REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 2012/17771

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

....
DATE SIGNATURE

In the matter between:

BACKIOKILA DORCASSE Applicant

and

MINISTER OF HOME AFFAIRS First Respondent

DIRECTOR GENERAL DEPARTMENT OF HOME AFFAIRS Second Respondent

BOSASA (PTY) LIMITED Third Respondent

J U D G M E N T

MOSHIDI, J:

INTRODUCTION

[1] The applicant approached this Court on urgent basis for an order authorising her release and declaring her continued detention by the first and

second respondents ("*the respondents*") to be unlawful. In the notice of motion dated 16 May 2012, the applicant also claimed certain other relief as mirrored in the order which I subsequently granted. As the matter was intensely opposed with lengthy heads of argument, I initially reserved judgment. However, in the course of preparing judgment I came to the definitive conclusion that the applicant deserved not to be kept in detention any longer than was necessary. As a consequence, I issued an order on 14 September 2012 in the following terms:

> "*1. Declaring the arrest and continued detention of the Applicant to be unlawful.*
>
> *2. Directing the Respondents to release the Applicant forthwith.*
>
> *3. First and Second Respondents are interdicted from removing the Applicant or causing her to be removed from the Republic of South Africa pending the final determination of the appeal by the Refugee Appeals Board and judicial review proceedings.*
>
> *4. First and Second Respondents are directed to issue the Applicant with an asylum seeker permit in terms of s 22 of the Refugees Act, which permit is to remain valid up and until the date of final determination of the judicial review proceedings.*
>
> *5. The Applicant is to institute such review proceedings within 30 days of this order.*
>
> *6. Directing the First and Second Respondents to pay the Applicant's costs.*
>
> *7. The reasons for this order shall be furnished later.*"

[2] As indicated in the last paragraph of the order, I undertook to furnish the reasons for the order later. What follows are such reasons.

BRIEF HISTORICAL BACKGROUND

[3] The applicant, a 40 year old female, from the Democratic Republic of Congo is an asylum seeker. She is married to Mr Gislain Eloge Miekoutima ("*Mr Miekoutima*") also from the Democratic Republic of Congo. However, Mr Miekoutima is also an asylum seeker presently residing at Flat 6, Savoy Building, Yeoville, Johannesburg. He is in possession of an asylum seeker permit issued in terms of sec 22 of the Refugees Act No. 130 of 1998 ("*the Refugees Act*") on 28 February 2012 issued by the Department of Home Affairs. This permit is valid until 1 June 2012.

[4] In the founding papers the applicant alleged that on departure from the Democratic Republic of Congo, she was staying with her parents in Brazzaville. Her father was an active member of the Congolese Movement for Democratic and Integral Development, a political party in opposition to the ruling government of Congo. During the political unrest in 1997 the government forces began to harass and persecute her family. Her father was arrested and detained frequently. During such detentions, the government soldiers would come to her home and intimidate and harass the family. These visits by the soldiers were regular during which they alleged that applicant's father had escaped from custody. On one such visits, the soldiers assaulted and threatened to kill the family. In 2005 the family heard that their father was tortured and killed in the military facility. There was also a decree to detain all those individuals and families who were collaborating with the rebels.

[5] For the above unsafe circumstances, the applicant and her family decided to flee from the Democratic Republic of Congo. Some of her family fled to Kenya, others to Rwanda, whilst the applicant fled to Kinshasa. In the latter country, the applicant was informed by the missionaries that the Congolese government circulated a list of people and families who were sought for collaborating with the rebels, and that her family was on that list. The applicant, on advice of the missionaries, travelled through Tanzania, Zambia and Zimbabwe to South Africa. She advanced certain credible reasons why she could not apply for asylum in the abovementioned countries.

[6] The applicant eventually arrived in South Africa in 2006, and lodged an asylum seeker permit in 2007. She was issued with an asylum seeker permit which entitled her to work and study in the Republic of South Africa. Her permit was thereafter renewed and extended on several occasions. On 10 February 2012, the applicant's asylum seeker permit was renewed and extended to 14 May 2012.

[7] Later, after some 2/3 years of her initial application, and on 21 September 2009, the applicant's application for asylum was considered by the Refugees Status Determination Officer ("*RSDO*"). The application was rejected. Thereafter, the applicant, with the assistance of Lawyers for Human Rights lodged an appeal to the Refugee Appeal Board established in terms of sec 12 of the Refugees Act. In the interim, the applicant continued having her permit renewed. The Refugee Appeal Board subsequently dismissed the appeal. On 14 May 2012, the date on which her asylum seeker permit was to

expire, the applicant visited the Refugee Reception Office, in Pretoria in order to further renew her permit. However, she was arrested, declared an illegal immigrant, given a notice of deportation, and a warrant for her detention at the third respondent's Lindela Detention and Holding Facility at Krugersdorp ("*Lindela*"), pending her deportation was issued.

