

SOUTH AFRICA / JUDGMENT

City of Cape Town v Balus and Others (21616/19) [2020] ZAWCHC 22 (17 March 2020) [2020] ZAWCHC 22

COURT

Western Cape High Court, Cape Town

BEFORE

D.M. Thulare

CASE / FILE NUMBER

21616/19

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CASE NO: 21616/19

In the matter between

THE CITY OF CAPE TOWN Applicant

And

JP BALUS First Respondent

PAPY SUKAMI

Second Respondent

SYLVIA NAHMANA

Third Respondent

THE PROTESTORS OCCUPYING THE SECTIONS OF
LONGMARKET STREET, BURG STREET, INCLUDING
THE SIDEWALKS, AND GREENMARKET SQUARE,
AS SHOWN ON ANNEXURE “A” HERETO
 (“THE AFFECTED AREA”)

Fourth Respondent

THOSE PERSONS WHO ASSOCIATED
THEMSELVES WITH THE AIMS AND CONDUCT

T OF THE FOURTH RESPONDENT AS
WELL AS THE FIRST TO THIRD RESPONDENTS

Fifth Respondent

THE NATIONAL COMMISSIONER OF THE SOUTH
AFRICAN POLICE SERVICES, WESTERN CAPE

Sixth Respondent

THE PROVINCIAL COMMISSIONER OF THE
SOUTH AFRICAN POLICE SERVICES,
WESTERN CAPE

Seventh Respondent

THE MINISTER OF HOME AFFAIRS

Eighth Respondent

JUDGMENT

DELIVERED: 17 MARCH 2020

THULARE AJ

[1] This is the return date for a rule nisi issued by this court on 17 February 2020. The reasons for the rule nisi and the terms thereof appear in that judgment of the court. The first to fifth respondents (the respondents) have not availed themselves of the opportunity to give reasons why a final order should not be granted.

[2] The interim order was served on 19 February 2020 as directed by the court. The Department of Home Affairs (DHA) conducted

verification and other administrative processes in relation to the Immigration Act and the Refugees Act from 19 February 2020 to Sunday 23 February 2020. First and Second respondents provided the lists used to control persons boarding buses provided by the City of Cape Town (the City). Only persons on the lists, to whom the court order was applicable, went through the process. A total of seven hundred and eighty one (781) persons went through the process. Seven hundred and eighty (780) were foreign nationals and one (1) child was South African. Three Hundred and Fifty

(350) had asylum seeker permits of which two hundred and forty two

(242) were valid and hundred and eight (108) had expired. Hundred and eighty eight (188) had been granted asylum of which hundred and sixty six (166) had valid documents and twenty two (22) had expired documents. The total of documented foreign nationals was five hundred and thirty eight (538). Two hundred and thirty six

(236) were undocumented of which fifty (50) were adults and hundred and eighty six (186) were children. Six (6) were in possession of valid study/work visas some of which were pending further investigation.

[3] Department of Home Affairs (DHA) initiated necessary actions including administrative fines where applicable. Asylum seekers

who indicated their intention to apply for asylum were issued with visas valid for fourteen (14) days and had to report to the Cape Town Refugee Reception Office to lodge their applications. A total of twenty three (23) indicated their intention to apply for asylum. Hundred and fifty six (156) asylum seekers with pending appeals were referred to the Refugee Appeal Authority. One undocumented foreign national from the Democratic Republic of Congo (DRC) was arrested for fraud after it was found that he was in possession of a fraudulent permit. Sixty two (62) asylum seekers appeared before a magistrate for failure to renew their permits whilst others were under investigation. Three (3) of the sixty two (62) did not pay their administrative fines and were detained. Some of the people who appeared on the lists did not report for verification. The 1st, 2nd and 3rd respondents failed to appear for interviews with DHA officials.

