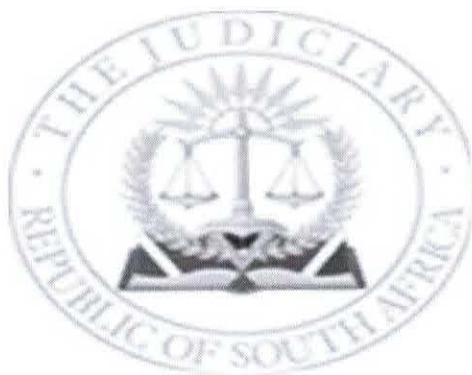


REPUBLIC OF SOUTH AFRICA

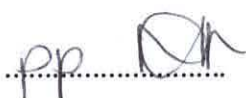


IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 32620/2021

CASE NO: 32621/2021

CASE NO: 32622/2021

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
26/07/2021	
DATE	SIGNATURE

IN THE MATTERS BETWEEN :-

SHANKO ABRAHAM

APPLICANT

And

THE MINISTER OF HOME AFFAIRS

FIRST RESPONDENT

THE DIRECTOR GENERAL,
DEPARTMENT OF HOME AFFAIRS

SECOND RESPONDENT

AND

SHAMBU JAMAL

APPLICANT

And

THE MINISTER OF HOME AFFAIRS

FIRST RESPONDENT

THE DIRECTOR GENERAL,
DEPARTMENT OF HOME AFFAIRS

SECOND RESPONDENT

AND

BOGALA IYوبا

APPLICANT

And

THE MINISTER OF HOME AFFAIRS

FIRST RESPONDENT

THE DIRECTOR GENERAL,
DEPARTMENT OF HOME AFFAIRS

SECOND RESPONDENT

JUDGMENT

Kollapen, J

Introduction

[1] These three matters served before me in the urgent court in the week of the 20 July 2021 and while Mr Abraham and Mr Jamal's matters were argued together, the legal principles applicable to all three matters and the broad factual matrix relevant to each of them overlap considerably and to that extent a single judgment dealing with all three applications would avoid duplication and constitute an efficient use of judicial resources.

[2] All three applicants are nationals of Ethiopia and are currently being held in immigration detention pending their deportation to Ethiopia. They entered South Africa at a place other than a port of entry in the period December 2019 to October 2020 and were all arrested during the period May to June 2021 by immigration officers and processes were put in place for their deportation to Ethiopia.

[3] The applicants say that they entered South Africa in fear of being persecuted in Ethiopia, that it was their intention to seek asylum in South Africa, that they were unable to do so in the time they have been here largely due to the effects of the lockdown and that they have a right to seek asylum and should be released from detention to enable them to apply for asylum. They contend that their continued detention is unlawful given their intimation that they seek to apply for asylum.

[4] The respondents oppose the relief sought and deny that the applicants are entitled to their release and further rely on the provisions of the Refugees Act and the Regulations promulgated thereunder to argue that in not complying with the peremptory requirements of the Act and the regulations, the applicants are firstly not entitled to their release and secondly can only make application for asylum if they have shown good cause for their illegal entry and stay in the country as contemplated in the Act and Regulations.

[5] All of the applicants seek relief in the following terms :-

“2. Subject to the applicant approaching the Refugee Office as contemplated in paragraph 5 below, the First and the Second Respondent are interdicted from deporting unless and until his status under the Refugee Act, 130 of 1998 as amended by the Refugee Amendment Act 11 of 2017 has been lawfully and finally determined.

3. It is declared that the continued detention of the Applicant is unlawful.

4. The Respondents are directed to release the Applicant forthwith.

5. It is declared, in terms of Section 2 of the Refugee Act, the Applicant is entitled to remain lawfully in the Republic of South

Africa for a period of 14 days, alternatively 5 days after the refugee reception office re- opens, in order to allow him to approach a refugee reception office.

6. The First and the Second Respondent are directed, upon submission by the Applicant of his asylum application, to accept the Applicant's asylum application and to issue him with a temporary asylum seeker permit in accordance with Section 22 of the Refugee Act, pending finalisation of the claim,- including exhaustion of his right of review or appeal in terms of Chapter 3 of the Refugee Act and the Promotion of Administration of Justice Act 3 of 2000, provided that the applicant apply for review or appeal in terms of the time periods afforded to him in terms of Chapter 3 of the Refugee's Act and the Promotion of Administration of Justice Act 3 of 2000."