[8] On the papers, it is not only entirely clear as to when the proceedings of the Refugee Appeal Board were held, but also when and how the outcome of the appeal was communicated to the applicant. I say this for the following reasons. The decision of the Refugee Appeal Board, consisting of some 7 typed pages, shows that the appeal was heard at Johannesburg on 25 May 2010 before a single member, i.e. M M Mohale. The decision was made on 4 May 2011 (date stamped). On the last page of the decision appear the following typed words: "*Member: Refugee Appeal Board*", with the signature of the member. Below that are the words: "*Date received: 4/5/2012*". To compound matters, attached to the decision was an undated letter from the Department of Home Affairs addressed to the applicant in the following terms:

> "*Please be informed that the Refugee Appeal Board considered your appeal and determined that it is dismissed. Accordingly the decision rejecting your application for refugee status is upheld. The decision of the refugee appeal is attached. As an illegal foreigner cannot reside in the country on a temporary basis indefinitely your case will be dealt with in terms of the provisions of the Immigration Act No 13 of 2002, after receipt of this letter.*"

SOME COMMON CAUSE FACTS

[9] Based on the above, as well as a careful reading of the founding affidavit, the answering affidavit and the replying affidavit, the following facts are common cause. The appellant's asylum seeker permit was renewed and extended on several occasions between 2008 and February 2012. On 21 September 2009, the applicant's application for asylum status was rejected by the RSDO. She lodged an appeal which was heard on 25 May 2010. The decision of the Refugee Appeal Board rejecting the appeal, was handed to the applicant only on 14 May 2012 (more than a year after the appeal hearing decision was taken) when she reported in person to renew her permit. Prior to 14 May 2012, neither the applicant nor her representatives, Lawyers for Human Rights, were informed of the decision of the Refugee Appeal Board. The applicant was arrested and detained summarily for purposes of deportation.

[10] On the basis of the facts set out above, the applicant contended in the main that her arrest and detention are unlawful and a violation of her constitutional rights for a number of reasons. However, prior to dealing with all the relevant contentions of the applicant, as well as the respondents' opposing arguments, I am of the view that the application ought to succeed on the basis of a procedural aspect as mentioned below.

SHORTCOMINGS IN THE APPEAL PROCEDURE

[11] The Refugee Appeal Board was established by sec 12 of the Refugees Act. Section 13 of the Act, which deals with the composition of the Appeal Board, provides as follows:

> "*(1) The Appeal Board must consist of a chairperson and at least two other members, appointed by the Minister with due regard to a person's suitability to serve as a member by virtue of his or her experience, qualifications and expertise and his or her capability to perform the functions of the Appeal Board properly.*
>
> *(2) At least one of the members of the Appeal Board must be legally qualified.*
>
> *(3) A person may not be appointed as a member of the Appeal Board if he or she –*
>
> *(a) is not a South African citizen;*
>
> *(b) has been sentenced to imprisonment without the option of a fine during the preceding four years.*"

[12] However, sec 12 of the Refugees Act which created the Refugee Appeal Board was subsequently aimed to be repealed by sec 12 of the Refugees Amendment Act No 33 of 2008 ("*the Refugees Amendment Act*"), which was published in the Government Gazette on 26 November 2008. Section 11 of the latter Act established the Refugee Appeals Authority. Section 11 (inserting section 8B into the Refugees Act), provides as follows:

> "*(1) The Refugee Appeals Authority consist of:*
>
> *(a) a chairperson who is legally qualified; and*

> *(b) such number of members as the minister determine having regard to the likely volume of work to be performed by the Refugee Appeals Authority: Provided that at least one of such members is legally qualified.*
>
> *(2) The chairperson and other members of the Refugee Appeals Authority are appointed by the Minister with due regard to their experience, qualifications and expertise, as well as their ability to perform the functions of the Refugee Appeals Authority properly.*"

Section 11 of the Refugees Amendment Act further provides that:

> "*The Refugee Appeals Authority must determine any appeal lodged in terms of this Act*",

and that:

> "*An appeal … must be determined by such number of members of the Refugee Appeals Authority as the chairperson may deem necessary: Provided that at least one of such members is legally qualified.*"

[13] In my view, the major obstacle facing the respondents is what is stated hereafter. Although the Refugees Amendment Act was published in the Government Gazette on 26 November 2008, it had or has not yet been implemented. The same applies to the provisions of the Refugees Amendment Act No. 12 of 2011 ("*the 2011 Amendment Act*") published in the Government Gazette on 21 August 2011, in terms of which the applicant's appeal was apparently heard since the appellate body is supposed to consist of a single member.

[14] From what has been sketched in paras [11] to [13] above, it is more than apparent that the applicant's appeal against the decision of the RSDO refusing her asylum status was adjudicated upon by the Refugee Appeal Board on 25 May 2010. This much is common cause. Indeed the contents of the decision of the Refugee Appeal Board corroborates the fact that it heard the appeal. Further proof hereof is contained in the fact that the submissions made by Lawyers for Human Rights on behalf of the applicant were addressed to the Refugee Appeal Board of South Africa. The decision conveying the outcome of the appeal is on a letterhead of the Refugee Appeal Board. Furthermore, the decision as stated above, was signed by a single member, i.e. M M Mohale, on behalf of the Refugee Appeal Board. The appeal should properly have been adjudicated upon by the Refugee Appeals Authority which, however, was legally impossible for the reason stated in para [13] above and below. It therefore follows that the purported decision of the Refugee Appeal Board was *ultra vires* and null and void. The alleged decision of the Refugee Appeal Board, which led to the detention and subsequent pending deportation of the applicant was therefore unlawful. In my view, a failure to have so complied resulted in the nullity of the Refugee Appeal Board's decision. It is a simple matter of the Rule of Law.

