THE REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Court Case No: **22059/2018**

In the matter between:

A[…] I[…]	First Applicant
S[…] B[…]	Second Applicant
A[…] N[…]	Third Applicant

and

THE DIRECTOR OF ASYLUM SEEKER MANAGEMENT: DEPARTMENT OF HOME AFFAIRS	First Respondent
THE CAPE TOWN REFUGEE RECEPTION OFFICE MANAGER	Second Respondent
THE MINISTER OF HOME AFFAIRS	Third Respondent
THE DIRECTOR – GENERAL OF THE DEPARTMENT OF HOME AFFAIRS	Fourth Respondent
THE CHAIRPERSON OF THE STANDING COMMITTEE FOR REFUGEE AFFAIRS	Fifth Respondent

JUDGMENT

SLINGERS J

[1] The applicants seek an order directing the first and second respondents to accept their asylum seeker application in terms of section 21 of the Refugees Act, Act 130 of 1998, based on their *sur place* refugee claims and for the respondents who oppose the application to pay the costs jointly and severally, the one paying the other to be absolved.[1]

[2] While preparing for the hearing of the matter it became evident that the applicants were parents to minor children who would be impacted by the court's decision. The parties were invited to address the court on the need for separate representation for the children and encouraged to investigate settlement of the matter. The applicants submitted supplementary submissions wherein they averred that the interest of the children were ad idem with those of their mothers, and that it would be in their interest as well as those of the applicants that the matter be resolved on the merits, as set down. The applicants furthermore submitted that, as there was no divergence between the interests of the minor children and the applicants, there was no cause for the court to direct that the minor children be treated differently to those of their parents.

[3] The applicants' attorney of record also deposed to an affidavit wherein she stated that both herself and the first and third applicants, despite multiple efforts over a significant period, have been unable to locate the second applicant. The court was informed that the second applicant had not been in contact with her legal representatives since January 2020, as a result whereof they could not obtain any instructions from her. All attempts by the legal representatives to contact the second applicant were unsuccessful. In the circumstances, the second applicant's application was struck from the roll.[2]

[4] All the applicants are Burundian nationals who previously applied for asylum in South Africa. Each of their applications were rejected as being manifestly unfounded

---

[1] Prayers 1 and 2 of the notice of motion dated 29 November 2018

[2] In this judgment I set out all the applicants' positions, notwithstanding the striking of the second applicant's application.

in terms of terms of section 24(3) of the Refugees Act. The refusal of the applicants' asylum applications was automatically reviewed by the Standing Committee for Refugee Affairs (**'SCAR'**) which confirmed the finding that the applications were manifestly unfounded.

[5] An asylum application is rejected as being manifestly unfounded when it is made on grounds other than those set out in section 3 of the Refugees Act. Section 3 provides that:

'Subject to Chapter 3, a person qualifies for refugee status for the purpose of this Act if that person-

> *a) Owing to a well-founded fear of being persecuted by reason of his or her race, gender, tribe, religion, nationality, political opinion, or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or*
>
> *b) owing to external aggression, occupation, foreign domination or other events seriously disturbing public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge in another place outside his or her country of origin or nationality; or*
>
> *c) is a spouse or dependent of a person contemplated in paragraph (a) or (b).'*

[6] The first applicant applied for asylum in 2009, having entered the country in 2007. Her application for asylum stated that her parents died a long time ago and that she wished to work and study in the Republic of South Africa ('**RSA**'). The second applicant's application stated that she wanted to work and study in the country. The third applicant's application stated that she came to the RSA to find her husband.

[7] The applicants accepted that their asylum applications were validly refused and did not take any steps to challenge the decision or the confirmation thereof by way of judicial review. This was confirmed during the hearing of the matter.

[8] After the decision by SCRA, the applicants were informed of the final rejection of their asylum applications and were informed that they had to arrange to depart from the country within 30 days. The applicants were also informed that their continued presence in the country would henceforth be regulated in terms of the Immigration Act.

[9] The applicants took no steps to have the refusal of their asylum application judicially reviewed, nor did they depart from the country. On the contrary, they remained, illegally and in contravention of the provisions of the Immigration Act and the Refugees Act, in the country from February 2014 to September 2019.

[10] The applicants seek an order compelling the first and second respondents to accept their second asylum application. From the papers filed, the second asylum application is to be made on the basis that the applicants are *sur place* refugees. However, the applicants argued that it is not for this court to determine whether they are indeed sur place refugees as that was a determination which could only be made by the Refugee Status Determination Officer ('RSDO') and that it would be inappropriate to decide on their refugee at this stage.