The position of the respective applicants

Mr Shanku Abraham

[6] The applicant says he is from a small town called Tiriga in Ethiopia and that the ruling party is involved in the persecution of people based on their religious and political beliefs. He says that his father was an active member of the opposition party he describes as the Ethiopian Federal Democratic Unity Forum and was actively involved in the affairs of that party. He says that both his parents were killed by the ruling party and that he feared for his life and decided to flee Ethiopia in September 2020.

[7] He made his way from Ethiopia to Mozambique and entered South Africa illegally in October 2020 and has been unable to access the offices of the department of Home Affairs as those offices have been closed. He lived with fellow Ethiopians in Johannesburg until his arrest on the 10 June 2021.

[8] He says that he still seeks to make application for asylum and should be afforded the opportunity to do so.

Mr Shambu Jamal

[9] The applicant says that he lived in Ethiopia and was a member of the opposition Ethiopia People's Revolutionary Party who were active in mobilising people against the government. He says that members of his party were persecuted, tortured and even killed by the ruling party and that fearing for his life he fled Ethiopia and made his way to Zimbabwe in September 2020 and thereafter illegally entered South Africa in October 2020 where he has since remained.

[10] He says he was unable to access the offices of the Home Affairs department as they were closed and could therefore not submit an application for asylum. He lived in Johannesburg with fellow Ethiopians until his arrest in May 2021 and maintains that it is still his intention to apply for asylum in South Africa.

Mr Bogola lyoba

[11] He is also from Tiriga in Ethiopia and say he was a member of the Ethiopian Federal Democratic Unity Forum and was actively involved in anti- government protests. He says that the ruling party has been persecuting members of his party and many have been arrested and detained. He says that he understood that the ruling party were seeking to have him arrested but that in around December 2019 he was able to flee and made his way to Zimbabwe. He says that it was not safe in Zimbabwe for a refugees and he then made his way to South Africa.

[12] He does not say when he came to South Africa but that he tried to access the offices of the department of Home Affairs in Pretoria in January 2020 but was told to come back in March and when he went back in March 2020 the offices were closed due to Covid lockdown.

[13] He also lived with fellow Ethiopians in Johannesburg until his arrest on the 10 June 2021. He days that it was always his intention to seek asylum in South African but never had the opportunity to do so and should be afforded such an opportunity.

The applicable legal framework

[14] The provisions of the Refugees Act and the Regulations promulgated thereunder apply to the claims and the relief sought by all of the Applicants. In this regard a new Regulatory framework came into operation on the 1 January 2020 in terms of Government Notice R 1707 published on the 27 December 2019 (these regulations replaced the April 2000 regulations). Amendments to the Act were also effected and came into force on the 1 January 2020.

[15] It was argued on behalf of Mr Lyoba that his application fell to be dealt with under the April 2000 regulations as he arrived in South Africa in December 2019 when those regulations were still in force.

[16] The problem with this submission is that on Mr Lyoba's version he only sought to access the asylum system in January 2020 and not in December 2019 when he arrived. No explanation is offered as to why he did not seek to apply for asylum in December 2019. If he did, then clearly the argument that the 2000 regulations was applicable would have been a compelling one.

[17] However having elected to seek to apply in January 2020 his application would fall to be dealt with under the regulatory framework that was in place when he sought to apply. To hold otherwise, would mean that a person may arrive in South Africa, stay undetected for a lengthy time and then upon arrest some months or even years later would be entitled to rely on a legal framework no longer in existence. This would undermine the efficacy of the law and the legislative intent and in addition using the current framework would not constitute a retrospective application of the law as was argued.

[18] In my view all three application fall to be dealt with in terms of the existing regulatory framework.

The entitlement to apply for asylum

[19] Central to the argument of the applicants is that notwithstanding their illegal entry into South Africa their entitlement to apply for asylum has not and cannot be extinguished simply on account of their illegal entry and stay in the country.