[15] However, if I am incorrect in my determination of the above point, I believe that there is yet another reason why the purported decision of the Refugee Appeal Board is suspect. This is that even if the Refugee Appeal Board had the necessary authority to hear the appeal, it was not properly and legally constituted as described above. The appellant's appeal was heard by

a single member only. Section 13 of the Refugees Act makes it clear that the Appeal Board "*must consist of a chairperson and at least two other members*". This was plainly not the case. Neither were the provisions of sec 11 of the Refugees Amendment Act, if applicable, complied with in regard to the composition of the Refugee Appeals Authority.

THE LAW AND IMPROPERLY CONSTITUTED TRIBUNALS

[16] It is settled law that when a decision is entrusted to a statutory tribunal composed of more than one member, every member of that body should take part in the decision-making process. In *R v Price* 1955 (1) SA 219 (A) at 224C-E, the Court said:

> "*Prima facie when a decision is entrusted to a tribunal consisting of more than one person, every member of that tribunal should take part in the consideration of the decision. In Ras Behari Lal and Others v The King Emperor, 150 L.T.R. 3, which was followed in this Court in Rex v Silber, 1940 AD 187, the Privy Council set aside the verdict of a jury because one of its members did not understand the language in which the proceedings or a material part of them were conducted. LORD ATKIN said that the Board thought*
>
> > *'that the effect of the incompetence of a juror is to deny to the accused an essential part of the protection afforded to him by law and that the result of the trial in the present case was a clear miscarriage of justice'.*
>
> *(See also Silber's case at pp. 193 to 194). What was denied to the accused in these cases was his right to a consideration of his case by every member of the fact-finding tribunal.*"

This legal principle was referred to with approval in *Schoultz v Personeel-Advieskom Mun George* 1983 (4) SA 689 (C) at 708.

[17] The legal principle that a statutory body charged with decision-making powers which is improperly constituted is incapable of pronouncing valid decisions, has been consistent in our law. More recently, the Court in *Judicial Service Commission and Others v The Premier of the Western Cape Province* (537/10) [2011] ZASCA 53 (31/3/2011) had occasioned to consider the question whether certain proceedings and decisions taken by the Judicial Service Commission ("*JSC*") were valid. The Premier sought an order declaring the decisions to be invalid and not taken by the requisite majority and that the JSC was not properly constituted. The Court, in dismissing the appeal at para [25] said:

> "*… So far as the further order setting the proceedings and decisions aside is concerned, against which the arguments were directed, it is the constitutional mandate of the JSC in terms of s 177 of the Constitution to investigate allegations of judicial misconduct and to make a finding on whether or not a judge is guilty of gross misconduct. The JSC (properly constituted and by majority vote) has done neither. The order made by the court a quo setting the decision of the JSC aside was accordingly imperative to enable the JSC to perform the function it is still obliged to perform.*"

[18] Based on the above principles and facts of the present matter, it is undoubted that the decision of the Refugee Appeal Board in dismissing the applicant's appeal was *ultra vires* and invalid. The applicant has reasonable prospects of success in her intended review proceedings. The later amendment as contained in the 2011 Amendment Act, which deals with the composition of the Refugee Appeals Authority, is equally of no assistance to the respondents. Section 4 of the 2011 Amendment Act makes provision for an appeal (such as the one in question) to "*be determined by a single*

member or such number of members of the Refugee Appeals Authority as the chairperson may deem necessary: Provided that at least one such member is legally qualified". Section 14 of the same Amendment Act provides that it comes into operation immediately after the commencement of the Refugees Amendment Act No 33 of 2008. The latter Act, as shown earlier in this judgment, was published in the Government Gazette on 26 November 2008. In any event, even if the applicant's appeal was heard by a single member, there is no evidence that there was full compliance with neither the Refugees Amendment Act 33 of 2008, nor the 2011 Amendment Act. For example, there is no evidence that the member or at least one of such members was legally qualified. In short, the decision of the Appeal Board remains invalid.

THE UNLAWFULNESS OF ARREST AND DETENTION

[19] However, if I am incorrect in my determination of the invalidity of the decision, I am of the view that the application should still succeed. The applicant has also advanced various reasons making her arrest and detention unlawful and violating her constitutional rights. In short, the applicant contended that in terms of sec 23 of the Refugees Act her asylum seeker permit has not been withdrawn by the Minister (first respondent); that at the time of the arrest, the applicant was awaiting the decision of the Refugee Appeal Board; that her status is governed by the Refugees Act and thus she may not be lawfully detained under the Immigration Act 13 of 2002 ("*the Immigration Act*"); that sec 21(4) of the Refugees Act prohibits her arrest and detention; that her asylum status remains valid until she has received the

outcome of the Refugee Appeal Board dismissing her appeal and have exercised her rights to apply to the High Court for judicial review of the decision of the RSDO; and that her arrest and detention has not been confirmed by a warrant of a court issued within 48 hours of her arrest in terms of sec 34(1)(b) of the Immigration Act.

