IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA)

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

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Case Number: **2011/9981**

In the matter between:

ESTHU MARKOS FIKRE	Applicant
and	
THE MINISTER OF HOME AFFAIRS	First Respondent
THE DIRECTOR GENERAL;	Second Respondent
DEPARTMENT OF HOME AFFAIRS	
BOSASA (PTY) LTD	Third Respondent
THE MINISTER OF SAFETY AND SECURITY	Fourth Respondent
NATIONAL COMMISSIONER OF POLICE	Fifth Respondent
PROVINCIAL COMMISSIONER OF POLICE	Sixth Respondent
(GAUTENG)	

JUDGMENT

SPILG, J:

INTRODUCTION

1. The Applicant is an Ethiopian national. He claims to have fled his country of birth to avoid political persecution and maintains an entitlement to protection as an asylum seeker under the provisions of the Refugees Act, 130 of 1998 until the final outcome of a decision, whether by way of appeal or on review, as to the correctness of a determination made on 9 January 2009 by the Refugee Status Determination Officer (RSD Officer) rejecting his application for asylum as unfounded under section 24(3) (c) of that Act.

2. It is common cause that the Applicant has been held in detention since 10 September 2010. He contends that the detention is unlawful since he has not yet exhausted all available remedies, which it is argued include the outcome of an application which was submitted on 3 March 2011for condonation for the late filing of a Notice of Appeal to the Refugee Appeal Board and any consequential appeal or review procedures available under Chapter 4 of the Refugees Act.

3. The Applicant believes that he is being detained for purposes of deportation and contends that until the final adjudication of his status he is entitled to protection under the Refugees Act as an asylum seeker.

4. The Respondent, by contrast, argues that the Applicant is not protected by the provisions of the Refugees Act and is being lawfully detained as an illegal foreigner in terms of the Immigration Act, 13 of 2002.

THE APPLICATION

5. On 1 March 2011 attorneys representing the Applicant addressed a letter to the First and Second Respondents and other state officials setting out the history of the matter and demanded his immediate release, the stay of all deportation proceedings against him and that he be re-issued with an asylum seeker permit. A condonation application for the late filing of the notice of appeal was submitted on 3 March 2011 and on the following day a further letter was sent to the Respondents which referred to the submission and repeated the earlier demands. There was no response to either written demand.

6. On 8 March 2011 the Applicant brought an urgent application to secure his release from detention and to prevent deportation pending the final outcome of the asylum seeker proceedings. The Respondents were afforded until 10 March to deliver an answering affidavit and the matter was set down for hearing on 15 March 2011.

7. The Applicant sought a broad range of orders. These were;

   a. To the extent necessary , permitting the Applicant to bring the proceedings without exhausting any applicable internal remedies provided for in section 8 of the Immigration Act 13 of 2002;
   b. Interdicting the First and Second Respondents from deporting the Applicant prior to the final determination of his status under the Refugees Act 130 of 1998;
   c. Declaring the Applicant's detention unlawful and directing his immediate release;

d. Directing the First and Second Respondents to re-issue the Applicant with an asylum seeker permit under section 22 of the Refugees Act , the permit to remain valid until the Applicant has had an opportunity to exhaust his rights of review or appeal in terms of Chapter 4 of the Refugees Act and the Promotion of Administrative Justice Act 3 of 2000;
e. Directing that the Applicant be provided with an asylum seeker permit by the time he is released;
f. Costs on the attorney and client scale.

8. A number of Respondents were cited although, as already indicated, substantive orders were sought only against the First and Second Respondents. Both Respondents, being the Minister of Home Affairs and the Director-General: Department of Home Affairs were cited only in their official capacities under the provisions of the Refugees Act. I mention this because some point was made of the failure to cite them also in their representative capacities under the Immigration Act, being the Act which the First and Second Respondents contend is applicable. I will deal with this later.

9. The First and Second Respondents filed a combined Answering Affidavit on 17 March 2011. This was after the urgent court judge had been approached on 12 March to allow, by agreement, the affidavit to be filed outside the time provided for in the notice. A replying affidavit was then filed by noon on 18 March 2011. Unfortunately the Respondent's counsel had taken ill and at the end of the day the matter was placed before me as the relieving urgent court judge.

10. Since the liberty of an individual was in issue the matter remained urgent. See *Arse v Minister of Home Affairs* 2010(7) BCLR 640 (SCA) at para 10.

11. It became apparent that the issues were not necessarily straight forward and the Respondents sought an opportunity to prepare fuller argument. In considering whether it was advisable to allow a postponement I also had regard to the facts I detail later which reveal that after the Applicant had applied for and was refused asylum in early 2009 he neither appealed the decision nor renewed his asylum seeker permit (*permit*). Instead he melted into the general population and only after he was detained as an illegal immigrant and released in order to return to Ethiopia did he then apply under an assumed identity for an original asylum seeker permit. When the immigration officials caught up with him in September 2010 and again detained him he abandoned reliance on the permit bearing his false details. Eventually at the beginning of March 2011, and just before launching this application, the Applicant sought to resurrect an appeal against the rejection some 3 years earlier of his application for asylum. It is clear that his intention was to again qualify as an asylum seeker entitled to protection from detention and deportation under the Refugees Act. These factors have continued to inform my approach to the case.

12. On the evening of 18 March 2011 I issued the following interim order;

> *1. The Applicant is not to be deported or otherwise removed from the facility pending the outcome of the application.*
>
> *2. Service of this order is effected by Advocate Manaka calling Mr Masanabo of the First and Second Respondents and it is recorded that the service was so effected; and*
>
> 3. *The matter is postponed to Tuesday 22 March 2011 at 9:30.*

FACTA PROBANDA, PLASCON-*EVANS* AND THE CONSTITUTIONAL RIGHT TO LIBERTY

13. Under our law it is clear that the onus in respect of the deprivation of liberty of an individual is borne by the State (eg, *Zealand v Minister of Justice and Constitutional Development and another* 2008 (4) SA 458 (CC) at para 5). However certain difficulties of application may arise because of our rules regarding what is to be treated as the evidence before a court in motion proceedings.

