THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case no: 224/2013

Reportable

In the matter between:

THE DIRECTOR-GENERAL:	
THE DEPARTMENT OF HOME AFFAIRS	**First Appellant**
THE MINISTER OF HOME AFFAIRS	**Second Appellant**
LINDELA DETENTION CENTRE:	
THE HEAD OF CENTRE	**Third Appellant**
and	
MUSENA NICOLE DEKOBA	**Respondent**

Neutral citation: *Director-General: Home Affairs v Dekoba* (224/2013)[2014] ZASCA 71 (28 May 2014)

Coram: MTHIYANE DP, LEACH and WALLIS JJA, VAN ZYL and MATHOPO AJJA.

Heard: 22 May 2014

Delivered: 28 May 2014

Summary: Refugee – holder of an asylum seeker permit in terms of s 22(1) of Refugees Act 130 of 1998 – decision by Refugee Status Determination Officer in terms of s 24(3)(*c*) of Refugees Act taken on appeal to Refugee Appeal Board – refugee attending appeal hearing – her case not reached and permit extended – decision by Refugee Appeal Board to dispose of her appeal on the basis that she did not appear a

nullity – refugee retained her status as refugee and her entitlement to a temporary asylum seeker permit – subsequent arrest and deprivation of permit invalid – restoration of permit.

ORDER

On appeal from: Western Cape High Court (Ndita J sitting as court of first instance):

1 Paragraph 2 of the order of the court below is amended to read as follows:

‘That First Respondent is hereby directed, upon the Applicant presenting herself at the Refugee Reception Office in Cape Town within 30 days of the date of this order being served upon her, to restore to the Applicant her asylum seeker permit in accordance with s 22 of the Refugees Act 130 of 1998, which permit shall remain valid until the hearing and final determination of her appeal to the Refugee Appeal Board against the decision by the Refugee Status Determination Officer rejecting her application for asylum and the final determination of any further appeal or review of the decision by the Refugee Appeal Board, whether under the Refugees Act or the Promotion of Administrative Justice Act 3 of 2000.’

2 The appeal is otherwise dismissed and the First and Second Appellants are directed to pay the travel and accommodation costs of and any out of pocket expenses incurred by the *amici curiae*, such expenses to include those incurred in respect of the attendance of three counsel.

JUDGMENT

Wallis JA (Mthiyane DP, Leach JA and Van Zyl and Mathopo AJJA concurring)

[1] Ms Dekoba, the respondent, is a Congolese national who, in either 2004 or 2006 (the date is uncertain although it is probably the former rather than the latter) came to South Africa from the Democratic Republic of Congo (DRC) as a refugee, seeking asylum. Whilst here she married another Congolese asylum seeker, like her from Lubumbashi, and bore a son. Her residence in this country was lawful in terms of an asylum seeker's permit issued in terms of s 22 of the Refugees Act 130 of 1998 (the Refugees Act). In circumstances that will be described, that permit was withdrawn and she was arrested and treated as an illegal immigrant to be deported in terms of the Immigration Act 13 of 2002 (the Immigration Act). Her deportation was stayed as a result of an urgent application to the Western Cape High Court and an agreement between the parties in those proceedings. She was subsequently released from detention as a result of the institution of the application leading to these proceedings. The issue in the appeal is whether she is entitled to have a temporary asylum seeker's permit issued to her, or perhaps more accurately restored to her. In the high court Ndita J held that she was. This appeal is with her leave.

[2] Ms Dekoba's attorneys have withdrawn and there was initially a prospect of the appeal being conducted without the benefit of submissions on her behalf. At the request of the court, Mr Anton Katz SC of the Cape Bar stepped into the breach and agreed to appear on her

behalf as *amicus curiae*, which he has done together with Mr Simonsz and Ms Bizony. We are grateful to them for their assistance and the detailed and helpful submissions they made to the court.

[3] As already noted it is unclear exactly when Ms Dekoba came to this country, but on 26 June 2006 she was interviewed by a Refugee Reception Officer in terms of s 21(2)(*c*) of the Refugees Act. Thereafter a Refugee Status Determination Officer rejected her application for asylum. The reasons for this do not emerge from the record, although, in view of the course that the matter followed thereafter, it seems likely that the decision was that the application was unfounded.[1] She appealed against this decision to the Refugee Appeal Board (the Board) established in terms of ss 12 to 14 of the Refugees Act and in the meantime her permit was extended. This case arises from the manner in which the Board dealt with her appeal. Ms Dekoba contends that she remains an asylum-seeker entitled to the restoration of her permit and the protection of the Refugees Act, whereas the first appellant, the Director General: Home Affairs (the D-G), maintains that she has lost that status and become an illegal immigrant and is subject to deportation if representations made on her behalf in terms of the Immigration Act are unsuccessful.