The relevant provisions of the Act and the Regulations

The Refugees Act No 30 of 1998

[20] Section 4 : Exclusion from refugee status

“(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 :-

.....

.....

(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; or

- (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.”*

[21] Section 21 Application for asylum

(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.

.....

(1B) 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.

.....

(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 application has been reviewed in terms of section 24A or where the applicant exercised his or her right to appeal in terms of section 24B; or

(b) such person has been granted asylum.”

[22] Section 22 : Asylum seeker visa

“(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.”

[23] The Regulations

Asylum transit visa

“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,

Application for asylum

“8. (1) An application for asylum in terms of section 21 of the Act must—

(a) be made in person by the applicant upon reporting to a Refugee Reception Office or on a date allocated to such a person upon reporting to the Refugee Reception Office;

.....

(c) be submitted together with—

(i) a valid asylum transit visa issued at a port of entry in terms of section 23 of the Immigration Act, or under permitted circumstances, a valid visa issued in terms of the Immigration Act;

...

(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 sub-regulation (3)."

Analysis

[24] What is clear from the Act and the Regulations is that while an aspirant asylum seeker is required to indicate an intention to do so at a port of entry, the Act and the regulations provide a clear mechanism for someone who has not arrived at a port of entry to be able to nevertheless have the opportunity to declare such an intention at a later stage and thereupon may be afforded the opportunity to apply for asylum.

[25] Section 4(1)(h) and (i) which deals with the exclusion from refugee status both provide for an asylum seeker to advance compelling reasons to either the Refugee Reception Office or the Refugee Status Determining Officer for the failure to either

having entered the country illegally or to report to a Refugee Reception Office within 5 days.

[26] In addition Regulation 8(3) also provides for an asylum seeker to show good cause before being entitled to apply for asylum for their illegal entry or stay in the country.

[27] The totality of the effect of these provisions is that :-

- a) They do not create a bar to an application for asylum on the part of those who have either entered South Africa illegally and remain here illegally or those who may have entered legally but whose stay has for some reason become illegal. That this should be so is consistent with both the letter and spirit of the 1951 Convention and Protocol relating to the status of Refugees which in Article 31 reads as follows :-

“1. The contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their 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.”

Indeed the Constitutional Court in ***Ruta v Minister of Home Affairs (CCT02/18)*** [2018] ZACC 52 confirmed that to be the state of our law when it said so in the following terms:-

“The Refugee’s Act makes plain principled provision for the reception and management of asylum seeker applications. The provisions of the Immigration Act must thus be read together with and in harmony with those of the Refugees Act. This can readily be done. Though an asylum seeker who is in the country unlawfully is an “illegal foreigner” under the Immigration Act, and liable to deportation, the specific provisions of the Refugees Act intercede to provide imperatively that, notwithstanding that status, his or her claim to asylum must first be processed under the Refugees Act.

This is the meaning of Section 2 of the Act, and it is the meaning of the two statutes when read together to harmonise with each other.”

Therefore, on this aspect I am satisfied that on what is before me and regard being had to what each of the applicants say is what compelled them to leave Ethiopia , they should not be automatically excluded from accessing the provisions of the Act.

- b) They create different procedures and entitlements for those who wish to apply for asylum and as the applicants correctly point out create a separate route for those who like all of the applicants have entered the country illegally. Both Section 21 as well as Regulation 7 and 8 provide that an applicant for asylum must present a valid transit visa or other visa when approaching the Refugee reception office but that the failure to do so will not be fatal to their attempts to apply for asylum.
- c) Section 4 of the Act would exclude someone in this position obtaining refugee status if they were unable to provide compelling reasons for either their failure to enter South Africa through a designated port of entry and/or failing to report to a Refugee Reception Office within 5 days of their arrival. None of the applicants have made application for asylum so the opportunity to provide such compelling reasons may yet arise in the future and it therefore cannot be said that they are excluded from consideration for refugee status.
- d) Regulation 8 (3) however provides that those who fail 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. I have already made reference to Article 31 and it appears that the import of Regulation 8(3) is that the establishment of good cause (in defined cases) must precede the submission of an application for asylum. Simply put if an applicant who is required to show good cause (which is what the applicants must show)

fails to do so they may not proceed to submit application for asylum. This intermediate step is what is provided for in Regulations 8(3) . It is interesting to note that Section 21 of the Act says that where a person is not in possession of a valid visa the immigration officer is required to interview such person to ascertain whether there are valid reasons why such a person is not in possession of such a visa. It does not say what should occur where no such valid reasons are found to exist. Regulation 8(3) appears to be more explicit in that regard.