14. While the order in the main application to prevent deportation is clearly interlocutory, those parts of the order declaring the Applicant's detention unlawful and directing his immediate release together with ancillary relief are final in effect.

15. In order to obtain interim interdictory relief the Applicant must show a *prima facie* case though open to some doubt. The actual weight to be given, where only an interim interdict is sought, to the conflicting factual versions put up by the parties in a matter involving constitutionally protected rights need not be analysed. Compare Ferreira *v Levin NO and others; Vryenhoek and others v Powell no and others* 1995 (2) SA 813 (W) at 830d to 836e (applying the House of Lords decision in American *Cyanamid Co v Ethicon Ltd* [1975] AC 396) and more recently *Johannesburg Municipal Pension Fund and Others v City of Johannesburg and Others* 2005 (6) SA 273 (W) per Malan J (at the time) at para [8]. It is adequate for the purposes of this case to apply the test set out by Holmes JA in *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton, and Another* 1973 (3) SA 685 (A) at 691c-G and given practical effect by

Goldstone J(at that time) *Tshabala and Others v Minister of Health and Others* 1987 (1) SA 513 (W) at 523D-F when confronted with a dispute of fact in an application for interim relief .

16. In the present case I am satisfied that the issue of whether the Applicant is subject to deportation at this stage is a legal issue not dependant on the resolution of any of the facts that are in dispute, but rather on one undisputed fact, namely that the Applicant has submitted an application for condonation for the late noting of his appeal.

17. The appropriate test for determining what facts are to be accepted as the evidence before me in respect of the final declaratory orders sought by the Applicant is more problematic.

18. The facts in issue (*facta probanda)* which are accepted, and therefore proven, in motion proceedings for final relief are effectively those presented by the Respondent (including express or implied admissions of any facts presented by Applicant) unless the Respondent's version does not meet the threshold requirement of demonstrating a real, genuine or *bona fide* dispute of fact as explained in *Plascon-Evans Paints v Van Riebeeck Paints (Pty) Ltd* 1984(3) SA 623 (A) at 634E to 635C.

19. Accordingly the onus in the sense of demonstrating the existence of a fact which will be accepted as the evidence before the court on a balance of probabilities is replaced in motion proceedings for final relief by the application of the *Plascon-Evans* principles. Since an application to secure release from detention under an interdict *de libero homine exhibendo* (which is comparable to habeas *corpus* under American law (see *Wood and Others v Odangwa Tribal Authority and Another* 1975(2) SA 294 (A) at 310D to 311H) is by its nature to be dealt with urgently (*Arse* (supra) at para [10]) an

application on motion is the only viable process to achieve that objective. But in being compelled to proceed by way of motion to obtain release from detention, an Applicant, under our ordinary rules of procedure, forfeits the right to require the State to bear the *onus* of proving facts on a balance of probabilities which justify depriving him of his liberty and is compelled to rely on the Respondent's averments unless the *Plascon-Evans* considerations for rejecting them can apply or the Applicant successfully seeks a referral to oral evidence.

20. The rule confirmed in *Plascon-Evans* is essentially one of adjectival law, although not necessarily exclusively so. See *Minister of the Interior and Another v Harris and Others* 1952(4) SA 769 (A) at 781C to D and *South African Broadcasting Corporation Ltd v National Director of Public Prosecutions and Others* 2007 (1) SA 523 (CC) at paras [86] to [88] . Whether adjectival or hybrid, the way in which the accepted *onus* that lies on the State would be distorted if the courts rigidly applied the test as to when a matter should be referred to oral evidence in cases involving the liberty of individuals. The *Plascon-Evans* principles were expressly applied in *Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma and Another v National Director of Public Prosecutions and Others* 2008(1) BCLR 1197 (CC) at paras [8], [10], [21] and [26], a case where the question of referring the matter to oral evidence did not arise.

21. The concerns expressed by Heher J (at the time) when dealing with a constitutionally protected right on interim motion proceedings in Ferreira *v Levin (supra)* have particular resonance where the court's decision would be final. The restoration of the State's obligation to discharge the *onus* of proving facts justifying the deprivation of an individual's liberty is realised practically, by applying *Plascon-Evans* without distortion, but recognising that the usual grounds for refusing to hear oral evidence, ie that there are real and

substantial questions in dispute that should be determined rather by trial, are not necessarily applicable.

22. In order to comply with its obligation under section 39 of the Constitution to promote the values that underlie it including those based on dignity and freedom when interpreting not only the Bill of Rights but in developing the common law in a manner that promotes the values contained Chapter 2 of the Constitution it appears prudent that a court gives due effect to the wide discretion it enjoys under Rule 6(5)(g) to allow the calling of oral evidence where a matter cannot be decided properly on affidavit so as to ensure *"a just and expeditious decision".* See *Marques v Trust Bank of Africa Ltd and Another* 1988(2) SA 526 (W) at 530J to 531B , *Administrator, Transvaal and Others v Theletsane and Others* 1991 (2) SA 192 (A) at 200 C-E and also *President of the RSA and Others v M&G Media Ltd* 2011 (4) BCLR 363 (SCA) at paras [13] to [15].

23. By transforming the proceedings to the hearing of evidence the court can then determine the facts based on whether the burden of proof in the true sense has been discharged by the State. While it is appreciated that there are practical difficulties attendant upon a prompt referral to oral evidence, particularly where there might be more than one factual issue to be determined and where there might have to be extensive discovery or subpoenaing of witnesses, it appears that this procedure may have to be accommodated in order to properly meet constitutional requirements.