[4] The City provided transport to the respondents from the affected area to Salt River Community Hall, the venue provided by the City. The City also made available officials to assist the respondents who were in distress and who sought assistance. Some respondents who attended at the venue approached the City's officials to report their situations, a total of four hundred and nineteen (419) individuals making up two hundred and seventy one (271) family units. Only eighty five (85) of the two hundred and seventy one (271) families indicated that they wished to remain in South Africa but did not wish to return to their previous residences as they felt unsafe. They needed accommodation in a safe place and not in informal settlements. One person indicated that she wanted to return to Bellville where she previously stayed. The other hundred and eighty five (185) family units indicated that they did not wish to be accommodated anywhere in Cape Town and wanted to be resettled in another country.

[5] The sheriff assisted by the South African Police Services (SAPS) took steps to enforce the order on 1 March 2020. There was very little physical resistance from the respondents. The temporary structures, tents and other belongings of the respondents were removed from the pavements for safe keeping and the affected area was cleansed. Approximately two hundred (200) persons moved from the affected area. Some attempted to gain entry into the St George's Cathedral which attempt failed. Some managed to gain entry into St Mary's Cathedral. A charge of trespass was laid by the church and those respondents were removed by the SAPS. The respondents moved to De Villiers Park where they spent the night. As it

was still a transgression of the by-laws and the interim order the sheriff still assisted by the SAPS took steps to enforce the interim order the next day. The sheriff warned the respondents that their continued refusal to comply with the interim order and by-laws could result in their arrest. The respondents indicated their willingness to be arrested and moved towards the SAPS station in Buitekant Street where they camped.

- [6] The current position is that the remaining respondents on the streets are camping in Buitekant and Albertus streets in the City. The numbers are dwindling but remain fluid in that they increase during the day but only about eighty five (85) people spend the night there. Of those who indicated that they need a safer place to live, the City indicated to them that it will facilitate arrangements with various shelters available. The Portfolio Committee on Home Affairs, a committee of Parliament of the Republic of South Africa, on 10 March 2020 held a briefing by DHA, the City, The Provincial Joints Committee, the South African Human Rights Commission (SAHRC) and the United Nations High Commissioner for Refugees (UNHCR) on the situation of the refugees in Cape Town who are demanding to be resettled to a third country. The papers show that in his oral and written submissions to that Committee, the Minister for Home Affairs emphasized the importance of the City enforcing its by-laws more vigorously.
- [7] On the evening of 11 March 2020, a day after the briefing of the Portfolio Committee, a number of respondents approached the law enforcement officials of the City and expressed an interest in being accommodated at shelters the City engaged. These respondents made approaches on a clandestine basis as they feared others who do not want any of the respondents to break rank. Other respondents also approached City officials confidentially, indicating that they had found private accommodation and require assistance with rental payments. The City and the SAHRC are attending to that request. Consul- Generals and other relevant officials of Angola, Somalia, Democratic Republic of Congo, Burundi and Zimbabwe informed the Executive Mayor of the City that nationals of those countries who are in South Africa and in distress can be assisted by their embassy if such assistance is requested. In the case of Angola attempts have been made by the relevant officials of that country to speak to respondents who are nationals of that country, but those attempts were met with intransigence.
- [8] There is a side issue between the City and the SAPS. Mr RG Bosman (Bosman), the Executive Director of Safety and Security of the City was the deponent to the supplementary affidavit of the City for purposes of today's proceedings and the relief sought. He said the following in paragraphs 17 and 18:
- "17. The Sheriff then attended at the Charge Office of the Central Police Station to lay a charge, but was persuaded by members of the SAPS that it was not his responsibility to do so and it was the City's responsibility to approach the Court in terms of paragraph 6 of the interim order, to request an order to arrest and detain protestors who do not comply with the order.*

18. I annex hereto as "RB1", a copy of the Sheriff's return of service indicating this."

[9] The relevant part of RB1 reads as follows:

“NATURE OF PROCESS: COURT ORDER

On 3rd day of March 2020 at about 14hrs the above matter was handled by N.N. NTSIBANTU in the following manner:

I was invited to attend a strategic meeting with stake holders in this matter during which it was revealed that it was not my responsibility

to lay charges against the protesters as there was no direct obstruction of the Sheriff by the protesters. It was further

revealed that it is the applicant's responsibility to go back to court based on the same Order and request the Court to grant an Order to arrest and detain those protestors who do not comply with the order: Refer to paragraph 6 of the Court order under Case number 21616/19 dated 18 March 2020.”