[4] According to Ms Dekoba the course of events in regard to the appeal was the following. On 22 January 2009 she received a notice saying that her appeal would be heard by the Board on 17 February 2009 at a place cryptically described in the notice as 'Refugee Reception'. At that time the refugee reception office in Cape Town was situated in

[1] Section 24(3)(*c*) of the Refugees Act.

Airport Industria,[2] which is close to Nyanga and in the papers is referred to as the Nyanga Refugee Centre. She went there on 17 February 2009 together with her husband. She said that an official told them to go instead to the offices of the Department of Home Affairs in Barrack Street, Cape Town, which they did. There they waited all day in a queue but, along with a number of others waiting there for the same purpose, Ms Dekoba was not called in for her appeal. At the end of the day the waiting asylum-seekers were told that their appeals would be dealt with on a later date and in the meantime their permits were extended for three months and stamped to reflect this. At regular intervals of either three or six months thereafter she returned to the refugee reception office and her permit was further extended. This continued for more than two and a half years after the abortive appeal.

[5] Continuing Ms Dekoba's narrative of events, on 14 October 2011 she again returned to the refugee reception office, which by this stage had been moved to Maitland, in order to have her permit further extended. It was due to expire the following day. Instead the permit was confiscated and she was arrested as an illegal immigrant. At the same time she was served with a document reflecting that her appeal had been dismissed on 4 May 2009 in consequence of her non-appearance at the appeal hearing. She was initially detained at Maitland Police Station and thereafter at Pollsmoor Prison. She was released on 2 November 2011 after being given and signing a notice of departure. She did not leave by the stipulated date of 12 November 2011, as by that date she had lodged representations to stay in this country in terms of s 8 of the Immigration Act. Consequently she was re-arrested on 15 November 2011 and taken

[2] *Intercape Ferreira Mainliner (Pty) Ltd and Others v Minister of Home Affairs and Others* 2010 (5) SA 367 (WCC)

to Lindela Detention Centre in Krugersdorp. That resulted in an urgent application being launched the following day in which a consent order was made that she would not be deported pending the outcome of her representations. It also provided for her to be removed from the detention centre to a 'safe house' and for her to be reunited with her son. Whilst there, both she and her son fell ill and there were problems with the quality of the food provided to them. The present application was launched, as a matter of urgency, on 23 December 2011. An agreement was then reached that Ms Dekoba would be released pending the determination of the application.

[6] The facts as set out by and on behalf of Ms Dekoba[3] were not seriously disputed. The deponent to the answering affidavit on behalf of the appellants one Newton John Booysen, a Chief Control Immigration Officer in the department of Home Affairs in Maitland, Cape Town, had no personal dealings with or knowledge of her case. He repeatedly said that he had no knowledge of the facts as set out by or on behalf of Ms Dekoba, but then denied them. That was improper, as he advanced no facts justifying his denials. There was no appreciation on his part that a deponent, who denies the facts deposed to on oath by witnesses for the other party, accuses those witnesses of lying and lying on oath is a serious criminal offence. One expects greater care on the part of a senior government official when deposing to an affidavit. As it is these denials can be disregarded.

[7] The case for the appellants hinged around the decision by the Board reflected in the document handed to Ms Dekoba on the day of her

[3] The founding affidavit was deposed to by her husband and, after her release, she deposed to an affidavit confirming its correctness.

arrest. Based on its contents Mr Booysen contended that there was an appeal hearing that Ms Dekoba did not attend, notwithstanding having been given notice to do so. As a result the appeal was disposed of in her absence. The process of dealing with her application for asylum was thereby completed and her continued right to an asylum seeker's permit had terminated. If she wished to remain in South Africa thereafter her only course of action was by way of representations to the D-G in terms of s 8 of the Immigration Act. Those representations had been made and were under consideration. In the meantime the D-G agreed not to deport her until the final decision has been made in respect of those representations. A curious feature of the case is that, notwithstanding the fact that two and a half years have elapsed since those representations were lodged with the D-G, he has not as yet made any decision on them.

