



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

Case Number: 2024/120786

(1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES: NO  
(3) REVISED: YES

\_\_\_\_\_  
DATE

\_\_\_\_\_  
SIGNATURE

**TEMBO PAUL**

Applicant

and

**THE MINISTER OF HOME AFFAIRS**

First Respondent

**THE DIRECTOR GENERAL:**

**DEPARTMENT OF HOME AFFAIRS**

Second Respondent

**THE CHAIRPERSON: REFUGEE STATUS**

**DETERMINATION OFFICER**

Third Respondent

**THE CHIEF DIRECTOR OF DEPORTATION:**

**DEPARTMENT OF HOME AFFAIRS**

Fourth Respondent

**THE DEPARTMENT OF JUSTICE AND CORRECTIONAL  
SERVICES**

Fifth Respondent

**THE CHIEF MAGISTRATE:**

**KEMPTON PARK MAGISTRATE’S COURT**

Sixth Respondent

**THE HEAD OF THE NATIONAL**

**PROSECUTING AUTHORITY**

Seventh Respondent

**THE CONTROL PUBLIC PROSECUTOR:**

**KEMPTON PARK MAGISTRATE’S COURT**

Eighth Respondent

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## **JUDGMENT**

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MAHOSI J

### *Introduction*

- [1] This is an urgent application for an order to, *inter alia*, interdict the respondents from deporting the applicant until his status under the Refugees Act<sup>1</sup> has been lawfully and finally determined, declare his detention unlawful, direct the respondents to release him from unlawful detention and review and set aside any decision of a Magistrates’ Court to extend his warrant of detention.

### *The parties*

- [2] The applicant is a Malawian national and an illegal “foreigner” for the purpose of the Immigration Act.<sup>2</sup> He is currently detained at Kempton Park police station.
- [3] The first respondent is the Minister of Home Affairs, cited as an official administering the Refugees Act. The second respondent is the Director General of the Department of Home Affairs, also cited in her official capacity. The third respondent is the Chairperson, Refugee Status Determination Officer, cited in his official capacity as an official responsible for determining asylum applications. The fourth to eighth respondents are the Chief-Director of Deportation, the Department of Justice and Correctional Services, the Chief

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<sup>1</sup> Act 130 of 1998, as amended.

<sup>2</sup> Act 13 of 2002, as amended.

Magistrate, Kempton Park Magistrate's Court, the Head of the National Prosecuting Authority and the Control Public Prosecutor: Kempton Park Magistrate's Court. They are respectively cited in their official capacities. The seventh respondent opposed the application.

### *Background facts*

- [4] The applicant entered South Africa from Malawi in April 2024 through the Zimbabwe and South Africa Border post in Musina, Limpopo, where he enquired about the process of applying for asylum and was advised to approach the Refugee Centre, the Lawyers for Human Rights and the United National Refugee Commissioner offices, so he narrates. He claims to have been forced to flee his country because of socio-political persecution and is in fear for his life.
- [5] On 7 October 2024, the applicant was arrested and charged with contravention of section 49(1)(a) of the Immigration Act. He appeared before the Kempton Park Magistrate's Court on 9 October 2024 for a bail application, which was opposed. The matter was remanded to 23 October 2024 and transferred to Court C of the same Magistrate's Court for a guilty plea. On the return date of 23 October 2024 and on the behest of his attorneys of record, the matter was remanded to allow the applicant to launch this application. The return date was set for 1 November 2024. The first hurdle that the applicant faced was that of urgency.

### *Urgency*

- [6] The applicant's basis for urgency was that his application was inherently urgent, he approached this Court at the earliest opportunity available to him, and cannot obtain relief in the ordinary course because there is an imminent threat of deportation to Malawi, where he will face the risk of persecutions and threat to his life and freedom. He claims to be exposed to the risk of unlawful detention and subjected to the ongoing violation of his rights to human dignity and freedom of movement.

