THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT)

Case no: 26044/11

In the matter between:

MUSENA NICOLE DEKOBA	Applicant
and	
THE DIRECTOR-GENERAL	
THE DEPARTMENT OF HOME AFFAIRS	First Respondent
THE MINISTER OF HOME AFFIARS	Second Respondent
LINDELANI DETENTION CENTRE	
HEAD OF CENTRE	Third Respondent

JUDGMENT delivered this 22nd day of October 2012

NDITA ; J

[1] The applicant is an adult female citizen of the Democratic Republic of Congo. According to the founding papers, she fled from the DRC due to

persecution by reason of her mother's affiliation to that country's opposition political party, as well the fact that she had been shot by the military police. She entered the Republic of South Africa in 2004. Shortly after her arrival in South Africa, the applicant applied for refugee status and whilst awaiting the outcome of her application she was provided with an asylum seeker temporary permit in terms of s 22 of the Refugees Act 130 of 1998 ("RA"). After a lapse of two years, she was in July 2006 advised by the Department of Home Affairs that her application was rejected and that she could appeal against the finding to the Refuge Board. She duly filed her notice of appeal. The date of the appeal hearing was the 17th February 2009 at the Nyanga Refugee Centre, Cape Town. However, the application was not heard on that day, instead, her asylum seeker permit was extended for a further three months. Subsequent to the first extension, she was granted further extensions until 2011. Her last permit was valid until 15 October 2011. On 14 October 2011, she was advised that her appeal to the Appeal Board had failed because she did not attend the hearing. On the same day, she was arrested and detained. According to the respondents, the applicant's detention was justified under s 34 (1) of the Immigration Act 13 of 2002 ("IA") which provides that:

34 Deportation and detention of illegal foreigners

(1) Without the need for a warrant, an immigration officer may arrestan illegal foreigner or cause him or her to be arrested, and shall, irrespective of whether such a 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 or her to be deported and may, pending his deportation, detain him or her or cause him or her to be detained in a manner and at a place determined by the Director-General..."

[3] In an attempt to secure her release, the applicant's husband, Mr John Kalemba-Tshabangu averred that he accepted the advice of the Immigration Inspectorate that he must purchase an airline ticket for her to the DRC and provide proof of such purchase. On production of the airline ticket as well as the applicant's passport, and after the signing of the Notice of Departure by the applicant, she was released from custody on 2 November 2011with a directive to leave the country on 12 November 2011. It is common cause on these papers that the applicant has a four year old child.

[4] The applicant did not leave the country on the given day. With the assistance of her legal representative, she on 10 November 2011 made representations in terms of s 8 (6) of the IA wherein she indicated that she was exercising her rights to appeal the decision of the Director-General. The section provides that:

"An applicant aggrieved by the 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 for the review or appeal of that decision."

But on 15 November 2011, she was arrested and taken to the Lindela Detention Centre in Krugersdorp. On 16 November 2011 the applicant launched an urgent application in this court for an order interdicting the respondents from deporting her. Prior to the hearing of the application, the first respondent had in an email, made an undertaking to the effect that the applicant would not be deported pending the outcome of her representations. By agreement between the parties, the court issued the following order:

"1. The Respondents undertake not to deport the Applicant pending the decision on her representations in terms of s 8 of the Immigration Act 13 of 2002.

2. Shiloh Kelemba-Tshibangu, the four year old child of the Applicant will be reunited with the Applicant as soon as the Respondents have made the relevant and lawful arrangements for such reunion. In this regard, the Respondent will transport the child together with John-Peter Kalemba-Tshibangu, his father to the said safeguard."

The above order was clearly made in the light of the provisions of s 21(4) of the RA which provide that:

"Notwithstanding any law to the contrary no proceedings may be instituted or continue against any person in respect of his or her unlawful entry or presence within the Republic if 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."

[5] At the time of the hearing of this matter, the applicant's representations had still not been considered. The matter was postponed to the semi-urgent roll, hence this application, which was heard on 7 August 2012.

[6] As earlier indicated, the applicant was released shortly after the above order was issued. The order she now seeks is to the following effect:

"The First and Second Respondent be directed to re-issue the Applicant with an asylum seeker permit in accordance with s 22 of the Refugees Act 130 of 1998 which permit shall remain valid until a decision has been made on the Applicant's application for asylum and, where applicable, the Applicant has had an opportunity to

exhaust her rights of appeal and review in terms of the Refugees' Act and the Promotion of Administrative Justice Act 3 of 2000.