[20] The respondents, on the other hand, have in the answering papers, strongly challenged the applicant's contentions. As I understood the argument, the main challenge of the respondents is that the applicant has not exhausted her internal remedies, that the decision declaring the applicant as an illegal foreigner constitutes an administrative act which remains valid until set aside by a competent court. On this basis, the respondents contended that the Court was precluded from granting the relief sought in the present proceedings.

[21] The issue that the applicant was entitled to procedural fairness in her application for asylum, is not in dispute. The applicant specifically contended that her rights in terms of sec 33, sec 35(2) and 35(3) of the Constitution have been violated. Section 33 of the Constitution provides as follows:

> "*(1) Everyone has a right to administrative action that is lawful, reasonable and procedurally fair.*
>
> *(2) Everyone whose rights have been adversely affected by administrative action has a right to be given written reasons.*
>
> *(3) National legislation must be enacted to give effect to these rights, and must -*

> *(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;*
>
> *(b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and*
>
> *(c) promote an efficient administration.*"

Section 35(2) and sec 35(3), respectively, entrench certain rights of detained persons and to a fair trial of every accused person. I have already found that the decision of the Refugee Appeal Board was invalid. See *Watchenuke and Another v Minister of Home Affairs and Others* 2003 (1) BCLR 62 (C) at 69F-G. In *Abdi and Another v Minister of Home Affairs and Others* [2011] 3 All SA 117 (SCA) at para [36] the Court said:

> "*Our courts have on several occasions expressed their disquiet at the failure of Government officials, including the Department's officials, to respect the rights of individuals they deal with and to act in accordance with their duties imposed by the Constitution: Eveleth v Minister of Home Affairs and Another 2004 (11) BCLR 1223 (T) at paragraphs 45-48; Nyathi v MEC for the Gauteng Department of Health and another 2008 (5) SA 94 (CC) [also reported at 2008 (9) BCLR 865 (CC) – Ed]; Total Computer Services (Pty) Ltd v Municipal Mayor, Potchefstroom Local Municipality and others 2008 (4) SA 346 (T) at paragraph 21 [also reported at [2007] JOL 20884 (T) – Ed]; Van Straaten v President of the Republic of South Africa and others 2009 (3) SA 457 (CC) [also reported at 2009 (5) BCLR 480 (CC) – Ed]. In the present instance, the respondents' officials failed to understand the very object and purpose of the Act it was their duty to apply, causing unnecessary litigation and wasted costs. Had the appellants given timeous notice of an intention to apply for a punitive costs order, such would in all likelihood have been granted.*"

See also *Bula v Minister of Home Affairs* [2012] 2 All SA 1 (SCA) at para [79].

[22] Section 22(1) of the Refugees Act provides that, the Refugee Reception Officer ("*RRO*") must, pending the outcome of an application in terms of sec 21(1) (application for asylum) issue to the applicant an asylum seeker permit to sojourn in the Republic temporarily, subject to conditions which are not in conflict with the Constitution or International law. Section 22(6) provides for the withdrawal of an asylum seeker permit by the Minister on certain conditions, whilst sec 23 deals with the arrest and detention of an asylum seeker permit holder pending the finalisation of the application for asylum. In the present matter, the procedure followed leading to the arrest of the applicant was materially flawed as revealed by the common cause facts. The applicant's asylum seeker permit was renewed and extended on several occasions. The last extension, as seen earlier, was up to 14 May 2012. On the latter date, when the applicant reported to the offices of the respondents, in order to further renew her permit, she was summarily arrested and detained. She was also for the first time informed of the decision of the Refugee Appeal Board. However, the latter decision had already been taken a year before, namely on 4 May 2011. The applicant was not informed of the decision of the Refugee Appeal Board immediately and in contravention of Rule 17 of the Refugee Appeal Board which provides that the Appeal Board shall record the decision of any appeal and shall convey such decision in writing to the parties to the appeal. These provisions are clearly couched in peremptory terms. The provisions involve the liberty of an individual and must be strictly construed. See *R v Sachs* 1953 (1) SA 392 (A) at 399F-H. There were no reasons furnished for the default. In fact the respondents stated in para 17 of the answering papers that:

> "*The applicant's asylum seeker temporary permit was extended until 14 May 2010 on condition she awaits the outcome of the appeal.*"

The same affidavit went on to state in para 20 that:

> "*On the 14 May 2010, the decision of the RAB was handed to the applicant together with a letter explaining that she will be dealt with in terms of the Immigration Act 13 of 2002 ('the Immigration Act') … Her permit was also due to expire on the same day.*"

[23] The respondents chose to adopt the above procedure of conveying to the applicant the outcome of the appeal in spite of the fact that she could be contacted through the address of her husband, Mr Miekoutima, who also held an asylum seeker permit. She denied that the decision was conveyed to her in writing before 14 May 2012. It is also questionable and inexplicable why the applicant's permit was renewed at least three times after the decision of the Refugee Appeal Board. On 10 February 2012, the permit was extended to 14 May 2012, some 8/9 months after the decision of the Appeal Board. Indeed, the hearing of the appeal on 25 May 2010, the handing down of the decision on 4 May 2011 and the conveying of the decision to the applicant only on 14 May 2012, show unequivocally an inordinate and unreasonable delay. There was no explanation at all for the delay. The applicant was plainly prejudiced. The conduct of the respondents was also in violation of sec 8 of the Immigration Act which sets out the procedure to be followed in appealing the decision of the respondents. In particular, sec 8(3) to 8(7) of the Immigration Act provides as follows:

"*(1) An immigration officer who refuses entry to any person or finds any person to be an illegal foreigner shall inform that person on the prescribed form that he or she may in writing request the Minister to review that decision and –*

(a) if he or she arrived by means of a conveyance which is on the point of departing and is not to call any other port of entry in the Republic, that request shall without delay be submitted to the Minister; or

(b) in any other case than the one provided for in paragraph (a), that request shall be submitted to the Minister within three days after that decision.