- [7] The respondent disputes urgency because the applicant failed to raise his asylum status at the time of his arrest or at his first appearance in the Magistrate's Court. Instead, he miraculously remembered that he intended to seek asylum on 23 October 2024 during the last Court appearance, where the matter was remanded for a guilty plea, and the impending sentencing was imminent. Had the applicant followed the correct procedure provided for in the Refugees Act, he could have avoided his arrest and deportation, argued the respondent.
- [8] To the extent that the applicant claimed that the immense urgency with which he brought this application revolved around his continued detention and the impending deportation, the respondent contended that such urgency was ill-founded because there was no impending deportation as the matter in the Magistrate's Court was still pending and his detention was lawful. This argument ignores the fact that the applicant is in detention and awaiting imminent deportation upon being convicted for breaching the Immigration Act. Therefore, his application is urgent.<sup>3</sup>

### *Submission*

- [9] The applicant submitted that his detention at the Kempton Park police station was arbitrary and unlawful and subjected him to an ongoing violation of his rights to apply for asylum, human dignity and freedom of movement. He asserted that, albeit there was no conviction or date for deportation set, he awaited to be transferred to the Lindelani Deportation camp from where he will be deported to a country from which he fled. Under the circumstances, the applicant argued that his deportation was imminent and he faced a real risk of persecution and threats to his life, physical safety and freedom.
- [10] The respondent conceded that the applicant had a right to be allowed to appear before a Refugee Status Determination Officer ("RDSO") for the processes under section 21(1B) of the Refugee Act, read with Regulation 8 (3), but denied that his arrest and detention were unlawful.

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<sup>3</sup> See *Ashebo v Minister of Home Affairs and others* [2023] ZACC 16; 2024 (2) BCLR 217 (CC); 2023 (5) SA 382 (CC) at [13].

## *Legal Framework*

### *Immigration Act*

[11] Section 23 deals with asylum transit visas, and it reads:

- “(1) The Director-General may, subject to the prescribed procedure under which an asylum transit visa may be granted, issue an asylum transit visa to a person who at a port of entry claims to be an asylum seeker, valid for a period of five days only, to travel to the nearest Refugee Reception Office in order to apply for asylum.
- (2) Despite anything contained in any other law, when the visa contemplated in subsection (1) expires before the holder reports in person at a Refugee Reception Office in order to apply for asylum in terms of section 21 of the Refugees Act, the holder of that visa shall become an illegal foreigner and be dealt with in accordance with this Act.”

[12] Section 34 provides for the deportation and detention of illegal foreigners as follows:

- “(1) Without the need for a warrant, an immigration officer may arrest an illegal foreigner or cause him or her to be arrested, and shall, irrespective of whether such foreigner is arrested, deport him or her or cause him or her to be deported and may, pending his or her deportation, detain him or her or cause him or her to be detained in a manner and at a place determined by the Director-General, provided that the foreigner concerned—
- (a) shall be notified in writing of the decision to deport him or her and of his or her right to appeal such decision in terms of this Act;
- (b) may at any time request any officer attending to him or her that his or her detention for the purpose of deportation be confirmed by warrant of a Court, which, if not issued within 48 hours of such request, shall cause the immediate release of such foreigner;
- (c) shall be informed upon arrest or immediately thereafter of the rights set out in the preceding two paragraphs, when possible, practicable and available in a language that he or she understands;
- (d) may not be held in detention for longer than 30 calendar days without a

warrant of a Court which, on good and reasonable grounds, may extend such detention for an adequate period not exceeding 90 calendar days, and

- (e) shall be held in detention in compliance with minimum prescribed standards protecting his or her dignity and relevant human rights.”

[13] Section 49 reads:

- “(1) (a) Anyone who enters or remains in, or departs from 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 two years.
- (b) Any illegal foreigner who fails to depart when so ordered by the Director-General shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding four years.’

