

SOUTH AFRICA / JUDGMENT

Otshudi v Minister of Home Affairs and Others (12/05018) [2012] ZAGPJHC 15 (23 February 2012) [2012] ZAGPJHC 15

COURT

South Gauteng High Court, Johannesburg

BEFORE

Wepener

CASE / FILE NUMBER

12/05018

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REPORTABLE

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 12/05018

DATE: 23/02/2012

In the matter between:

OTSHUDI, FRANCIS KIMOTO.....Applicant

and

THE MINISTER OF HOME AFFAIRS.....First Respondent

THE DIRECTOR GENERAL,

DEPARTMENT OF HOME AFFAIRS.....Second Respondent

BOSASA (PTY) LTD

t/a LEADING PROSPECTS TRADING.....Third Respondent

J U D G M E N T

Summary

Refugees Act no 130 of 1998 – illegal foreigner having exhausted internal remedies and no further proceedings pending - falls to be dealt with in terms of the provisions of the Immigration Act no 13 of 2002.

Contempt of court – minister and officials prevented from deporting illegal foreigner whilst proceedings pending as they may be guilty of contempt of court.

Immigration Act – detention pursuant to s 34 of Immigration Act – calculation of initial period of 30 days and extended period of 90 days to be cumulative. Suspension of 120 day period allowed by Act for detention for purposes of deportation in the event of legal proceedings preventing Department from deporting illegal foreigner.

WEPENER, J:

- [1] This is an urgent application in which the applicant seeks a declaration that his continued detention is unlawful and an order for his release. In addition he seeks that the respondents be directed to re-issue him with a temporary asylum seeker permit in accordance with s 22 of the Refugees Act No. 130 of 1998 ('the Refugees Act').
- [2] I deal with the applicant's prayer for a mandamus to re-issue an asylum seekers permit first. Only two affidavits, a founding affidavit and an answering affidavit were filed. There is a serious dispute of fact which cannot be resolved on the papers. Mr Dikolomela, appearing for the applicant requested me to find the version of the applicant to be supported by probabilities and to decide the matter on such probabilities. I decline the invitation. Since time immemorial and at least since the

judgment

in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A), the approach to disputed facts in application proceedings is to have regard to the facts averred by the applicant which have been admitted by the respondent, together with the facts alleged by the respondent.

- [3] The applicant's version regarding his application for a temporary asylum seeker permit, is put into context by the respondents, who justify their actions also with reference to objective evidence in the form of documents. From this version, it is clear that the applicant was less than frank in his founding affidavit. Once the applicant was found to be an illegal foreigner present in the Republic of South Africa, he was afforded to and did utilise the internal remedies provided for in the Refugees Act. The applicant submitted an application for asylum to a Refugee Status Determination Officer ('RSDO') in terms of s 21 of the Refugees Act and was issued with a temporary refugee permit as provided for in s 22 of the Refugees Act. He received an answer from the RSDO, (a copy of which is attached to the founding affidavit) in which he was advised that his application was rejected as unfounded pursuant to s 24(3)(c) of the Refugees Act. S 24(3) of the Refugees Act provides that the RSDO must, upon the application of a refugee, either grant asylum; or reject it as manifestly unfounded, abusive or fraudulent; or reject it as unfounded; or refer any question of law to the Standing Committee. The result is that the provisions of s 26 of the Refugees Act come into operation and an asylum seeker may then lodge an appeal to the Refugees Appeal Board ('RAB'). This, the applicant also did whilst his temporary refugee permit was extended but the RAB

eventually dismissed the appeal, thus ending the applicant's reliance on the Refugees Act to obtain the status of an asylum seeker in the Republic.

- [4] The applicant exhausted the internal remedies available to him under the Refugees Act. The RAB decision, which was handed to the applicant, advised him that henceforth, he will be dealt with in terms of the provisions of the Immigration Act No. 13 of 2002 ('the Immigration Act'). That, in my view, brought the applicant's entitlement to rely on the Refugees Act to an end and his application for an order to extend his asylum seeker permit is ill-advised and misplaced.
- [5] The original temporary asylum seeker permit issued to the applicant provides that he had to leave the Republic on 15 June 2010 or such later date as was authorised by the RSDO. At a later date, and after a further extension of his temporary permit, the date upon which the applicant was obliged to leave the Republic, was extended to 17 October 2011. On 18 October 2011 the applicant was given the decision of the RAB and arrested and detained as an illegal foreigner pursuant to the provisions of the Immigration Act.
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Prepared on 14 October 2026 · Esheria