(2) The person who was refused entry or was found to be an illegal foreigner and who has requested a review of such a decision -

(a) in a case contemplated in subsection (1)(a), and who has not received an answer to his or her request by the time the relevant conveyance departs, shall depart on that conveyance and shall await the outcome of the review outside the Republic; or

(b) in a case contemplated in subsection (1)(b), shall not be removed from the Republic before the Minister has confirmed the relevant decision.

(3) Any decision in terms of this Act, other than a decision contemplated in subsection (1), that materially and adversely affects the rights of any person, shall be communicated to that person in the prescribed manner and shall be accompanied by the reasons for that decision.

(4) An applicant aggrieved by a decision contemplated in subsection (3) may, within 10 working days from receipt of the notification contemplated in subsection (3), make an application in the prescribed manner to the Director-General for the review or appeal of that decision.

(5) The Director-General shall consider the application contemplated in subsection (4), whereafter he or she shall either confirm, reverse or modify that decision.

(6) An applicant aggrieved by a decision of the Director-General contemplated in subsection (5) may, within 10 working days of receipt of that decision, make an application in the prescribed manner to the Minister for the review or appeal of that decision.

> *(7) The Minister shall consider the application contemplated in subsection (6), whereafter he or she shall either confirm, reverse or modify that decision.*"

It is plain that these rights were not explained to the applicant at the time. The decision to declare the applicant as an illegal foreigner, to arrest her and detain her pending deportation was drastic in the circumstances. See *Jeebhai v Minister of Home Affairs and Others* 2009 (5) SA 54 (SCA) and *Ulde v Minister of Home Affairs and Another* 2009 (4) SA 522 (SCA). There is also no evidence that the applicant was served with a formal notification of intention to extend the period of her detention after 14 May 2012. This was in fact part of the reason for my order releasing the applicant on 14 September 2012. At the hearing of the matter, counsel for the respondents had, correctly and fairly in my view, given an undertaking that the applicant shall not be deported pending the outcome of the present proceedings.

THE RESPONDENTS' CONTENTION ON EXHAUSTION OF INTERNAL RIGHTS

[24] I turn to the respondents' contention that the applicant is non-suited since she has failed to exhaust her internal remedies in terms of the provisions of sec 8 of the Immigration Act, quoted above. It was also contended that as a result of the alleged failure, the jurisdiction of the Court to entertain the present application was ousted, and that the applicant has not shown exceptional circumstances not to exhaust her internal remedies before judicial review. In this regard heavy reliance was placed on *Koyabe and*

Others v Minister of Home Affairs and Others (Lawyers for Human Rights) 2010 (4) SA 327 (CC).

[25] As will be demonstrated shortly, the contention of the respondents is misplaced for a number of reasons on the facts of the instant matter. Sections 25 and 26 under Chapter 4 of the Refugees Act deal with the review of the decision of a Refugee Status Determination Officer ("*RSDO*"), and the appeal procedure open to a disgruntled refugee to the Refugee Appeal Board, respectively. Sections 27 and 28 under Chapter 5 of the Refugees Act deal with the protection and general rights of refugees, and the rights of refugees in respect of removal from the Republic of South Africa, respectively. Section 29(1) provides that no person may be detained in terms of the Act for a period longer than is reasonable and justifiable and any detention exceeding 30 days must be reviewed immediately by a judge of the High Court of the provincial division in whose area of jurisdiction the person is detained, and that such detention must be reviewed immediately after the expiry of every subsequent period of 30 days.

[26] I have already made reference to sec 22 of the Refugees Act. Section 21(4) of the same Act 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 person has had*

an opportunity to exhaust his or her rights of review or appeal in terms of Chapter 4; or

(b) such person has been granted asylum."

On the other hand, sec 23 of the Immigration Act provides that:

"*(1) The Director-General may issue an asylum transit permit to a person who at a port of entry claims to be an asylum seeker, which permit shall be valid for a period 14 days only.*

(2) Despite anything contained in any other law, when the permit contemplated in subsection (1) expires before the holder reports to a Refugee Reception Officer at a Refugee Reception Office in order to apply for asylum in terms of section 21 of the Refugees Act, 1998 (Act 130 of 1998), the holder of that permit shall become an illegal foreigner and be dealt with in accordance with this Act."