- e) In the proceedings before me the parties accepted that on the face of it Regulation 8(3) created a jurisdictional requirement that the applicants had to meet before being allowed to apply for asylum. All of them entered South Africa illegally and were not in possession of valid visa issued in terms of the Immigration Act and were therefore required to show good cause as set out above.

Where and when must good cause be established.

[28] The applicants, placing reliance on Regulation 8(3) contended that good cause had been established as required by the Regulations and argued that the Court must in terms of Regulation 8(4) require such a person to show good cause and the Court was therefore required to make a determination in terms of Regulation 8(4) on the question of good cause.

[29] If regard is had to Regulation 8(4) it is certainly not clear what situations it contemplated and there are a number of difficulties with the proposition that it applies in these civil proceedings before me. They are :-

- a) The Regulation refers to 'any foreigner appearing before the Court' This may well be suggestive of a foreigner who appears before the Court in either criminal proceedings or in proceedings contemplated by the Immigration Act and in particular the proceedings following the arrest of a foreigner and their appearance in Court following their arrest and for the confirmation of

their detention. In this regard Annexure B to the answering affidavit in the matter of Mr Jamal reflects his appearance before a magistrate and the questioning that occurred prior to an order for his further detention. Certainly in this context the foreigner is appearing before the Court in a largely inquisitorial process and if he should indicate an intention to apply for asylum then the Court would be obliged (must) to require him to show good cause.

- b) In ordinary civil proceedings such as these, the foreigner is not appearing before the Court in the sense described in Regulation 8(4) and nor can it be said that the Court in adversarial civil proceedings should be compelled to require a litigant to prove something. Generally, the parties in civil proceedings define the issues and the court is required to adjudicate the disputed issues and not to raise issues for determination nor compel a litigant to prove something (whether or not it is an issue in dispute). For this reason, I am also not convinced that Regulation 8(4) was intended to apply in ordinary civil litigation of this kind. It is certainly better suited to inquisitorial processes than to adversarial processes.

[30] It is therefore for these reasons that I conclude that Regulation 8(4) does not apply in context of these proceedings and to that extent I am not empowered to either compel the applicants to show good cause nor to make a determination on good cause.

[31] Having said that it must therefore follow that the applicants are entitled to the opportunity to show good cause and following that, if they are successful to submit their applications for asylum. It is not for this Court to pre-empt whether the applications for good cause or the asylum applications, if they are submitted, will be successful or not. What this Court has affirmed is the entitlement of the applicants to access the provisions of the Act in the manner I have described.

[32] I intend making an order to facilitate the proper recognition of their rights in this regard.

The claim for the release of the applicants

[33] On what is before me the applicants were detained in terms of the Immigration Act and their further detention has been authorised by a Court. There was no suggestion that the existing warrants for their detention were deficient in any respect and leaving aside their intimation to apply for asylum, there is nothing unlawful about their detention.

[34] What the applicants say is that once they make an election to apply for asylum they are entitled to their release in order to present themselves to a Refugee Reception Office and that the refusal by the respondents to release them renders their current detention unlawful.

[35] The ordinary procedure that would have followed had the applicants reported at a port of entry and intimated an intention to apply for asylum would have been the issuing of an asylum transit visa that would have allowed them to enter the country and thereafter present themselves to a Refugee Reception office. None of the applicants followed this route and the consequence of that is that they do not have a valid immigration visa (transit asylum or otherwise). They were accordingly at risk of being arrested and this is what occurred.

[36] They would, if their applications for asylum are submitted be entitled to the issuing of a Section 22 permit to allow them to remain in South Africa until the finalisation of their applications. The provisions of Section 22 however only come into operation once an application for asylum has been submitted which has not occurred in the case of the applicants.

[37] In addition, the protection in Section 21(4) that no proceedings may be instituted or continued against someone who has entered the country illegally if such a person has either applied for asylum or has been granted asylum is also not triggered as there is for now, no application for asylum.