24. Recently Nugent JA in *M&G Media Ltd* at paras [13] to [15] indicated that a court should be astute to exercise the broad discretion it enjoys and "…*should not hesitate to allow cross-examination of witnesses who have deposed to affidavits if their veracity is called into question."*

25. There appears to be no reason, at least since the cases of *Marques* and *Theletsane* , for a court not to *mero motu* refer a matter to oral evidence if it is of the view that this would ensure *" a just and expeditious decision"* as contemplated in the Rule. It appears that the practical means of reconciling the *Plascon-Evans* rules regarding the evidence which a court must accept with the court's obligation to give effect to Constitutional values under sections 12(1) and 35(1)(d) to(e) is to more readily entertain the hearing of oral evidence. Once it is determined what evidence the court is entitled to receive then the second component of what makes up the *onus c*omes into play; ie, whether the Applicant has demonstrated a deprivation of liberty and if so whether the State has discharged the *onus* of justifying the detention.

26. This case presents a number of disputes of fact. I considered the advisability of referring these to the hearing of oral evidence. In particular the factual base for detaining the Applicant since at least 3 March 2011. I tested the advisability of doing so by asking whether on the facts presented the Respondent's version would be accepted if the evidential burden was on it and whether *vive voce* evidence was likely to affect the outcome. I am satisfied that after scrutinising the Respondent's allegations and those that the Applicant has elected to disclose there is only one issue that should not be left for resolution on the papers as they presently stand. The issue that should not be so resolved is whether the Applicant is being detained under the Refugees Act or is being held in custody as an awaiting trial prisoner pursuant to charges laid either under the Immigration Act or the Refugees Act.

27. Since the parties had focused on whether the Applicant's status was determined under the Immigration Act or the Refugees Act, the reference in both parties' papers to charges being laid against the Applicant was *en passant* .Neither party had considered whether the Applicant was being held subject to the provisions of the Criminal Procedure Act in a way which would

affect the rights or entitlements of either party. Although not fully dealt because of a misconception of the situation, and because of the serious consequences both to the Applicant and the Respondents should the actual position not be addressed due to a misconception of the applicable legislation governing the status of the Applicant I believed it appropriate to apply the considerations adopted in *SA Bank of Athens v van Zyl* 2005(5) SA 93 (SCA) esp. at para [16] to the present situation.

28. In doing so I considered it unnecessary to have the parties incur the cost and delay attendant on receiving oral evidence before certain essential facts were placed before the court. I accordingly framed an order in the form of a *rule nisi* which required a response from the Respondents. On the return date the presiding judge could then determine whether there was an issue that should be determined, having regard to the constitutional nature of the case, by a referral to oral evidence.

RELATIONSHIP BETWEEN IMMIGRATION ACT AND REFUGEES ACT

29. The fact that the legislature has elected to continue dealing with refugees entitled to asylum under a specific piece of legislation and not as a Chapter under the subsequent and more generalised Immigration Act does not lessen the appreciation that they are inter-related. The SCA specifically addressed this in *Arse v Minister of Home Affairs and Others* 2010 (7) BCLR 640 (SCA) at para [19] where Malan JA said that: "*Where two enactments are not repugnant to each, they should be construed as forming one system and as re-enforcing one another".* In the context of the Immigration and Refugees Acts the learned justice of appeal continued: "*The two provisions can be reconciled with each other without doing violence to their wording and in*

accordance with the spirit of the international instruments the Refugees Act seeks to give effect to " .

30. A foreigner entering the Republic becomes subject to the provisions of the Immigration Act 13 of 2002 unless he qualifies for refugee status under the provisions of the Refugees Act 130 of 1998. In *Arse* the SCA confirmed at para [19] that when an asylum seeker permit is granted to an illegal foreigner the provisions of the Immigration Act cease to apply and by reason of the provisions of section 21(4) of the Refugees Act; *" .. no proceedings may be instituted or continued against such person in respect of his or her unlawful entry into or presence in the country until a decision has been made on his or her application or he or she has exhausted his or her rights of review or appeal*" (emphasis added).

For sake of completeness section 24(1) reads:

"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. "

31. In the case of illegal entry into the country the foreigner must depart unless he is authorised, by the Director-General of the Department of Home Affairs, to remain in South Africa pending his application for a status. This is provided for in section 32 (1) of the Immigration Act.

32. Unless authorised under section 32 (1) to remain in the country an illegal foreigner can be arrested without a warrant by an immigration officer. Even if

the illegal foreigner is not arrested, he may nonetheless be deported, or detained pending deportation. See section 34 (1).

33. However an illegal foreigner;

a. may not be deported until he is notified in writing of the decision to deport him and he has been advised of his right to appeal that decision (section 34(1)(a);
b. May at any time request that his detention for the purposes of deportation be confirmed by warrant of a Magistrates' Court. If a warrant from the court is not issued within 48 hours of being requested then the individual must be released immediately (section 34(1) (b) read with the section 1 definition of *"court"*).
c. Must be informed on arrest or immediately afterwards of the rights set out in the previous two paragraphs, and as far as practicable in a language he understands (section 34(1)(c)
d. May not be detained without a warrant of a Magistrates' Court for longer than 30 calendar days. This period may only be extended for a further period not exceeding 90 calendar days provided good and reasonable grounds exist to do so. See section 34(1)(d)
e. Must be held in detention in a manner that complies with minimum standards prescribed by regulation that protect his dignity and relevant human rights (section 34(1)(e) read with the section 1 definition of *"regulation" .*