[11] If this court was to determine, *prima facie*, whether the applicants were sur place refugees and whether or not the circumstances in their country of origin had materially changed[3], thereby allowing them to re-submit asylum applications, any material dispute of fact would have to be resolved on the application of the Plascon-Evans principle as they seek final relief.[4] On the application of this legal principle, the applicants would not have established that the condition in their country of origin had materially changed to such an extent as to render them *sur place* refugees. On the

[3] The founding affidavit relies upon a change in the circumstances of the applicants' country of origin to substantiate an averment that they may qualify as *sur place* refugees.
[4] *Plascon-Evans Paint (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd*. [1984] 2 All SA 366 (A). In terms of the *Plascon-Evans* principle, where disputes of fact have arisen on the affidavits and a final order is sought, it may be granted if the facts averred in the applicant's affidavit which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order.

contrary, the respondents have shown that peaceful elections were held in Burundi in May 2020, which resulted in a new president being elected. Since the election of the new president, many Burundian refugees have voluntarily returned to their home country.

[12] The applicants claim a clear right to re-submit and asylum application based on their interpretation of the Refugees Act, which they argued was an open system designed to allow vulnerable people to apply for asylum. The applicants further argued that there was no limitation to the number of application an asylum seeker could submit and that it does not necessarily follow that an asylum seeker should have to depart from the country when his or her asylum application is rejected.

[13] The applicants argued that the respondents' refusal to accept the applicants' second asylum application is inconsistent with the Refugees Act, the Constitution and International Law, more particularly, the principle of non-refoulement. They argue that, considering the prominent, overriding, important of the right of non-refoulment, foreign nationals must be allowed to re-apply for asylum.

[14] The applicants find support for their argument in the Refugees Act's definition of abusive application which is defined as an asylum application made

> ' (a) with the purpose of defeating or evading criminal or civil proceedings or the consequences thereof; or
>
> (b) after the refusal of one or more prior applications without any substantial change having occurred in the applicant's personal circumstances or in the situation in his or her country of origin.'

[15] The applicants argue that as it is only the RSDO who can determine whether the asylum application is abusive, the definition set out in paragraph (b) indicated that an asylum application can be re-submitted.

[16] The applicants' case is premised on an interpretative exercise of the Refugees Act. *Natal Joint Municipal Pension Fund v Endumeni Municipality*[5] sets out the approach to be adopted when engaged in an interpretative exercise. It requires an objective approach, unrelated to the intention with which the word may have been selected and the starting point is to consider the language of the provision, read in context and having regard to the purpose thereof and the background to the preparation and production of the document or regulation. The approach that words must be give their ordinary grammatical meaning in statutory interpretation, unless to do so would result in an absurdity was also endorsed by the Constitutional Court which went on to hold that (i) statutory provisions must always be interpreted purposively, (ii) the relevant statutory provision must be properly contextualised and (iii) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity[6].However, the text, context and purpose – the triad of statutory interpretation – should not be used in a mechanical fashion as it is the relationship between the words used, the concepts expressed by those words and the place of the contested provisions within the scheme of the entire statute, which constitutes the unitary exercise of interpretation.[7]

[17] The long title of the Act informs that it was enacted to give effect, within the RSA, to the relevant international legal instruments, principles and standards relating to refugees; to provide for the reception into the RSA of asylum seekers; to regulate application for and recognition of refugee status; to provide for the rights and obligations flowing from such status; and to provide for matters connected therewith.

[18] Section 1A prescribes that the Act must be interpreted and applied in a manner that it consistent with the 1951 United Nations Convention Relating to the Status of Refugees; the 1967 United Nations Protocol Relating to the Status of Refugees; the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa; the 1948 United Nations Universal Declaration of

---

[5] 2012 (4) SA 593 (SCA) (see paras 18 and 23)
[6] *Cool Ideas v Hubbard* 2014 (4) SA 474 (CC*)*
[7] *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments* 194 (Pty) Ltd and Others [2021] ZASCA 99

Human Rights; and any domestic law or other relevant convention or international agreement to which the RSA is or becomes a party.

[19] Section 21(4) provides that:

> *'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."*[8]

[20] Sections 22(12) and (13) provide that:

'(12) The application for asylum of any person who has been issued with a visa contemplated un subsection (1) must be considered to be abandoned and must be endorsed to this effect by the Standing Committee on the basis of the documentation at its disposal if such asylum seeker fails to present himself or herself for renewal of the visa after a period of one month from the date of expiry of the visa, unless the asylum seeker provide, to the satisfaction of the Standing Committee, reasons that he or she was unable to present himself or herself, as required, due to hospitalisation or any other form of institutionalisation or any other compelling reason.

(13) An asylum seeker whose application is considered to abandoned in accordance with subsection (12) may not re-apply for asylum and must be dealt with as an illegal foreigner in terms of section 32 of the Immigration Act.'

[8] Section 24A pertains to the review of the decision by SCRA.