[7] Relying on the judgment of the Supreme Court of Appeal in *Arse v Minister of Home Affairs* [2010] 3 All SA 261 SCA, Counsel for the applicant contended that a permit in terms of s 22 of the RA ought to be issued because the withdrawal of the applicants permit was premature given she had not yet exhausted her internal remedies and the consideration appeal was still pending.

[8] In the answering papers the respondents submitted that because the applicant failed to attend her appeal hearing scheduled for 17 February 2009, the Appeal Board could not determine whether she met the requirements of s 3 (a) or 3 (b) of the RA, it dismissed the appeal and upheld the decision of the Refugee Status Determination Officer. Furthermore, the applicant undertook to voluntarily leave the country but failed to honour the undertaking, and in so doing misled the first respondent in order to secure her release. The respondent argued that the facts of the *Arse* decision are distinguishable from the present matter because in the former the proceedings under the RA had not yet been completed whereas in the latter the Refuge Board had already given a decision and the RA was therefore no longer applicable. For this reason the application falls to be determined in terms of the Immigration Act.

[9] This contention is flawed as Malan JA in *Arse* noted that:

"[19] The respondents' reliance on section 23 (2) of the Immigration Act to justify the appellant's detention is, as I have said misconceived. Section 23 (2) provides that

"[d]espite anything contained in any other law" the holder of any asylum transit permit becomes, on expiry of the permit an "illegal foreigner" liable to be dealt with under the Immigration Act. This contention however, does not account for r section 21(4) of the Refugees Act which provides that "[n]otwithstanding 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 in the country if that person has applied for asylum in terms of section 21(1) until a decision has been made on his or her application and that person has had an opportunity to exhaust his or her rights or review or appeal in terms of the Refugees Act which deals with the specific situation of refugees. In so far as they may be a conflict between the two provisions they should be reconciled. Where two enactments are not repugnant to each other , they should be construed as forming one system and as re-enforcing one another. In *Petz v Commercial Electrical Contractors*[1] it was said that:

> "Where different Acts of Parliament deal with the same or kindred subject-matter, they should, in a case of uncertainity or ambiguity, beconstrued in a manner so as to be consonant and inter-dependant, and the content of the one statutory provision may shed light upon the uncertainties of the other."

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. It follows that section 23(2) of the Immigration Act ceases to be of application when an asylum seeker permit is granted to an "illegal foreigner" and no proceedings may be instituted or continued against such a person in respect of jis 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."

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[1] 1990 (4) SA 196 (C) at 204H-I

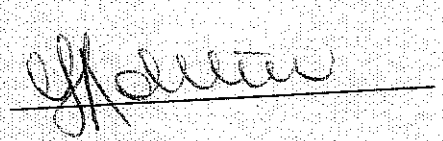
[10] For approximately seven years the applicant has had an asylum seeker permit which was continuously extended until the day of her arrest on 15 October 2011. In addition her appeal amply demonstrates that she seeks to challenge the decision of the Appeal Board. Furthermore, the respondents readily conceded that the appeal has not been determined. Whereas it must be accepted that a person whose asylum seeker permit has been withdrawn by the Department of Home Affairs, in terms of section 22(6), may be arrested and detained, the applicant in *casu* had lodged an appeal and is entitled to the benefit of the provisions of s 21 (4) of the RA. The order obtained by agreement between the parties is cold comfort when regard is had to the fact that her temporary sojourn in the country would be stifled by the necessity to explain that the appeal has not yet been finalised whenever she is asked to justify her presence in the country, whereas that would be easily mitigated by the production of a temporary asylum seeker permit. Whilst it must be acknowledged that the respondents have a duty to curb the influx of illegal foreigners into the country, the circumstances of this case demand that the applicant be issued with a temporary asylum seeker permit pending the determination of her representations.

[11] For all these reasons, the application ought to be granted. Since the applicant's asylum seeker permit has expired and has not been extended in terms of s 22(3) of the RA, the following order will issue:

1. The First and Second Respondent are hereby directed to re-issue the Applicant with an asylum seeker permit in accordance with s 22 of the

Refugees Act 130 of 1998 which permit shall remain valid until a decision has been made on the Applicant's application for asylum and, where applicable, or until the Applicant has had an opportunity to exhaust her rights of appeal and review in terms of the Refugees' Act and the Promotion of Administrative Justice Act 3 of 2000.

2. The respondents are ordered to pay costs of this application.



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