[38] The detention of the applicants is therefore not unlawful and nor have they demonstrated any entitlement to their release, they may well do so at a later stage but that is of no consequence now.

[39] The new regulations signal a departure from the situation that existed before it and in particular the entitlement to apply for asylum in cases of illegal entry is

dependant now upon good cause being shown. That being so it cannot be said that an asylum seeker who enters South Africa illegally and is in lawful immigration detention can automatically trigger his or her release if an intimation is given that he or she wishes to apply for asylum. To do so would ignore the scheme of the new system, would undermine the requirement of good cause and would not allow for harmony between the Immigration Act and the Refugees Act.

[40] In this regard it is necessary to record that the 2000 regulations were markedly different in so far as they related to the right not to be detained even in the case of those who entered South Africa illegally. It provided as follows :-

(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 sub-regulation 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.

[41] There is no similar provision in the current regulations and it must therefore follow that the detention of the applicants under the Immigration Act continues to endure and is not interrupted by the mere intimation of the applicants of their intention to apply for asylum but will be so interrupted once they apply for asylum and are issued with permits in terms of Section 22.

The remedy

[42] Mindful that Refugee Reception Offices remain closed and it is not clear when they will be re-opened but also recognising the right of the applicants to be afforded the opportunity to show good cause and if successful to then apply for asylum, there is in my view a duty in law on the respondents even in these unusual and difficult circumstances to facilitate such a process. There was, in response to a suggestion made by the Court, seemingly nothing that stood in the way of the respondents taking the necessary steps to ensure that the applicants can access the asylum seeking mechanisms of the Act. Whether it requires immigration officers to be taken to the

applicants for this purpose or in any other way that is practical and feasible is for the respondents to determine provided that ultimately a process is undertaken in terms of which the applicants' intention to apply for asylum is responded to as required by the Act or in a manner that gives substance to the Act.

[43] In my view allowing the respondents a period of 14 days from the date of this order to do so would be reasonable.

Costs

[44] Both parties have achieved some measure of success and an order that each party pay its own costs would be fair in the circumstances.

Order

[45] I make the following order :-

a) In case number 32620/2021

- 1) The respondents are interdicted from deporting the applicant pending the processes as set out in paragraph 2 of this order
- 2) The respondents are to take all reasonable steps within 14 days from the date of the order to give effect to the intention of the applicant to apply for asylum as contemplated in the Refugees Act and the Regulations thereto. This may entail bringing the applicant before a Refugee Officer in a manner that is both practical and efficient regard being had to the existing Covid regulations and the limitations associated therewith.
- 3) Each party is to bear its own costs.

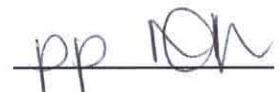
b) In case number 32621/2021

- 1) The respondents are interdicted from deporting the applicant pending the processes as set out in paragraph 2 of this order

- 2) The respondents are to take all reasonable steps within 14 days from the date of the order to give effect to the intention of the applicant to apply for asylum as contemplated in the Refugees Act and the Regulations thereto. This may entail bringing the applicant before a Refugee Officer in a manner that is both practical and efficient regard being had to the existing Covid regulations and the limitations associated therewith.
- 3) Each party is to bear its own costs.

c) In case number 32622/2021

- 1) The respondents are interdicted from deporting the applicant pending the processes as set out in paragraph 2 of this order
- 2) The respondents are to take all reasonable steps within 14 days from the date of the order to give effect to the intention of the applicant to apply for asylum as contemplated in the Refugees Act and the Regulations thereto. This may entail bringing the applicant before a Refugee Officer in a manner that is both practical and efficient regard being had to the existing Covid regulations and the limitations associated therewith.
- 3) Each party is to bear its own costs.


N KOLLAPEN

Judge of the High Court, Pretoria

APPEARANCES

Case number: 32620/2021

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ATTORNEYS**

**COUNSEL FOR THE
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Instructed by : THE STATE ATTORNEY,
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Case number: 32621/2021

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Case number: 32622/2021

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DATE OF HEARING : 23 JULY 2021

DATE OF JUDGMENT : 26 JULY 2021