 35 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 (6) such person has been granted asylum."

[18] In terms of s 12 (1) of the Constitution, every person has the right to freedom and security, which includes the right not to be deprived of freedom arbitrarily or without just cause. And thus the burden to justify the detention rests on the detaining authority.[6]

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[4] See Abdi v Minister of Home Affairs 2011 (3) SA 37 (SCA).

[5] See Ersumo v Minister of Home Affairs (69/12) [2012[ZASCA] at par 7-12.

[6] See Arse v Minister of Home Affairs [2103] All SA 261 (SCA) at page 265 and Bula at paragraph 51.

Analysis

[19] Following the above discussion, I find that the Respondents have failed to discharge their duty of showing that the continued detention of the Applicants was justified, for the following reasons: The Applicants were after their arrest in Makhado transported to the detention centre at Lindela. The Applicants asserted that upon their arrest, they informed the arresting officers that they wished to apply for asylum. The Applicants' attorneys of record confirmed the following in the letter (in paragraph 7) that:

> "7 At the time of their arrest and on several occasions after that, our clients tried to inform the immigration officers and police officers that they are the asylum seekers and that they want to apply for asylum in the Republic."

[20] The Respondents never responded to the letter, and thus it seems reasonable to infer that, that version remains undisputed.

[21] The deponent to the answering affidavit disputed and contended that the Applicants informed them that they had a visiting permit at the time of their arrest.

[22] In my view even assuming that the version of the respondents was to be accepted that the Applicants said that they had visiting permits, the situation in the law relating to the detention to the detention changed as soon as they received the letter from Applicants' attorneys dated 8 November 2019. In law, this means that the latest that the Respondents ought to have realised the applicants was on 9 November 2019. This is so because it stated clearly in the letter that the Applicants

intend to apply for asylum. In this respect, the letter stated (at paragraph 8) the following:

> "8 It is our instructions to humbly advise you that our clients intend to apply for asylum and that in terms of Regulation 2(2) of the Refugees Act they must be afforded an opportunity to do so."

[23] The regulatory frame of the RA kicks in at any time and specifically from the point that a person indicates the desire to apply for asylum. There is nothing that requires and confine an asylum seeker to disclose the intention to apply for asylum at the point when he or she is encountered by the immigration authorities. In Bula the SCA held that:

> ". . The word 'encountered' in Regulation 2(2) must be given its ordinary meaning which is to meet or come across unexpectedly. The regulation does not require an individual to indicate an intention to apply for asylum immediately he or she encounters the authorities. It should not be interpreted to mean that when the person does not do so there and then he or she is precluded from doing so after that. The purpose of subsection 2 is clearly to ensure that where a foreign national indicates an intention to apply for asylum, the regulatory framework of the RA kicks in, ultimately to ensure that genuine asylum seekers are not turned away. It is clear that the applicants communicated to the Department's officials when they were detained at Lindela. They expressed their wish through their attorneys in the letter referred to earlier in this judgment that they intended to apply for asylum. Once the appellants, through their attorneys, indicated an intention to apply for asylum they became entitled to be treated in terms of Regulation 2(2) and to be issued with an appropriate permit valid for 14

days, within which they were obliged to approach a Refugee Reception Office to complete an asylum application."

[24] The other point raised by the Respondents is that the Applicant in their application before this Court did not disclose the jurisdictional facts relating to the grounds for fear of persecution if they were to be deported. This bears no merit. Court processes and documents used in such processes are public and thus disclosing the jurisdictional facts relevant for a successful asylum application would defeat the protection of non-disclosure as envisaged in s 21 (5) of the RA. The interrogation and investigation of the application is the responsibility of the Refugee Reception Officer (RRO).[7] It is at that stage and during that process when the asylum seekers has receive assistance and guidance from the RRO or officers who are knowledgeable about the process that the disclosure would be required.

Order

In light of the above discussion, I make the following order:

1. It is declared that the continued detention of the Applicants is unlawful.
2. The first and second respondents are directed to immediately release the Applicants from detention at detention Facility at Lindela not later than 16:00 on the date of this order.
3. It is declared that each of the applicants is entitled to be afforded a period of 14 days after the release within which to approach the Refugee Reception Office to apply for an asylum seeker permit.

[7] See Bula paragraph [77].

4. On presenting themselves individually at any Refugee Reception Office as aforesaid, the first and second respondents are to issue the applicants with a Section 22 Permit pending finalisation of his asylum application.
5. The first and second respondents are directed to pay the costs of this application.

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E Molahlehi

Judge of the High Court, Johannesburg

Representation:

For the Applicant:

Represented by:

For the Respondents:

Represented by:

Heard on: 21 November 2019

Delivered on: 29 November 2019