### *Refugees Act*

[14] Section 2 captures the fundamental principle of non-refoulement<sup>4</sup> and it states:

“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 public order in any part or the whole of that country.”

[15] Section 4 provides for exclusion from refugee status as follows:

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<sup>4</sup> See *Aboe v Minister of Home Affairs and Another* [2021] ZACC 50; 2022 (4) BCLR 387 (CC); 2022 (2) SA 321 (CC) at [42].

- “(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) has committed a crime against peace, a crime involving torture, as defined in the Prevention and Combating of Torture of Persons Act, 2013 (Act 13 of 2013), a war crime or a crime against humanity, as defined in any international legal instrument dealing with any such crimes; or
  - (b) has committed a crime outside the Republic, which is not of a political nature and which, if committed in the Republic, would be punishable by imprisonment without the option of a fine; or
  - (c) has been guilty of acts contrary to the objects and principles of the United Nations or the African Union; or
  - (d) enjoys the protection of any other country in which he or she is a recognised refugee, resident or citizen; or
  - (e) has committed a crime in the Republic, which is listed in Schedule 2 of the Criminal Law Amendment Act, 1997 (Act 105 of 1997), or which is punishable by imprisonment without the option of a fine; or
  - (f) has committed an offence in relation to the fraudulent possession, acquisition or presentation of a South African identity card, passport, travel document, temporary residence visa or permanent residence permit; or
  - (g) is a fugitive from justice in another country where the rule of law is upheld by a recognised judiciary; or
  - (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.

- (2) For the purposes of subsection (1) (c), no exercise of a human right recognised under international law may be regarded as being contrary to the objects and principles of the United Nations or the African Union.”

[16] Section 9 reads:

- (1) Subject to this Act, no person shall enter or depart from the Republic at a place other than a port of entry.
- (2) Subject to this Act, a citizen shall be admitted, provided that he or she identifies himself or herself as such and the immigration officer records his or her entrance.
- (3) No person shall enter or depart from the Republic—
  - (a) unless he or she is in possession of a valid passport and, in the case of a minor, has his or her own valid passport;
  - (b) except at a port of entry, unless exempted in the prescribed manner by the Minister, which exemption may be withdrawn by the Minister;
  - (c) unless the entry or departure is recorded by an immigration officer in the prescribed manner; and
  - (d) unless his or her relevant admission documents have been examined in the prescribed manner and he or she has been interviewed in the prescribed manner by an immigration officer: Provided that, in the case of a child, such examination and interview shall be conducted in the presence of the parent or relative or, if the minor is not accompanied by the parent or relative, any person of the same gender as the minor.
- (4) A foreigner who is not the holder of a permanent residence permit contemplated in section 25 may only enter the Republic as contemplated in this section if—
  - (a) his or her passport is valid for a prescribed period; and



- (b) issued with a valid visa, as set out in this Act.

[17] Section 21 provides for the application for asylum. It reads:

- “(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.
- (b) An application for asylum must be made in person in accordance with the prescribed procedures to a Refugee Status Determination Officer at any Refugee Reception Office or at any other place designated by the Director General by notice in the *Gazette*.
- (1A) Prior to an application for asylum, every applicant must submit his or her biometrics or other data, as prescribed, to an immigration officer at a designated port of entry or a Refugee Reception Office.
- (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.
- (1C) The Director-General may, by notice in the *Gazette*, require any category of asylum seekers to report to any particular or designated Refugee Reception Office or other place specially designated as such when lodging an application for asylum, if the DirectorGeneral considers it necessary for the proper administration of this Act.
- (1D) For purposes of subsection (1C), a category of asylum seekers refers to asylum seekers from a particular country of origin or geographic area or of a particular gender, religion, nationality, political opinion or social group.
- (2) The Refugee Status Determination Officer must, upon receipt of the application contemplated in subsection (1), deal with such application in terms of section 24.
- (2A) When making an application for asylum, every applicant must declare all his or her spouses and dependants, whether in the Republic or elsewhere, in the application for asylum.