Sections 34(1) and (2) of the same Act provide that:

"*(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 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, 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.*
>
> *(2) The detention of a person in terms of this Act elsewhere than on a ship and for purposes other than his or her deportation shall not exceed 48 hours from his or her arrest or the time at which such person was taken into custody for examination or other purposes, provided that if such period expires on a non-court day it shall be extended to four pm of the first following day.*"

[27] I have already found that the procedure adopted by the Refugee Appeal Board was seriously flawed and its ultimate decision was invalid. It is settled law that once it is established that a person is detained, the *onus* of justifying the detention is on the detaining authority. See *Aruforse v Minister of Home Affairs* 2010 (6) SA 579 (GSJ). In short, the applicant, more particularly in the replying papers, contended that: On 14 May 2012, the date of the expiry of her asylum seeker permit, she went to the respondent's offices in order to renew her permit; instead, she was declared an illegal foreigner, a decision taken prior to her visit; that she was not given adequate prior notice of the nature and purpose of the proposed administrative action; that she was not given a reasonable opportunity to make representations before the decision; that the notice of deportation handed to her did not provide her with sufficient information on her rights to review or appeal; that the notice of deportation did not state the time periods within which she could appeal or review, and did not state the name and address of the official with whom an appeal or review must be instituted; that even if she was given information to

appeal or review the decision to deport her, she would not be able to exercise such right since she was immediately incarcerated at Lindela, without any legal assistance or advice; that neither her erstwhile legal representatives, Lawyers for Human Rights, were informed of the decision of the Refugee Appeal Board; that at the time of her arrest and detention her asylum seeker permit was still valid and had not lapsed in terms of sec 22(5) of the Refugees Act; that her permit had not been withdrawn by the Minister in terms of sec 22(6) of the Refugees Act; that subsequently i.e. on 17 May 2012, after carefully perusing the notification of deportation at Lindela, she requested one of the immigration officers to have her detention for purposes of deportation confirmed by a warrant of a court, but such request was repeatedly declined; and that she had been in detention since 14 May 2012, which is illegal.

[28] To the above allegations, the respondents proffered a bare denial. It was contended that the applicant failed to provide details of her alleged demands made to an immigration officer. The respondents further contended that there was nothing wrong with the decision of the RSDO and that of the Refugee Appeal Board. It was further contended that the applicant failed to lodge any application in terms of the Promotion of Administrative Justice Act 3 of 2000 ("*PAJA*"). The respondents also submitted that the applicant was a foreigner as defined in sec 1 of the Immigration Act, that she was a foreigner not holding a permanent residence permit as envisaged in sec 9(4) of the Immigration Act, and that in terms of sec 32(2) of the Immigration Act, an illegal foreigner should be deported. The applicant was in lawful detention pending such deportation.

[29] In my view, the dispute of fact relating to the issue whether the applicant requested her detention to be confirmed by a warrant of court or not ought to be decided in favour of the applicant. See *Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints Ltd* 1984 (3) SA 623 (A) at 734E-635C. It is not a genuine and *bona fide* dispute. See *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA). The fact of the matter is that the applicant was not afforded the opportunity to exercise her rights since her detention. As at the hearing of the matter on 7 June 2012, more than a month after her arrest and detention, there was no evidence of a court order confirming or extending the detention of the applicant. This was clearly in violation of sec 29(1) of the Refugees Act, quoted above.

[30] In *Arse v Minister of Home Affairs and Others* 2012 (4) SA 544 (SCA), the Court at paras [8] and [9] said:

> "*[8] Even if the appellant is an 'illegal foreigner' as envisaged by sec 23 of the Immigration Act his detention in terms of s 34 cannot be justified. Section 34(2) permits the detention of an 'illegal foreigner' only for a period not exceeding 48 hours, subject to the proviso that if the said period expires on a non-court day it 'shall be extended to four pm of the first following court day'. The appellant was arrested on 26 May 2009 and detained at Lindela since 2 June 2009. Section 34(2) is therefore of no assistance to the respondents.*
>
> *[9] To justify the appellant's detention the respondents sought to bring it within the ambit of s 34(1). The respondents indeed produced the original warrant of detention dated 26 May 2009 but no evidence that a court (i.e. a magistrate's court) has extended the period of detention in terms of s 34(1)(d). An 'illegal foreigner' may in terms of this paragraph not be detained for a period 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'. The respondents were not able to produce such a warrant justifying the appellant's continued detention. It seems to me that the maximum period of detention permitted under s 34(1)(d) is 120 days,*

> *i.e. an initial period of 30 days, followed by an extended period or periods not exceeding 90 days.*"

At para [10] of the judgment, the Court went on to state:

> "*[10] A 'detained person' has an absolute right not to be deprived of his freedom for one second longer than necessary by an official who cannot justify his detention. The importance of this right 'can never be overstated'. Section 12(1)(b) of the Constitution guarantees the right to freedom, including the right not to be detained without trial. This right belongs to both citizens and foreigners. The safeguards and limitations contained in s 34(1) of the Immigration Act justify its limitation of the right to freedom and the right not to be detained without trial …*"

In the instant matter the respondents' contentions therefore that the applicant could not rely on the protection afforded by secs 35(2) and 35(3) of the Constitution, was clearly misplaced. Section 35(2) of the Constitution specifically provides that everyone who is detained has the right, *inter alia*, "*to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released*". As stated earlier in the judgment, the decision to arrest and detain the applicant, in the circumstances of this matter, was not only based on a flawed appeal procedure, but also too drastic and unreasonable. In *Ziaur v Minister of Home Affairs and Another* 2012 (3) SA 90 (ECP), the applicants were detained pending deportation. The applicants approached the Court for orders directing their release from detention. At 92C, the Court held that:

> "*The arresting authority must justify the lawfulness of that arrest by demonstrating by means of acceptable evidence that there was a proper exercise of discretion …*"

In the present matter there was clearly no exercise of discretion since the decision to detain the applicant was taken in advance, before her asylum seeker permit expired. It was unlawful. There was no evidence that the applicant's asylum seeker permit was withdrawn by the Minister.