34. Moreover ;

a. The detention of any person under the provisions of the Immigration Act for purposes "*other than his or her deportation"*, and provided detention does not occur on a ship, cannot exceed 48 hours from the time of arrest or being taken into custody. There is the usual criminal procedural

exception that the period will be extended, if it ends on a non-court day, to 4pm on the first following court day (section 34(2);

b. Under section 34(5) any person who is not a citizen or permanent resident;

   i. and , under subsection 34(5)(a), who " *having been …removed from the Republic or while subject to an order issued under a law to leave the Republic returns thereto without lawful authority or fails to comply with such order"*

   ii. or, under subsection 34(5) (b), who *"having been …. refused admission … has entered the Republic"*

shall be guilty of an offence and *"..liable on conviction to a fine or to imprisonment for a period not exceeding 2 months <u>and may</u>, if not already in detention, be arrested without a warrant and deported under a warrant issued by a Court and, pending his or her removal, be detained in the manner and at the place determined by the Director-General*"

c. Any illegal foreigner convicted and sentenced under the Immigration Act may be deported before the expiry of the sentence, which then terminates the imprisonment (section 34(6))

d. "*On the basis of a warrant for the removal or release of a detained illegal foreigner, the person in charge of the prison concerned shall deliver such foreigner to that immigration officer or police officer bearing such warrant, <u>and if such foreigner is not released</u> he or she <u>shall be deemed</u> to be in lawful custody while in the custody of the immigration officer or police officer bearing such warrant."* (section 34(7))

(emphasis added).

35. The Refugees Act was introduced in order to comply with our international obligations *".. to receive and treat in its territory refugees in accordance with the standards and principles established in international law"* . See the *Preamble* to this Act. The international instruments that were in existence at

the time of the enactment are set out in section 6 of the Act. Section 6 requires the Act to be interpreted and applied with due regard to these instruments and "*any other relevant convention or international agreement to which the Republic is or becomes a party"* It must also be interpreted in conformity with tenets of our Constitution. Compare *Sonderup v Tondelli and Another*2001 (1) SA 1171 (CC) at para [27] to [29] . In the case of deprivation of liberty the provisions of section 12(1)(b) apply, and where a person is alleged to have committed an offence then sections 35 (1)(d) to (f) and (2)(a),(d) and (e) apply.

36. The point of departure between the Immigration Act and the Refugees Act is that irrespective of whether an individual entered the country as an illegal foreigner and despite the provisions in that Act for prompt detention and deportation as set out already, the moment he qualifies for refugee status under section 3 (and is not excluded by reason of section 4) , and subject to certain limited exceptions, he is effectively protected not only against deportation but also detention until his refugee status is finally determined.

37. The structure of the Refugees Act is premised on respecting the right to liberty of a foreigner who claims refugee status until his application is finalised. This is understandable if regard is had to the experiences of those who were forced into exile and the more recent experiences of ethnic intimidation including genocide that characterised Eastern Europe and our own Continent and which placed the lives and general wellbeing of ordinary citizens in jeopardy. See further *Arse* and also its explanation of the structure of the Refugees Act.

38. The issue before me is whether the Applicant fell outside the protection accorded a foreigner qualifying for refugee status under the Refugees Act by reason of certain other provisions of that Act, and if so whether he could then be subject to detention and deportation under that Act or under any other law.

CITATION OF THE RESPONDENTS

39. It is advisable to dispose of the argument regarding the citation of the Respondents. *Ms Manaka* took the point that they have only been cited in their representative capacities as respectively, the responsible Minister under the Refugees Act and the Director-General responsible for administering that Act, but not in their representative capacities under the Immigration Act, being the Act which they contend is applicable.

40. Even if the Respondents were correct that the Immigration Act and not the Refugees Act applies to the Applicant, it is difficult to appreciate how there can be any prejudice or on what basis a court would allow a technical point of this nature to delay the determination of the liberty of an individual. In my view it has no substantive law consequences where the same Minister and same Director-General are responsible for administering two pieces of legislation that may impact upon the rights sought to be asserted.

41. In the present case it is unnecessary to consider whether a cosmetic amendment is necessary since in my view the current status of the Applicant is regulated by the Refugees Act, subject only to any criminal prosecution that might be relied upon. In that event there would be a need to consider whether the continued detention is pursuant to a lawful arrest on a criminal charge and if so whether there has been compliance with the provisions of sections 50 and 60 of the Criminal Procedure Act 51 of 1977 dealing with an individual's rights on arrest to be charged and brought before a court effectively within 48 hours or be released and also the right to apply for bail.

42. Accordingly the Respondents are correctly cited.

THE FACTS BEFORE THE COURT

43. The Applicant is an Ethiopian national. He entered the Republic on 1 January 2006.

44. During August 2006 and while in Port Elizabeth the Applicant applied for asylum. He was issued with a permit under section 22 of the Refugees Act 130 of 1998. The permit was renewed from time to time. In early January 2009 the Applicant appeared before a Refugee Status Determination Officer (*Officer*) for a status determination. His claim was rejected as unfounded under section 24(3) (c) of the Refugees Act. The decision was conveyed to him in writing on 9 January 2009. The notification also contained the reasons for the decision and under a separate and bold heading entitled *"NOTICE OF RIGHT TO APPEAL"* the Applicant was informed of his right to appeal the decision within 30 working days.

45. In reaching his decision the Officer referred to the Applicant's claim in his application that he was a member of the CUD who was being forced to join the rival EPRDF but refused. As a consequence he was threatened and fearing arrest he fled to South Africa. The Officer also referred to the Applicant's subsequent statement during his second interview regarding the extent of political fighting and his decision to flee Ethiopia because he supported the CUD.