[10] The deponent to the affidavit on behalf of the Minister of DHA, Mr Yusuf Solomoms (Solomons) was advised that it was not necessary for DHA to enter into the fray regarding the difference of opinion on the correct legal position between the City and the SAPS. The deponent to the affidavit on behalf of the SAPS, Mr Melville Cloete (Cloete) disputed that members of the SAPS discouraged the sheriff from laying a charge as alleged by Bosman and indicated that Bosman did not have visible involvement in the matter. According to Cloete, the sheriff was given the assurance that the SAPS would assist him if necessary, as provided for in paragraph 3 of the order. In the event that any crimes were committed in the presence of the SAPS, then the SAPS would take action. The SAPS's view was that the sheriff was able to execute the order and the fact that people may have been in breach of the order triggered the civil contempt remedy provided for in paragraph 6 of the order and the City remained at liberty to implement its by-laws. The SAPS did not get involved in orders of civil contempt and that was a matter between the City and the persons who were not adhering to the order.

[11] The City seeks a final order in terms of paragraph 1 of the rule nisi, which related to the 1st to 5th respondents only. In the absence of opposition, no costs order is sought against those respondents. The City does not seek relief against the SAPS and DHA. The City prays that together with the final order, the court should extend the relief set out in paragraph 6 of the interim order, should the enforcement of the order remain problematic. Paragraph 6 of the interim order reads as follows:

“6. That in the event of non-compliance with any provision(s) of this order, the applicant is granted leave to approach this Court on the same papers, duly supplemented, for an order of civil contempt and/or any further and appropriate relief that may be necessary.”

[12] South Africa has a law specifically enacted with the purpose to give effect within the Republic to the relevant international legal instruments, principles and standards relating to refugees, to provide for the reception 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 [Preamble to the Refugees Act, 1998 (Act No 130 of 1998) (the Act)]. In terms of the Act, asylum means refugee status recognized in terms of the Act, asylum seeker means a person who is seeking recognition as a refugee in the Republic and a refugee means a person who has been granted asylum in terms of the Act.

[13] It was in recognition of the country's responsibilities to refugee and asylum seekers in particular and migrants in general that this court, as part of the relief granted to the City, included amongst others terms set out in paragraphs 2 and 4 of the rule nisi. This court, through those terms, was exercising its judicial oversight over the State and ensured that the State respected, protected, promoted and fulfilled the rights of the respondents as enshrined in the Bill of Rights [Chapter 2 section 7 of the Constitution of the Republic of South Africa (Act No. 108 of 1996) (the Constitution)]. The papers show that the City and DHA complied with that part of the order.

[14] According to the report of the Acting Director-General in DHA the majority of the respondents possess lawful permits to be in the country either as asylum seekers, refugees or those who have indicated their intention to apply for asylum. They are

protected in terms of international and domestic refugee laws and protocols. According to the Senior State Attorney, Western

Cape, S Karjiker the alleged failure to make a decision regarding permanent resident permits, judicial reviews and refusal of asylum

seeker status, disputed deportations, declaration of undesirability, prohibited persons, refusal of entry to prohibited persons, disputes of identification, birth certificates, marriage certificates, adoptions, constitutional challenges to immigration and refugee legal framework and civil claims arising out of alleged assaults at Refugee offices are matters related to Refugees and migrants in general which DHA has to deal with and the State Attorney get involved in litigation.

[15] For this workload, there is only 1 Chief Director, 2 Legal Directors in Litigation and Legislative Drafting and only five legal advisors at national level in Pretoria. These five legal advisors service 13 State Attorneys Offices in the whole country and have to attend to court matters, attend consultations with counsel, provide instructions to State Attorneys, court orders that need compliance and receive on average fifty (50) to sixty (60) new court applications per week plus summonses served directly at their offices. Because of the backlogs, attorneys and foreign nationals are capitalizing on the inordinate delays and some practitioners are cashing in on cost orders against DHA [Report of the State Attorney to the Western Cape Provincial Efficiency

Enhancement Committee of the Judiciary of the Republic of South Africa, 4 March 2020]. It should be borne in mind that matters

of refugees also relate to Government Policy, State Security and DHA policies and the Judiciary is uncomfortable with increasing judicial applications for substitution, where the courts are requested to substitute the decision of the Executive. In my view, Adv. Bongo and the Portfolio Committee on Home Affairs owe Legal Services Unit of DHA in Pretoria a visit to fully appraise themselves in order to support the Minister of DHA and the Director-General.