- (3) When making an application for asylum, every applicant, including his or her spouse and dependants, must have his or her biometrics taken in the prescribed manner.
- (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.”

[18] Section 22 is titled “Asylum seeker visa” and it reads:

“(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.”

### *Regulations*

[19] Regulation 7 reads:

“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.”

[20] Regulation 8 provides for the manner in which the application for asylum must be made. It reads:

“(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;
- (b) be made in a form substantially corresponding with Form 2 (DHA-1590) contained in the Annexure;
- (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;
  - (ii) proof of any form of a valid identification document: Provided that if the applicant does not have proof of a valid identification document, a declaration of identity must be made in writing before an immigration officer; and
  - (iii) the biometrics of the applicant, including any dependant.

(2) Any person who submits a visa other than an asylum transit visa issued in terms of section 23 of the immigration act must provide proof of change of circumstances in the period between the date of issue visa and the date of application of asylum.

(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*

[21] The applicant's case rests on his submission that the moment he expressed his intention to apply for asylum he fell under the protection of Refugees Act and International Conventions and as such his further detention and threats of expulsion were unlawful. The law in this regard has become crystalized.

[22] In *Ashebo v Minister of Home Affairs and others*,<sup>5</sup> the Constitutional Court considered the issue of whether there was a legal basis to detain an illegal foreigner whilst the process under section 21(1B) of the Refugee Act read with Regulation 8(3) was still pending and said:

"[47] It must be observed, at the outset, that the fact that an illegal foreigner is still entitled to apply for asylum does not negate the fact that he or she has contravened the Immigration Act by entering and remaining in the country illegally. Where the detention is solely for the purpose of deportation then the detention is authorised by section 34 of the Immigration Act. However, where the detained person has been charged with a criminal offence in terms of section 49(1), the further detention may also be authorised by the Criminal Procedure Act.

[48] It is important to note that the applicant was charged under section 49(1)(a) of the Immigration Act. Sections 34 and 49 both regulate illegal entry and stay by non-South African citizens in the country. However, each has a distinct purpose. Section 34 does not create or refer to any criminal offence. But section 49 does. Section 34 is primarily intended for deporting illegal foreigners and detaining them for that purpose, whereas section 49 criminalises certain conduct."

[23] The Court further stated that:

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<sup>5</sup> [2023] ZACC 16; 2024 (2) BCLR 217 (CC); 2023 (5) SA 382 (CC).

“However, and whether the detention was in terms of section 34 or pursuant to a criminal charge in terms of section 49(1)(a), the same question arises – whether the applicant’s expression of an intention to apply for asylum entitled him to be released from such detention. The answer must be no.”<sup>6</sup>

[24] Regarding the International Convention, the Court stated that Article 31 of the Convention does not give illegal foreigners unrestricted indemnity from penalties but requires them to present themselves to the authorities and to show good cause for their illegal entry or presence without delay. In light of the above, the respondent correctly contended that the relief sought by the applicant, a declaration of his detention unlawful and directing the respondents to release him from unlawful detention, is gravely out of this Court’s purview.

[25] The applicant was arrested and charged with contravention of section 49(1)(a) of the Immigration Act. Thus, his arrest and detention do not violate the non-refoulement protection in section 2 of the Refugees Act, and his expression of an intention to apply for asylum does not entitle him to be released from detention. First, he has to show good cause for his illegal entry and stay in this country, and the respondent must assist him by facilitating an interview with an immigration officer to determine whether he has a valid reason for not being in possession of an asylum transit visa. Should he succeed, and an application is lodged, he may be issued with an asylum seeker visa that would enable him 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.