[8] The immediate problem with this argument, crucial to the outcome of this appeal, is that it depends entirely upon Ms Dekoba's appeal having been disposed of by the Board. But that was inconsistent with her evidence. If that evidence was truthful then she had not had an appeal at all. As regards its truth there was no direct evidence tendered to rebut it. Mr Booysen complained that her factual allegations were 'extremely vague' but there was no justification for that complaint. The immediate and obvious question was whether the Board had conducted its hearings on 17 February 2009 at the Nyanga Refugee Centre or at the Barrack Street offices of the Department of Home Affairs. The person to deal with that was the Board member who had allegedly been responsible for conducting this appeal, a Mr Damstra. But no affidavit from him was forthcoming. One would have expected him to be able to produce a diary or other record of his activities that day and to explain what had been done in relation to Ms Dekoba's appeal. He could also have explained

the steps taken to ascertain whether Ms Dekoba was present and whether, on her alleged non-appearance, enquiries were made of the officials and time afforded to her against the possibility that she had been delayed or encountered some unexpected problem. The need for that in the circumstances that prevailed at the Nyanga Refugee Centre, as described below, was apparent. Instead the appellants contented themselves with an affidavit from someone who had no personal knowledge of what had happened on that day.

[9] It will be recalled that Ms Dekoba said that she and her husband initially went to the Nyanga Refugee Centre on 17 February 2009 and were directed to go to the Department's offices in central Cape Town. Mr Booysen accepted that the venue for hearing appeals does change from time to time after notices of appeal have been issued, but said that a venue would not change on the day of hearing, nor would an appellant be informed of a change of venue on the day of an appeal. One wonders how he could be so categorical about this point. The material available about the situation at the Nyanga Refugee Centre suggests that circumstances there were such that the need to move appeals to more acceptable premises might easily have arisen. Those circumstances and the situation in dealing with refugees in Cape Town have been described in several judgments of the Western Cape High Court and this Court.[4]

[10] In *Intercape Ferreira*[5] Rogers AJ referred to a period in January and February 2008 when asylum seekers and applicants for permits were bussed from the refugee reception centre, then situated in Customs House

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[4] *Kiliko and Others v Minister of Home Affairs and Others* 2006 (4) SA 114 (C); *Intercape Ferreira, supra; 410 Voortrekker Road Property Holdings CC v Minister of Home Affairs and Others* [2010] 4 All SA 414 (WCC); *Minister of Home Affairs and Others v Scalabrini Centre and Others* 2013 (6) SA 421 (SCA).

[5] Supra fn 2, paras 30 -32

on the Foreshore to the Department's Barrack Street offices. That judgment paints a stark picture of the situation in 2008 and 2009 at the Nyanga Refugee Centre in the Airport Industria premises. It is one of massive over-crowding; inadequate capacity to deal with the numbers of asylum-seekers (some 600 per day on average); noise, filth and crime; lack of ablution and sanitation facilities; roads blocked by the comings and goings of taxis and cars, police vehicles and ambulances; extensive illegal street trading; vehicles and crowds jostling for space on roads and pavements; and regular outbreaks of crowd violence generating the need for police intervention, sometimes extreme. These conditions led Rogers AJ to interdict the Department from continuing to operate the refugee reception centre at the Airport Industria premises.

[11] These circumstances could have contributed to the situation to which Ms Dekoba and her husband testified, that the appeal hearing was redirected to Barrack Street. However, it is unnecessary to speculate further in that regard because there is one feature of their evidence that convincingly demonstrates that their version must be truthful. It is their evidence that on 17 February 2009, at Barrack Street, and on a number of occasions thereafter prior to 14 October 2011, at either Nyanga Refugee Centre or Maitland, her permit was renewed. That would mean that on a minimum of six and a maximum of 11 occasions, depending on whether the renewals were for three or six month periods, she attended on the Department's officials and they renewed her permit without demur. If she was not telling the truth about this then all that Mr Booysen needed to do in order to demonstrate her dishonesty was to produce the confiscated permit. Far from doing that he admitted the renewals of the permit.

[12] That admission establishes that Ms Dekoba indeed went to Barrack Street on 17 February 2009. There was absolutely no reason for her to have done this unless she was told to do so by the Department's officials. She knew the Nyanga Refugee Centre and, notwithstanding the cryptic terms of the notice of appeal, knew that she had to report there for her appeal hearing. Her record of regularly renewing her permit at the appropriate place shows that she knew where she had to go in order to deal with the Department in relation to her asylum application and went to the correct place whenever necessary. It is inconceivable that on this day she would have gone to the wrong place for her appeal hearing. It is even more inconceivable that if she had done so she would have been permitted to queue there for the whole day and at the end of it have had her permit renewed. After all the Barrack Street offices were not the place that dealt with permit renewals.

[13] In those circumstances it is plain that Ms Dekoba did not have the appeal that she was entitled to. The purported disposition of the appeal on 4 May 2009 by Mr Damstra was void, because it was based on the proposition that she had not attended for her appeal hearing. That was not the case. How Mr Damstra came to produce what purported to be a record of the appeal and a decision is unexplained. But it matters not. Appellant's counsel rightly accepted that if Ms Dekoba did attend her appeal, but was not called in and the appeal was disposed of on the basis that she was absent and without hearing her, the purported decision could not be effective to dispose of the appeal and it remained pending.