[16] The suggestion that South Africa is xenophobic is simplistic sensationalism that attempts to draw attention away from the true

issues behind the sit-in protest. It would have been understandable if the issues that the respondents raised were related

to the challenges experienced by foreign nationals seeking asylum in the Republic. The demands of the respondents are far removed from the experiences of an average refugee, asylum seeker or foreign national in the Republic. In my view, an inductive study of the papers illuminated the true issues, and the following is the picture that emerged.

[17] The respondents' demand is to move from their ordinary places of residence in the Republic to another area where they will be provided with accommodation by the government of the Republic, or be taken out of the Republic at State expense and be moved to Canada or another country in Europe. The respondents, in essence, seek to be moved to another area or country in order to improve their standard of living. They regard their ordinary places of residence within the Republic from which they moved in order to start a sit-in protest as insufficient. These demands which the respondents advance to justify their continued occupation of the streets of the City unlawfully, have got nothing to do with the country's responsibilities to give effect to the international legal instruments, principles and standards or our own national prescripts to regulate matters connected with refugees, asylum seekers and migrants.

[18] The respondents are not forced by circumstances not to return to their ordinary places of residence in the Republic. They chose not to return and elected to move. They are drawn to housing or another country because of the prospect of and a desire to escape the social and economic situation in their ordinary places of residence in the Republic. They have experienced the life of an ordinary South African in their ordinary places of residence and it does not tickle their fancy. An informal settlement in South Africa, its struggles and challenges is not for them. They demand a better life than that experienced by the majority of South Africans, Africans in particular and Blacks in general with sprinklings of White.

[19] There are no attacks on foreign nationals anywhere in the Republic of South Africa currently. There are no potentially deadly consequences and it is not dangerous for the respondents to return back to their ordinary places of residence within the Republic. The respondents are simply refusing to go back to their ordinary places of residence, are refusing access to the country's social services and to be integrated into the South African Society. Their plight is self-created. It is not humanitarian and is purely economic. It is a demand for one or more steps away from the poverty line and up the social ladder. In the

White styrofoam cup of coffee which represents the economy and the Black majority life in South Africa, they do not want to be the general content inside or at the bottom. They want to bubble to the top.

- [20] The quest for the economic freedom of the respondents is not only general in the sense that they have a greater choice to determine

their destination which offered better conditions than their ordinary places of residence within the Republic. It is also specific. The papers showed that Balus, the first respondent and his wife Aline Bukuru, are founders of an organization called Women and Children at Concern (WCC). The conduct of the two and their supporters was not only in furtherance of a dishonest manipulation of uninformed refugees, asylum seekers and migrants who believe that support for WCC would translate into a resettlement from South Africa to Europe as a first prize and formal housing at State expense within the Republic as a consolation prize.

- [21] The papers reveal a violent trail by the two and their hangers-on towards other organisations and personalities involved with refugee, asylum seeker and migrant communities in the country. The pursuit of a greedy iron-fisted dictatorship in matters involving refugees, asylum seekers and migrants, and the muscling out of other organisations perceived to be a potential threat of competition as the legitimate authority as well as the occupation of the funding space stands out. Officials of the State including the City, the police, Non-Governmental Organisations, the Human Rights Commission and the United Nations High Commission for Refugees have not been spared the verbal and in some instances physical attacks or threats in pursuit of these economic goals. It is Balus and Bukuru's way, or no way. It is the WCC and no other in the refugee, asylum seeker and migrant environment.