46. The Officer rejected the claim on the ground that the Applicant's fear of persecution was not well founded. The Officer reasoned that since the Applicant did not suffer any actual persecution it would be safe to return home. Although accepting that there is political instability and actual fighting between political parties the question that had to be asked was how the Applicant personally was persecuted or affected by the fighting. The Officer

also relied on the *Human Rights Watch World Report* of October 2008 which confirmed that political violence was pervasive in Ethiopia and was fuelled by long-standing rivalry between the ruling and opposition parties. The Report however also referred to the Ethiopian Constitution which protected the right of free movement within the country and noted that this was generally respected. The Report concluded that internal relocation to safer areas not dominated by political violence was a viable option for those who found themselves in the minority in a given area.

47. On the same date as the Officer rejected his application for asylum the Applicant was issued with a temporary asylum seeker permit which in its terms expired on 9 February 2009. The permit sets out the following conditions of issue;

1. *The holder of the permit may reside temporarily in the Republic of South Africa for the purpose of applying for asylum in terms of the Refugees Act.130 of 1998.*
2. *The permit holder shall, without expenses to the state , leave the republic on before 09/02/2009 or such later date as duly authorised by a Refugee Status Determination Officer if his/her application for asylum has been rejected .*
3. *The permit entitles the holder to: EMPLOYMENT AND STUDIES IN RSA.*
4. *Failure to comply with the conditions of this permit will be dealt with in terms of Section 37(b) and Section 22(b) of the Refugees Act 1998.*
5. *All permit holders are obliged to respect the laws of South Africa.*
6. *This permit will lapse if the permit holder does not appear in person as required at the designated Refugee Reception Office or if he/she departs from the Republic without prior authorisation from the Director-General.*

7. *All other permits issued prior to the issuance of this permit are automatically nullified.*
8. *All other conditions- REFERRED TO RAB PEB/007442/06.*
9. *I FIKRE ESTHU MARKOS agree to the above conditions and understand that a breach will result in an offence in terms of Section 37 of the Refugees Act.*

48. The Applicant failed to lodge an appeal within the 30 days which expired on 20 February 2009, and did not seek to renew his asylum seeker permit. More pertinently he fails to explain either why he did not appeal the decision or why he did not continue to report for an extension of his asylum seeker permit as he had done in the past.

49. Despite these failures on his part, the Applicant did not return to Ethiopia but remained in the country and was arrested either on the 5th or 9th November 2009. This was some 9 months after his asylum application had been rejected. Since the respondent did not provide details I accept the Applicant's statement that upon arrest he was detained at the Lindela Repatriation Facility on the grounds that he was an illegal foreigner. His evidence is that he was not issued with a deportation notice, or warrant of deportation nor was his detention extended by a court warrant.

50. The Respondents then commenced processing the repatriation of the Applicant to Ethiopia. Since the Applicant was not in possession of a passport, the Ethiopian Embassy was required to issue an Emergency Travel Certificate (ETC). This document serves as a one way passport to the foreign national's country of origin. Without it, the Respondent is unable to deport the Applicant.

51. However the Ethiopian Embassy refused to issue the document and claimed that the Applicant had to first settle his business affairs in South Africa.

52. It was on this basis that the Applicant was released on 26 April 2010 from the Lindela Repatriation Facility *(Lindela)* in order to enable him to settle his affairs and leave South Africa by 10 May 2010.

53. On the day of his release the Applicant signed receipt of a notice which constituted an order to an illegal foreigner to leave the Republic under section 49(1)(b) of the Immigration Act read with regulation 39(17).

54. The order notified the Applicant that as an illegal foreigner who had contravened the provisions of the Immigration Act he was guilty of an offence for which he may be charged in a court of law, but since he had undertaken to leave the country voluntarily the document ordered him to leave the country by no later than 10 May 2010. In the order the Applicant was warned that if he failed to leave by that date, a warrant for his deportation would be issued in terms of section 34 of the Immigration Act and that he would be detained or charged pending his removal. The Respondent contends that the Applicant voluntarily agreed to be repatriated.

55. The Applicant however claimed that on his release he was told by an immigration officer that he must "*fix up"* his documents and that he was unsure of the contents of the document he was handed as he has difficulty with reading or understanding English. This is the furthest the Applicant goes to explain to the court whether or not he voluntarily agreed to leave the country. He does not expressly state that he did not voluntarily elect to return to Ethiopia.

56. On the facts presented by the Applicant he does not contend that he was forced to leave, only that he was unsure of the import of the documents he

received. I am satisfied that the Applicant knew that he could no sojourn in the country without at least reporting to immigration officials at some stage, if only to regularise any application for asylum that he may wish to pursue or revive. Since the Applicant did not appeal the decision and did not seek to renew his asylum seeker permit when it expired initially in February 2009 and took no steps to regularise his presence in the country. It is apparent from his own version that he voluntarily agreed to leave South Africa. The background leading to his release also indicates that the only basis upon which the Applicant was permitted to leave the repatriation centre was upon him agreeing to leave the country.

57. A failure to comply with the Order which the Applicant received to leave South Africa by 10 May 2010 rendered him guilty of an offence under section 34(5)(a) of the Immigration Act and liable on conviction to a fine or to imprisonment for a period not exceeding a year and "*if not already in detention, be arrested without warrant and deported under a warrant issued by a Court and, pending his or her removal, be detained in the manner and at the place determined by the Director-General.* This was set out plainly in the body of the Order.