[21] In terms of section 24(5)(a) an asylum seeker whose application was rejected as being manifestly unfounded and whose rejection was confirmed by SCRA, as the applicants in this matter, must be dealt with as an illegal foreigner in terms of section 32 of the Immigration Act, which provides that any illegal foreigner shall depart, unless authorised by the Director-General in the prescribed manner to remain in the Republic pending his or her application for a status and that any illegal foreigner shall be deported.

[22] Section 27A sets out the protection and general rights of asylum seekers, with section 27(b) providing that an asylum seeker has the right to remain in the RSA pending the finalisation of his or her application for asylum.

[23] Section 34A sets out the obligations of asylum seekers and provides that an asylum seeker must abide by the laws of the RSA. In accordance with section 27 of the Refugees Act, any person who fails to comply with or contravenes the conditions subject to which any permit has been issued to him or her under the Act, or without just cause refuses to or fails to comply with a requirement under the act is guilty of an offence.

[24] The applicants' interpretation of the Refugees Act allowing for the resubmission of an asylum application without departing from the country is problematic on several fronts. Firstly, it would undermine the public interests in finality of decisions and would result in a never-ending cycle of asylum applications.[9] As soon as an asylum application is refused, the asylum seeker would simply re-submit a new application, thereby rendering him or her subject to the protections and general rights set out in section 27A of the Refugees Act. There would also be no need to be granted asylum as the asylum seeker need only continuously apply for asylum to be granted the right to stay in the RSA in terms of section 27A(b). Secondly, the applicants' interpretation renders section 24(5)(a) of the Refugees Act invalid. As soon as an application is finally determined, the asylum seeker need merely indicate an intention to reapply for asylum to escape the provisions of section 24(5)(a) and avoid being dealt with in

[9] *Zondi v MEC, Traditional and Local Government Affairs, and Others* 2006 (3) SA 1 (CC). Although this judgment spoke to the public interest in the finality of judgments, the principle would equally apply decision in respect of asylum applications which have far-reaching consequences for the applicant.

terms of the Immigration Act. Thirdly, section 21(4) of the Refugees Act would be rendered tautologous and as stated in *Wellworths Bazaars Ltd v Chandler's Ltd and Another*,[10] a court should be slow to conclude that words are tautologous or superfluous.

[25] Further, section 22(12) and (13) are indicative that the Refugees Act does not favour an open system as contended for by the applicants. Section 22(12) is phrased in peremptory language. It is also evident from using institutionalisation as an example of a compelling reason that a factor and/or issue had to be outside a person's control or influence for it to be considered a compelling reason in terms of section 22(12).Section 22(13) makes it peremptory for an asylum seeker whose application has lapsed to be dealt with in terms of the Immigration Act.

[26] It would not be equitable if an applicant whose application was refused, could re-submit an application, but an applicant whose application was endorsed as abandoned could not.

[27] The applicant's interpretation of the Refugees Act is based solely on the definition of an abusive asylum application and fails to consider the Refugees Act as a whole.

[28] An interpretation of the Refugees Act which provides that an asylum seeker has no clear right to resubmit an application after it was refused would not be inconsistent with the Refugees Act, the Constitution and International Law, more particularly, the principle of non-refoulement. In *Abore v Minister of Home Affairs and Another*[11] the Constitutional Court held that the principle of non-refoulement, and the protection it offered endured until the final determination of the asylum claim. It held that:

'[42] In a nutshell, this court in *Ruta* highlighted that our country adopted Article 33 of the 1951 Convention, which guarantees the right to seek and enjoy in other countries

[10] 1947 (2) SA 37 (AD); See also *Case and Another v Minister of Safety and Security and others; Curtis v Minister of Safety and Security and Others 1996* (3) SA 617 (CC) and *Florence vs Government of The Republic of South Africa* 2014 (6) SA 456 (CC)
[11] 2022 (2) SA 321 (CC)

asylum from persecution. It also clarified that Parliament decided to enforce the Convention in the country through s 2 of the Refugees Act. Section 2 captures the fundamental principle of non-refoulement. As this court reasoned, the 1951 Convention protects both what it calls ‘de facto refugees’ (those who have not yet had their refugee status confirmed under domestic law), or asylum seekers, and ‘de jure refugees’ (those whose status has been determined as refugees). The protection applies as long as the claim to refugee status has not been finally rejected after a proper procedure. This means that the right to seeks asylum should be made available to every illegal foreigner who evinces an intention apply for asylum, and a proper determination procedure should be embarked upon and completed. The ‘shield of non-refoulement’ may only be lifted after that process has been completed.

In the present matter, the applicants’ asylum applications were finally determined when SCRA confirmed the decision that their applications were manifestly unfounded and they accepted this decision. As the applications were finally determined, the shield of non-refoulment have been lifted. On the applicants’ interpretation, there would be no point to finally determine asylum applications as the consequences thereof could be avoided by re-submitting an asylum application.