[31] The respondents' contention that the applicant failed to exhaust her internal remedies is without merit in the circumstances of this matter. This is so for a number of reasons. For reasons already advanced in the judgment, the applicant was summarily arrested and detained at Lindela, without legal assistance or advice. She could clearly not exercise her rights as entrenched in sec 8 of the Immigration Act. In addition, sec 26 of the Refugees Act is silent on the rights of an unsuccessful appellant. However, this cannot be interpreted to mean that once an appeal has been dismissed by the Refugee Appeal Board, the officials of the respondents are entitled to immediately arrest and detain an asylum seeker in terms of sec 34(1) of the Immigration Act.

[32] The common law and PAJA requirements that internal remedies first be exhausted prior to approaching the Court does not suggest that the Court's discretion was ousted. The respondents in support of their argument placed heavy reliance on *Koyabe v Minister of Home Affairs (supra)*. In that matter, the Court held that the duty to exhaust internal remedies was a valuable and necessary requirement in our law unless there exist exceptional circumstances not to exhaust such remedies before judicial review. However, the facts in the *Kuabe* case were clearly distinguishable from the facts in the

instant matter. In that matter the applicants' residence permits had been withdrawn. They approached the Constitutional Court for leave to appeal against the judgment of the North Gauteng High Court dismissing their request for the review and setting aside of the decision of the Director-General of Home Affairs to withdraw or terminate their residence permits. On the other hand, in the present matter, the applicant was in possession of a valid asylum seeker permit when she was summarily arrested and detained on 14 May 2012. Her permit had not been withdrawn by the Minister or Director-General of Home Affairs. As stated before, sec 26 of the Refugees Act is silent on further remedies once an appeal was dismissed. The applicant was not informed of her further rights on detention. Each case must, of course, be decided on its own merits. In my view, all these factors constitute exceptional circumstances.

[33] In *Sidorov v Minister of Home Affairs* [2001] 3 All SA 419 (T), Bertelsmann J held, *inter alia*, that:

> "*The Constitution of the Republic of South Africa Act 108 of 1996 guarantees the right to just administrative action. By definition, administrative action was held to be reviewable by the Court.*"

In the present matter the hearing of the appeal on 25 May 2010, the handing down of the decision on 4 May 2010 and informing the decision of the Appeal Board to the applicant on 14 May 2012 only, followed by immediate arrest and detention, can hardly be described as fair and constitutional administrative action. In Christie's *Law of Contract* 6ed, at 366, the learned authors state:

> "*The principle that the jurisdiction of the Courts must not be ousted must not, of course, be pushed to absurd lengths.*" In *Davies v South British Insurance Co* (1885) 3 SC 416 421 De Villiers CJ considered whether the principle would hit an arbitration clause in a contract, and said:
>
> > "*The unfortunate expression that by this means the jurisdiction of the Court would be ousted, appears to me to be founded on a fallacy. The interposition of the Court may be delayed, but its jurisdiction is not ousted. The Court still retains the power of setting aside the award of the arbitrators on sufficient grounds shown, and the award cannot be enforced without the aid of the Court.*"

See also *Moodley v Shri Siva Subramanier Oulaman* 1979 (2) SA 696 (SECLD) at 700C-D, and *Steer Property Services (Pty) Ltd v The Estate Agency Affairs Board* 2002 JDR 1070 (C). Based on the above, and the particular facts of the current matter, it would be a great injustice to deny the applicant the right to review the palpable incorrect manner in which the respondents handled her application.

WHETHER THE APPLICANT HAS A WELL-FOUNDED FEAR OF PERSECUTION

[34] I turn to the decision of the RSDO in rejecting the applicant's application for asylum. Since this decision has not been properly and legally appealed in my determination as set out above, I need only to express a *prima facie* view entitling the applicant to approach the Court on review. Her appeal has clearly not been correctly decided upon.

[35] At the heart of the matter is the question whether the applicant, based on her personal circumstances as sketched out at the commencement of the

judgment, will face persecution if returned to her country of origin, the Congo, Brazzaville. This based on her perceived political opinion imputed from her father's political activities. The applicant contended that the application for asylum falls within the definition of sec 3 of the Refugees Act which provides that:

> "*A person qualifies for refugee status for the purposes of this Act if that person –*
>
> *(a) owing to a well-founded fear of being persecuted by reason of his or her race, 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 …*"

[36] Much has been written in the law reports, law journals and textbooks on the interpretation of this provision. For example, in *International Law – A South African Perspective*, 3rd ed, Prof John Dugard at 434 stated:

> "*The 1951 Convention and 1967 Protocol do not provide a definition or otherwise clarify what is meant by persecution. The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status provides that:*
>
> > *'There is no universally accepted definition of persecution, and various attempts to formulate such a definition have met with little success. From Article 33 of the 1951 Convention it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights – for the same reasons – would also constitute persecution.'*

Assessments as to whether an individual will face persecution if returned to a particular state must be made on a case by case basis taking into account, on the one hand, the notions of individual integrity and human dignity and, on the other hand, the manner and degree to which they stand to be injured. Ordinarily claims involve likely persecution at the hands of the government. The threat of persecution must exist for the claimant in her country as a whole. If there is an area in her own country in which an asylum claimant would be safe from persecution, her claim for asylum may fail. Well-founded fear involves both a subjective and an objective component. The former is based on the applicant's reaction to events that impinge upon her personally; but to make it a well-founded fear, there must be other proof or objective facts that lend support to the applicant's subjective fear."