58. Moreover section 49(1) (b) of the Immigration Act provides that: *"Anyone who enters or remains in …. the Republic in contravention of this Act, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding three months".*

59. A week after receiving the Order and on 4 May 2010 the Applicant lodged a new application for asylum, but this time at the TIRRO Refugee Reception Office in Pretoria. The Applicant claims that this was in order to *"… re-document myself as an asylum seeker".* The Applicant confirms that he completed the form and filled out the details. He was then issued with an asylum seeker permit. This cannot be regarded as a genuine application and the permit is of no effect since it refers to details of a person other than the

Applicant. The Applicant has not sought to rectify its content but has distanced himself from it for good reason. The longer he wishes to rely on a document that self evidently was obtained by fraud the more serious is the nature of the offence and the possible sentence if found guilty.

60. The alleged misrepresentations made by the Applicant in obtaining the permit are as follows: He provided a different surname, *"Markus"* and then identified his forenames as *"Esctu Fekere"* : His date of birth was given as 6 May 1976. In his original application for asylum at the beginning of January 2006 the Applicant gave his name as *Eshtu Markos Fikre* born on 3 January 1978. The Applicant contends that he is also known by the other name and that the date of birth in the new application is based on an alternate calendar. This is rejected because on any basis he claimed in the new application that he had first entered South Africa on 11 March 2010, whereas it is common cause that he entered in January 2006 and never departed. The explanation of the use of a different calendar system is patently false on the basis of this simple comparator. I reject this evidence as manufactured in order to conceal the fact that the Applicant had sought to apply for asylum under a different name so as to avoid the possibility that the system would recognise that he had already applied for asylum and had not appealed the refusal of his application.

61. The consequence is that the Applicant exposed himself to prosecution under section 37(a) of the Refugees Act which renders an offender liable to a fine or imprisonment for up to five years, or to both a fine and imprisonment.

62. It is also evident that the new application for asylum cannot be considered as having any legal consequence. It cannot be contended that it contained genuine errors or was based on a reasonable view of the Applicant's predicament if he were to return to his home country, factors that would militate against holding an application fatally flawed on grounds of fraud or

false representation. Not so in the present case where a false name, false date of birth and false date of entry into the country were given. Section 37 of the Refugees Act draws this distinction.

63. Since then the Applicant was effectively at large until his arrest on 10 September 2010 in Colesberg. He was arrested as an illegal foreigner. He gave his date of birth as 6 May 1976. The Respondent contends that the Applicant was arrested and detained first at the Colesburg Police station and then at the one in De Aar pending deportation for contravening the order of 26 April 2010 to depart from the Republic.

64. On 28 September 2010 the Applicant was transferred to Lindela and detained there pending deportation. He however was not furnished with a deportation warrant nor was his detention extended by a court warrant.

65. Once again the Ethiopian Embassy was requested to issue an ETC to enable the Applicant's deportation to Ethiopia. On this occasion the Ethiopian Embassy claimed that the Applicant had business interests in the Republic and was also an asylum seeker. I will return to this.

66. However on 22 February 2011 the Applicant was transferred to the Krugersdorp Police Station and informed that he was being detained under a charge of contravening section 49(1)(b) and section 49(14) of the Immigration Act. This appears from the SAPS 14A Notice of Rights attached to the founding affidavit.

67. Until the charges were laid against him the Applicant was treated as an illegal foreigner and held in detention at Lindela awaiting deportation under the provisions of the Immigration Act. The Applicant was then released from Lindela and held in custody at the Krugersdorp Police station. It appears that the Applicant was unaware that he was no longer being detained awaiting

deportation. The Respondent claims that: *"At all times relevant hereto, the Applicant was released from Lindela and held at Krugersdorp Police Station. I am advised that the Applicant was now held in terms of the Criminal Procedure Act 51 of 1977 and not the Immigration Act."*

68. On 24 February 2010 the Applicant was brought before the Krugersdorp Magistrates' Court in respect of the section 49 offences under the Refugees Act. The prosecutor declined to prosecute because the alleged offences were not committed within the jurisdiction of that court. A recommendation was then made to place the matter before the Pretoria West Magistrates' Court. In the meantime the Applicant was released from police custody and transferred back to Lindela.

69. On 1 March 2011 the Applicant was to be brought before the Atteridgeville Magistrates' Court. According to the Respondents the prosecutor believed that the Applicant had been charged criminally. Apparently the Applicant was not charged. As a result the Applicant was properly released from police custody. Once again the version of the Respondent leaves much to be desired, nonetheless it amounts to a clear admission that the Applicant was not charged within the 48 hours required under section 50(1) of the Criminal Procedure Act.

70. The Applicant was then immediately detained again by immigration officers under section 34 of the Immigration Act pursuant to the failure to comply with the 26 April 2010 order to leave the country.

71. On 3 March 2011 the Applicant's legal representatives lodged an application for condonation for the late filing of a Notice of Appeal against the refusal of asylum.

72. On 7 March 2011 he was transferred from the police cells to Lindela.

73. Insofar as the prosecution for contravening section 49 of the Immigration Act is concerned, the Respondents claimed that the case was before the senior prosecutor in Pretoria to reconsider the withdrawal of the case from the Pretoria court of competent jurisdiction.

74. The Respondents also contend that the Applicant is subject to further criminal charges of contravening section 37(2) (b) of the Refugees Act in that he failed " *… to comply with or contravenes the conditions subject to which any permit has been issued to him … under this Act*". The offence carries a penalty of 5 years imprisonment or a fine or both.

75. In regard to the Respondents claim that the Applicant has contravened the provisions of section 37(2)(b) of the Refugees Act, it is apparent that on 24 February 2011 the Applicant was informed that he was being detained on grounds of committing fraud. This is also confirmed by reference to the cover of the crime docket attached to the founding affidavit, which in addition identifies the fraud as being in relation to forging documents during the period 4 May 2010 and on 22 February 2011.