[26] The respondent proposed an alternative remedy, which was identified in the *Ashebo* decision. It reads:

“[59] ...The applicant is entitled to an opportunity to be interviewed by an immigration officer to ascertain whether there are valid reasons why he is not in possession of an asylum transit visa. And he must, prior to being permitted to apply for asylum, show good cause for his illegal entry and stay in the country, as contemplated in the above provisions. Once he passes that hurdle and an application for asylum is lodged, the entitlements and protections provided in sections 22 and 21(4) of the

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<sup>6</sup> Id at [50].

Refugees Act – being issued with an asylum seeker permit that will allow him to remain in the country, without delay, and being shielded from proceedings in respect of his unlawful entry into and presence in the country until his application is finally determined – will be available to him.

[60] Once the applicant has an asylum seeker visa issued in terms of section 22, he would be entitled to remain in this country temporarily. His continued detention, to the extent that it rests solely on section 34 of the Immigration Act, would unquestionably become unlawful, because he would no longer be an “illegal foreigner” for purposes of the Immigration Act. Merely expressing an intention to seek asylum does not entitle the applicant to release from detention. On the other hand, however, the respondents, particularly the first, second, fourth, and fifth are obliged – regardless of the basis of his detention – to assist him to give effect to his intention to apply for asylum. At a practical level, this simply means that these respondents must facilitate arrangements either to transport the applicant to a RRO for his interview or to bring the relevant immigration and refugee officials to the correctional centre in which he is detained to conduct the necessary processes, whichever means is convenient. They must further refrain from deporting him until his asylum application is finalised.”

[27] The above remedy was recently applied in the judgment in *D S L and others v Minister of Home Affairs and others*,<sup>7</sup> where the Court gave the following order:

“1. The application is dismissed.

2. The first, second, third and fourth respondents are directed, to the extent necessary, to take all reasonable steps, within 60 days from the date of this order, to afford the applicants an opportunity in terms of section 21(1B) of the Refugees Act 130 of 1998, read with regulation (8)(3) thereto, to show good cause, and to allow the whole process of any review or appeal, in the event where good cause is not established, to unfold until it is finally determined.

3. The first, second, third and fourth respondents are directed to approach the Magistrates Court for the extension of time should the review or appeal

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<sup>7</sup> [2024] ZAGPJHC 123 at [95].

process not be finalised within the 60-day period. This request should be accompanied by a report directed to the Magistrates Court, setting out what steps have been taken and why the processes have not been finalised within the 60-day period.”

[28] In the circumstances, there is no reason why this Court should not adopt the remedies above. Accordingly, the following order is granted:

*Order*

1. The rules relating to forms, services and time periods as prescribed by the Uniform rules of this Court are dispensed with the matter heard as an urgent application in terms of rule 6(12).
2. The application to declare the applicant’s detention unlawful, direct the respondents to release him from unlawful detention and review any decision of a Magistrates’ Court to extend his warrant of detention is dismissed.
3. It is declared that in terms of section 2 of the Refugees Act 130 of 1998 (Act), the applicant may not be deported until he has had an opportunity of showing good cause as contemplated in section 21(1B) of the Refugees Amendment Act 11 of 2017, read with regulation 8(3) thereto, and, if such good cause has been shown, until his application for asylum has been finally determined in terms of the Act.
4. The first, second, fourth, fifth and seventh respondents are directed, to the extent necessary, to take all reasonable steps within 60 days from the date of this order to give effect to paragraph 3 above.
5. The first, second, fourth, fifth and seventh respondents are directed to approach the Magistrates Court for the extension of time should the review or appeal process not be finalised within 60 days. This request should be accompanied by a report directed to the Magistrates Court, setting out what steps have been taken and why the processes have yet to be finalised within the 60-day period.



D. Mahosi J  
Acting Judge of the High Court

Heard: 01 November 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives through email. The date for hand-down is deemed to be 13 November 2024.

Appearances

For the applicant: Advocate A. Mafanele  
Instructed by: Tandoh Desmond Attorneys

For the seventh respondent: Advocate L. Msomi  
Instructed by: State Attorney, Johannesburg