[37] In *Kabuika and Another v Minister of Home Affairs and Others* 1997 (4) SA 341 (C), asylum seekers from the former Zaire (now the Democratic Republic of Congo) applied to the Court, as a matter of urgency, for an interim interdict ordering the Minister of Home Affairs to allow them to remain in South Africa pending a judicial review of the decisions by the Refugee Standing Committee and the Appeal Board of Refugees. In granting the relief, the Court at 344H-J said:

"*The reports attached to the applicants' papers are not contradicted in any way whatsoever by the respondents. It appears to me that in these circumstances the respondents might well - and I come to no conclusion in this regard, not having the full facts before me at this stage, and this not being a full review application before me - have misinterpreted the facts to such an extent that they have indeed arrived at a capricious and incorrect decision which amounts to what appears to be reviewable grounds. They have not sought to contradict the allegations made on behalf of the applicants and in these circumstances it appears to me that the applicants have clearly shown that they are entitled to relief at this stage. They have shown, in my view, at the very least, a prima facie right to relief and certainly well-grounded apprehension of irreparable harm.*"

[38] In *Arse v Minister of Home Affairs (supra)*, at para [14], the Court said:

> "*In terms of the Refugees Act a person qualifies for refugee status if he or she has a well-grounded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, and is outside the country of his or nationality and is unable or unwilling to avail him 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. A person qualifies for refugee status if owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality he or she is compelled to leave his or her place of habitual residence in order to seek refugee elsewhere. Any dependant of either of the two categories of persons referred to also qualifies for refugee status …*"

See also *Ersumo v Minister of Home Affairs and Others* 2012 (4) SA 581 (SCA) at para [8].

[39] Based on the above, there is a *prima facie* view that the applicant's fear of persecution in her country of origin is a well-founded one, which should properly be ventilated in review proceedings. In the hearing before the RSDO, the applicant gave oral, written and documentary evidence of the risk of persecution that is a real probability should she return to the Congo. There appears to be a reasonably high probability that the applicant might be killed as her father was killed due to him being a member of the Congolese Movement for Democracy and Integral Development. This political party is opposed to the ruling party. Her evidence does not appear to have been convincingly rebutted in this regard. The matters raised by the applicant in her personal history and the reasons for asylum status are inherently and by nature arguable. She is entitled to review proceedings. There is no reason why the costs should not follow the result. The applicant is entitled to her costs.

[40] For all the aforegoing reasons, I granted the order as sought in the notice of motion dated 15 May 2012.

THE RESPONDENTS' APPROACH TO THE REFUGEES AND IMMIGRATION MATTERS

[41] Prior to concluding, I need to make mention of one issue which is bothersome. There are numerous similar matters involving the Department of Home Affairs on the motion court roll of this High Court. This occurs on a weekly basis almost. In my experience, most of these matters ought not to be coming to Court. In most of the matters the allegations of the applicants are often conceded or the matters are simply settled at Court. It is not unusual for draft orders in these matters to provide for the immediate release of the applicants as well as ancillary relief. It may be that the time has arrived for the Department of Home Affairs to devise an effective, cost saving and well-balanced approach to matters of this nature and immigration issues. There is plainly a need to re-visit the preamble to the Refugees Act which provides as follows:

> "*WHEREAS the Republic of South Africa has acceded to the 1951 Convention Relating to Status of Refugees, the 1967 Protocol Relating to the Status of Refugees and the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa as well as other human rights instruments, and has in so doing, assumed certain obligations to receive and treat in its territory refugees in accordance with the standards and principles established in international law.*"

The procedure relating to the application of the Refugees Act has been extensively set out in *Ersumo v Minister of Home Affairs (supra)* from paras [15] to [23], as well as other leading case law. In addition, Prof Dugard *op cit*, at 348-349 cites the enactment of the Refugees Act as follows:

> "*The Refugees Act 130 of 1998 was enacted to give effect within South Africa to the relevant international legal instruments and principles relating to refugees and to provide for the reception of asylum seekers. It was enacted to regulate applications for and recognition of refugee status and to provide for the rights and obligations flowing from such status. The Act must be interpreted and applied with due regard to the 1951 Convention, its 1967 Protocol, the 1969 OAU Convention, the Universal Declaration of Human Rights and any other relevant human rights treaty to which South Africa is or becomes a party . The 1969 OAU Convention on Refugees is of significance inasmuch as the Convention provides a wider definition of refugee compared to that under the UN Convention and its Protocol.*" All these quoted authorities are rather instructive.

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D S S MOSHIDI
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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DATE OF HEARING	7 JUNE 2012
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