APPLICANT'S LEGAL STATUS SINCE FEBRUARY 2009

76. It is evident that the Applicant was an illegal foreigner in South Africa from at least 20 February 2009 when his asylum seeker permit and any other permission to remain in the country had expired and was not renewed. Moreover, he had voluntarily elected not to appeal or review the rejection of his application for asylum. This conclusion arises by reason of section 5(1)(a) of the Refugees Act which deals with the cessation of refugee status and provides that;

" (1) A person ceases to qualify for refugee status for the purposes of this Act if-

(a) he or she voluntarily reavails himself or herself of the protection of the country of his or her nationality; "

77. This conclusion is reinforced by the terminology used in other provisions of the Refugees Act which draws distinctions between the cessation of refugee status, the *'withdrawal"* of a permit under section 22(5) which can only be effected by the Minster or under his delegated power, the *"lapsing"* of a permit under section 22(5), and the expiry by effluction of time and non-renewal of a permit by reason of the temporary nature of the permit which in its terms contains an expiry date. See sections 22(1) and (3) and also Regulation 7(1)(b) of the Regulations promulgated under the Refugees Act which provides that a permit issued under section 22 is of limited duration and must contain an expiry date. This appears to be consistent with the type of conditions permitted under the substantive enactment.

78. From 20 February 2009 until 22 February 2011 when the Applicant was brought to the Krugersdorp Police station and apparently charged with a criminal offence his status remained that of an illegal immigrant because;

a. His application for asylum had been refused and there was no pending appeal whether within the stipulated period or at all, despite the lapse of an extensive time period;
b. The conduct of the Applicant was consistent with accepting that he was to be repatriated, even after his subsequent arrest;
c. The new asylum application was false and has no legal significance. In any event the subsequent attempt to resurrect an appeal process based on the original application that was refused in February 2009 constitutes the clearest factual admission that it has been abandoned.

79. It is however evident that from the time of his arrest in September 2010 he was entitled to the protection afforded under the immigration Act. In particular,

the rights of limited detention without a warrant under section 34(1)(d) of the Immigration Act for a period not exceeding 30 days from date of detention and then not exceeding a further 90 days provided a Magistrates' Court finds that there are good and reasonable grounds for doing so. None of this was complied with. In part the difficulty lay with the Ethiopian Embassy. The limited time periods for processing alleged illegal foreigners are based on the accepted need to act expeditiously in determining status. However it also requires the active co-operation of the foreign national's diplomatic mission.. This is also the foundational premise of the applicable international Conventions and other accords. Since I have no further details regarding what effort if any was made to resolve the *impasse* with the Ethiopian Embassy, I must conclude that the continued detention of the Applicant became unlawful. However that does not conclude the matter.

80. It appears that the Applicant's status changed on 22 February 2011 when he was removed from the Lindela detention facility and detained at Krugersdorp Police Station where he was apparently charged with an offence. At this stage, while there may have been a right to arrest, he was entitled to be charged and brought before a court within 48 hours (save for the weekend exclusion period) and entitled to apply for bail under the provisions of the Criminal Procedure Act (which are consistent for these purposes with the provisions of section 35(1) (d) and (e) of the Constitution).

81. However the papers indicate that the charges were withdrawn on magisterial area jurisdictional grounds, with the intention of re-charging before a court of competent jurisdiction. The affidavits did not indicate if this had been done.

82. In the meantime, on 3 March 2011 the submission of the condonation application to appeal the refusal of asylum in early 2009 resurrected the Applicant's rights under the Refugees Act not to be deported until the exhaustion of all his appeal and review remedies. An application for

condonation for the late filing of an appeal is expressly recognised in Rule 6 of the Refugee Appeal Board Rules of 2003. I again refer to the earlier highlighted extract from para [19] of *Arse.* See para 30 above.

83. The question remains as to whether the Applicant's continued detention is unlawful. Clearly the Respondents are wrong to claim an entitlement to hold the Applicant under the Immigration Act since the Applicant's status after resurrecting his appeal (albeit via a condonation application) is governed once more by the Refugees Act (see *Arse* at para [19]). In any event, as pointed out by *Ms de Vos* on behalf of the Applicant, even if the Immigration Act applied there is no warrant and the period of permissible detention has long expired.

84. What remains unclear, because neither party focused on the issue, is whether the Applicant is subject to the ordinary criminal procedural laws. This is of concern because both sets of papers have mentioned the Applicant being detained in the ordinary police cells and that he signed a Notice of Rights (SAPS 14A) which indicated that he was formally charged with a criminal offence and brought before a court with the expectation that in the interim he may have again been brought before a Magistrate.

85. If he has not again been charged or is not an awaiting trial prisoner then the Applicant may only be detained under section 29(1) of Refugees Act, but then for a limited period which is subject to oversight by a High Court Judge. It provides as follows:

> ***29 Restriction of detention***
>
> *(1) No person may be detained in terms of this Act for a longer period 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, designated by the Judge President of that division for that purpose and such detention must be reviewed in this manner immediately after the expiry of every subsequent period of 30 days.*

(2) The detention of a child must be used only as a measure of last resort and for the shortest appropriate period of time.