- [22] In my view, the promotion of Women and Children at Concern (WCC) and their personal development as a leading authority on refugee, asylum seeking and migration at all costs as well as the influence of financial resources drove Balus, Sukami and Bukuru's agenda. They did not hesitate to and do not see anything wrong with disturbing the academic development of school-going children who were removed from schools to be used as pawns placed as the vanguard in their economic war. Whenever confronted, they retreated to the rear guard, and ensured that women and children are at the forefront in order to gain sympathy. The women and children are used as shields. This is also what happened during the law enforcement operation of the State on 30 October 2019 in Cape Town. Images of women and children being removed by the law enforcement agencies of a State painfully twisted the bones of humanity, looked inhumane and created a negative image about the country. It is not surprising that there was a national outcry and the Central Methodist Church's conscience was pricked to action and opened its doors to the respondents on sight of the images.

- [23] The humility of South Africa and its peoples was clearly confused with stupidity. The diligent attention to detail in analysis for proper decision-making was interpreted as not being decisive or not having a backbone. The consensus-seeking approach which sometimes

included tolerance for those who brought what sounded like a thesis of lunacy to the table was deemed as cowardice. The ability of the State to properly identify a refugee, asylum seeker and migrant who, once lawfully within our borders mutated into an autocratic and authoritarian economic migrant who violently and unlawfully pursued his or her own selfish way, and to adequately respond thereto was being tested by the respondents. The respondents refused to subject themselves to the country's laws and procedures. Their conduct had the potential to undermine the legitimate concerns of refugees, asylum seekers and migrants in this country. Migration in Africa as a concept should not be left to militant ill-disciplined street fighters.

[24] The economic migrants occupying the City streets in my view can be broken down into three groups. The first are those who are in fact in distress and remain within the group simply for security reasons as they fear violent criminals who appear in borrowed robes of leadership if they were to accept the help of the City. The second are those who want to return and can be integrated back into their ordinary places of residence, but fear the violent criminals who rule by force. The third are those who advance an economic cause including by violent and/or unlawful means, which include the unlawful contravention of the by-laws and the threats to other respondents and role players.

[25] Bosman was in a position to issue or cause an instruction to be issued to the Municipal Police of the City to arrest the respondents

if he believed that arrest was a competent avenue to deal with the respondents who contravened by-laws. By now the City cannot

claim ignorance that where there is a breach of its by-laws it has both the criminal remedy as well as the civil remedy. The City can also not claim that it is not aware of the power of its own law enforcement officers to arrest if it elects enforcement of its by-laws through the Criminal Procedure. In my view, the City appears comfortable in being a Judiciary-led Metropolitan City of Cape Town. It styles itself as a cousin to the South African Judicial Education Institute whose programme is led by the Judiciary. The City's officials no longer took decisions without "seeking clarity from the courts". The impression that I am left with is that the City in this matter, consciously elected to be led from the courtrooms of the Western Cape Division of the High Courts of South Africa, and not to govern from the City Council Chambers.

[26] The SAPS held a different view to that of the City but that was not enough to bar the City to execute its functions in terms of the by-laws as the City understood them and elected. The opinion of the SAPS was irrelevant for the determination and execution of the powers of the City. What is clear to me is that the SAPS understood the City to have elected to enforce the by-laws through a civil remedy and simply held the City to that election and committed to support the City to see its elected route through. The SAPS was not eager to conflate the remedies at the whim of the City. The Constitutional roles of the SAPS and the City are not the same and it is natural in our democratic system of checks and balances that advancement of constitutional roles may lead to tension, which is healthy in a democracy.

What our Constitution frowns upon is that tension to be allowed to flare into open conflict amongst functionaries of the State [section 40(1) of the Constitution]. It is not the responsibility of the SAPS to enforce the by-laws. They play a secondary and supportive role. It is the primary responsibility of the City to enforce its by-laws when they are contravened and if it so elects. It is not the function of the courts to offer legal advice, to argue what the law is or to substitute the Executive.

[27] I am unable to see any harm to the SAPS if clause 6 of the rule nisi is confirmed.

For these reasons I make the following order:

1. Clause 1 and 6 of the rule nisi is made final.
2. No cost order is made.
3. The applicant is to make the terms of this order available in Lingala, Swahili and French and to serve the order in the same terms as set out in clause 5 of the Rule Nisi.

D.M. THULARE

Acting Judge of the High Court

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