[29] In *Ruta v Minister of Home Affairs*[12] the Constitutional Court addressed the intersection of the Immigration Act with the Refugees Act and held that an application for asylum had first to be determined, and any arrest, deportation and detention under the Immigration Act has to be deferred until then. This interpretation of the Refugees Act read with the Immigration Act was consonant with the principle of non-refoulment, the text of the Refugees Act, is aims and the circumstances of most asylum seekers. However, *Ruta* dealt with the right to submit an asylum applications for asylum have been determined and there is no basis on which provisions of the Immigration Act need be deferred.

[30] On the interpretation favoured by the applicants, the application of the Immigration Act could potentially be deferred indefinitely as an asylum seeker could always have an asylum application pending.

---

[12] 2019 (2) SA 329 (CC)

[31] In *Ersumo v Minister of Home Affairs*[13] *and Others* the court opined that in circumstances where an illegal foreigner either fails to apply for asylum or where the asylum permit lapses, and the asylum seeker indicates an intention to again apply for asylum, there would no obligation to issue a new asylum transit permit.[14] Similarly, it follows that there is no general obligation to accept a new application for asylum upon the refusal of an application which was found to be manifestly unfounded. Consequently, the applicants cannot claim a clear right to re submit an asylum application, following the refusal of their application.[15] There may well be circumstances which would allow an applicant to re-submit an application, but there is no clear right upon which an applicant may rely to do so.

[32] In *Iqbal v Minister of Home Affairs*[16] and Others a Pakistani national sought his release from Lindela Detention Centre where he was being held as an illegal foreigner. He invoked section 21(4) of the Refugees Act and claimed protection against detention and deportation as he was waiting the outcome of his asylum application. However, this application had been rejected. He did not avail himself to the remedies provided for in the Refugees Act to challenge the rejection and appeared to have accepted it. The Pakistani national argued that he intended to re-apply for an asylum seeker permit and that he should be released pending the outcome of his application. In seeking his release, he relied on the judgment of Bula and Others v Minister of Home Affairs and Others 2012 (4) SA 560 (SCA), which held that once an intention to apply for asylum is evinced the protective provisions of the Refugees Act and its regulations come into operation. That court, correctly in my view, held that the Bula judgment was applicable only to first encounters between the immigration authorities and foreigners who had not yet applied for asylum, which was not the situation the applicant found himself in. The court went on to hold that as the Pakistani national failed to pursue his asylum application after it was rejected and was never denied the opportunity to exhaust his rights of judicial review, he would

---

[13] 2012 (4) SA 581 (SCA)
[14] The court stated that: 'It would be odd were the regulation to mean that, if an immigration officer thereafter encountered the same foreigner and the foreigner again indicated a desire to apply for asylum, an obligation to issue a fresh asylum transit permit would arise. However, it is unnecessary to express any final views on this, as those are not the facts before us.'.
[15] There may well be circumstances where an applicant could
[16] 2013 (5) SA 408 (GSJ)

revert to the status of an illegal foreigner, subject to the provisions of the Immigration Act.

[33] In the present matter, all the authorities on which the applicants rely address the situation of illegal foreigners who have yet to make an asylum application. As with Iqbal, the applicants in this case failed to take any steps to pursue their asylum application after they were rejected and rely on their interpretation of the Refugees Act to claim a clear right to resubmit an asylum application. As shown above, the applicants' interpretation of the Refugees Act is problematic. In the circumstances, the applicants have not shown that they have a clear right to re- submit an asylum application nor that they are entitled to the rights and protection offered in the Refugees Act pending a determination of their status. When their asylum applications were refused, and such refusal confirmed by SCRA and accepted by the applicants, they reverted to the status of illegal foreigners and fall to be dealt with under the Immigration Act.

[34] Section 27A(d) of the Refugees Act provides that asylum seekers are entitled to the rights contained in the Constitution insofar as those right apply to an asylum seeker. The applicants instituted this application to assert, what they erroneously believed, were their right to re-apply for asylum. In the circumstances, and in accordance with the Biowatch[17] principle (litigants should not be deterred from enforcing their rights because they fear that they will have to pay their opponent's costs as well as their own) the applicants should not be burdened with an adverse cost order.

[35] Therefore, I make the following order:

(i) in respect of the second applicant, the application is struck from the roll;

(ii) in the event that the second applicant presents herself to an employee and/or official of the second respondent, she must be given an opportunity to contact and consult with her attorney;

[17] *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC)

(iii) nothing in this order must be construed as detracting from the provisions of section 22(12) and section 22(13) of the Refugees Act, insofar as they may be applicable to the second applicant;

(iv) the first and third applicants' application is dismissed; and

(v) there is no order in respect of costs.

SLINGERS J

27 June 2022