ORDER OF 21 APRIL 2011

86. Since the condonation application had only been launched on 3 March 2011 the Applicant had not been in detention for a period longer than 30 days either at the time the application was launched or when I heard argument. It is for the reasons set out in the previous section that I made the following order on 21 April 2011:

1. The Application is urgent and the Uniform Rules are dispensed with under rule 6 (12) of the rules of this Court;

2. The Applicant is permitted to bring the present application without exhausting any applicable internal remedies provided for in section 8 of the Immigration Act 13 of 2002;

3. The First Respondent and Second Respondent are interdicted from deporting the Applicant unless and until his status under the Refugees Act, 130 of 1998, has been lawfully and finally determined;

4. The First and Second Respondents are to show cause to this Honourable Court on Tuesday the 3rd of May 2011 at 10 am or so soon as this matter may be heard as to:

a. why the Applicant should not be released from detention and issued simultaneously with an asylum seeker permit under section 22 of the

Refugees Act 130 of 1998 to remain valid until the Applicant has exhausted his rights of review or appeal under Chapter 4 of the Refugees Act;

i. *and if the ground is that the Applicant is an awaiting trial prisoner, whether bail was opposed on any ground peculiar to the provisions of the Immigration Act 13 of 2002 or the Refugees Act 130 of 1998 which precluded the court hearing bail from exercising its ordinary jurisdiction regarding the granting of bail;*

ii. *and if the ground is under any of the provisions of the Refugees Act 130 of 1998 other than section 37 why the detention should not be forthwith reviewed on the 3rd of May 2011 by a judge of this court designated in compliance with the provisions of section 29(1) of that Act;*

b. *why they should not pay the costs in relation to this rule and subsequent hearing.*

5. *The First and Second Respondents are to pay the Applicant's costs on the party and party scale;*

HEARING OF 3 MAY 2011

87. On the return day, Ms Manaka on behalf of the Respondents informed the court that the Applicant had not been arrested nor was he being detained under any charges.

88. The Respondents indicated they had faced a dilemma by reason of the wording agreed upon with the Applicant in respect of the original interim order of 18 March 2011 regarding their undertaking not to remove the Applicant from Lindela. I believed that this had been dealt with when I explained that my order of 21 April had removed that impediment. It was also contended that there was insufficient time from the date of my order of 21 April (due to the number of public holidays) for the National Director of Public Prosecutions to consider re-charging the Applicant, a matter that was outside the jurisdiction of the Respondents.

89. The effect is that the Applicant can only be detained under the provisions of the Refugees Act. In terms of section 29 of that Act, once the 30 day period has expired the detention of the Applicant must be reviewed by a High Court Judge.

90. The provision is unique. My research has revealed one other similar oversight provision. It is under section 37((6) (e) of the Constitution dealing with detentions under a declaration of a state of emergency.

91. It is evident that in discharging its functions a court seized with an application where detention has gone beyond the 30 days cannot stand idly by and await an application to be launched. The provisions of the Act, however inelegant and even though it is difficult to appreciate the nature of the proceedings envisaged (save that it presupposes that the State will initiate them in time) are nonetheless couched in imperative language and require a review before a High Court. Effect must be given to the legislation in order to achieve its objective and in a manner that has due regard to the instruments referred to in section 6(1) of the Refugees Act and the provisions of sections 12(1)(a) and (b), read with 35(10(d) and (e) where applicable, and section 39(1) of the Constitution to which I have already referred.

92. I have had regard to the recent case of *Diouf v Napolitano*, which appears at present only to bear the case reference 09-56774. It is a decision of the United States Court of Appeals for the Ninth Circuit delivered on 7 March 2011. The Court of Appeals found that the legislation did not expressly cover the situation before it where an individual was facing a prolonged detention under the immigration laws of the United States. The facts are set out at p3156 to 3157 of the report and may be regarded as not dissimilar insofar as it concerns the competing interests of the advisability of continued detention pending an appeal in certain circumstances on the one hand and the liberty of the individual on the other.

93. The Ninth Circuit Court of Appeals held that the detainee was entitled to be released on bond unless the government established that he was a flight risk or a danger to the community.

94. I am satisfied that a court is obliged to give content to section 29. This is because the initial period of 30 days expired at a time when this matter was before it and, even though the 30 days had not expired when the application was brought or argued, the court must discharge its judicial functions having due regard to the express wording of section 29. I turn section 29 must be considered in light of the constitutional obligations entrusted to a court under the Constitution and to which I have already referred). Section 29 in its terms provides for the considerations that must be taken into account if the individual is to be detained further.

95. I only indicated yesterday to counsel that I would be applying the review provisions of section 29 and asked if they were agreeable to dates for filing affidavits. Dates have been agreed upon. I believe that the process should as far as possible remain within the parameters of the ordinary rules of a motion court. If there is a need to hear oral evidence then that can be considered on the day of the hearing.

96. In order to avoid undue prejudice consideration needs to be taken of when the further period of 30 days is to commence. For this reason I have included that aspect in the order as it may require an interpretation of the section itself.

COSTS

97. The Applicant obtained no response from the Respondents, even in regard to the demand that the Applicant not be deported and even after the condonation application had been launched. Furthermore the Applicant has been successful in obtaining judicial scrutiny of his continued detention.

ORDER OF 11 MAY 2011

98. I make the following order:

1. The detention of the Applicant is to be reviewed under the provisions of section 29(1) of the Refugees Act 130 of 1998 by a judge of the South Gauteng High Court designated by the Judge President.
2. By no later than Monday 16 May 2011 at 10 am the First and Second Respondents are to deliver an affidavit setting out the grounds if any upon which the detention of the Applicant for a further period of 30 days is reasonable and justifiable and why the commencement of the 30 day period should not be reckoned from 3 May 2011
3. By no later than Thursday 19 May 2011 at 12 noon the Applicant is to deliver any affidavit in answer to the Respondents affidavit
4. By no later than Friday 20 May 2011 at 12 noon the Respondents are to file any affidavit in reply.

5. The First and Second Respondents are to pay all costs to date on the party and party scale;

_____

DATES OF HEARING (only those before SPILG, J): 18 March, 22 March, 21 April, 3 May and 11 May 2011.

LEGAL REPRESENTATIVES:

FOR APPLICANT: Adv I DE VOS
LAWYERS FOR HUMAN RIGHTS
JOHANNESBURG LAW CLINIC

FOR 1st ands 2nd RESPONDENTS: Adv N MANAKA
STATE ATTORNEY, JOHANNESBURG