[14] That conclusion disposes of the contention that the process under the Refugees Act was complete after the Board purported to decide the appeal. It was not. As it was incomplete, Ms Dekoba remained an

applicant for asylum and, in terms of the decisions of this Court in relation to a number of similar cases,[6] she was an asylum seeker and entitled to an asylum seeker's permit. She did in fact have one and, as no hearing of her appeal had occurred prior to her attending at the Refugee Reception Office in Maitland on 14 October 2011, she was entitled to have her permit extended until arrangements could be made for her appeal. Her arrest and the removal of her permit were entirely unwarranted as was her subsequent treatment.

[15] The proper order in those circumstances was one restoring the status quo as it existed on 14 October 2011. On that date Ms Dekoba was an asylum seeker in possession of an asylum seeker's permit and awaiting an appeal against the decision by the Refugee Status Determination Officer in relation to her application for asylum. It was not appropriate for the court below to order that she be re-issued with a permit, as she should never have been deprived of one. The proper order, albeit that its effect would be similar, was that her existing permit be restored to her and to order that such permit would remain valid while the appeal process was completed and, depending upon its outcome, any further proceedings were taken by way of appeal or review, either under the Refugees Act or in terms of PAJA.[7] Counsel were agreed that in the event of our concluding that Ms Dekoba had been denied an appeal the order of the court below should be amended to reflect this.

[16] I turn then to the issue of costs. Counsel appeared at the request of the Court on behalf of Ms Dekoba. Their contribution was extremely helpful. Mr Katz and Ms Bizony's expenses were met by the Cape Bar's

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[6] *Arse v Minister of Home Affairs* 2012 (4) SA 544 (SCA); *Bula and Others v Minister of Home Affairs and Others* 2012 (4) SA 560 (SCA) and *Ersumo v Minister of Home Affairs* 2012 (4) SA 581 (SCA).
[7] The Promotion of Administrative Justice Act 3 of 2000.

pro bono fund. Mr Simonsz has paid his own expenses. In our view neither the Cape Bar nor Mr Simonsz should be out of pocket as a result of counsel assisting the court. It is appropriate in those circumstances to order the unsuccessful appellants to bear the travelling and accommodation costs and any out of pocket expenses of the three counsel who appeared as *amici curiae*.[8]

[17] Before ending this judgment it is appropriate to comment briefly on the course of events in this case. First Ms Dekoba was arrested as an illegal immigrant at a time when she was in possession of a valid asylum seeker's permit that still had a day to run before its expiry. Second, she was arrested without any investigation of the circumstances arising from the fact that her permit had been repeatedly extended from 17 February 2009 to 15 October 2011, when the decision by the Board purported to have been given on 4 May 2009. That cried out for investigation, but none was undertaken. Third, when her detention and the attempts to deport her were challenged there was no attempt by the D-G and the officials of the Department of Home Affairs to place the full facts before the court through the officials responsible for these events. For example, one D D Gcuze signed the warrant for her detention, but we have no affidavit from him or her explaining why it was suddenly decided to implement the purported decision by the Board. Even had that decision been valid at the time it was taken, the lengthy delay in implementing it meant that the situation cried out for a further investigation of Ms Dekoba's circumstances and the appropriateness of deporting her. That could readily have been done without detaining her. After all, the Department was not dealing with someone who had been seeking to

[8] Such an order was made in *Oos-Randse Administrasieraad v Rikhoto* 1983 (3) SA 595 (A) at 610 and in *Paola v Jeeva NO* 2004 (1) SA 396 (SCA) para 27.

evade their scrutiny, but with someone who had been co-operating with it.

[18] That brings me to the final point. Once it became apparent that Ms Dekoba claimed not to have been given an appeal hearing, that claim should have been fully investigated by the Department. It was apparent from the purported decision by the Board that she had not been heard on her appeal. Why then did the Department not immediately make arrangements for her to have the appeal and ensure that she would be present and appropriately assisted (her grasp of English according to the affidavits is extremely limited and the *lingua franca* of the DRC is French)? Had they done so instead of claiming that her rights had been exhausted there would have been no need for this litigation and Ms Dekoba's refugee status would long since have been resolved. Instead, over five years after her appeal was due to be heard, like a game of snakes and ladders, she finds herself back where she was on 17 February 2009, awaiting a hearing of her appeal. In the meantime her son is now seven years old and presumably should have started his school career. We do not know the fate of her husband's application for asylum or their present circumstances. Indeed we are uncertain of her whereabouts or when or how she will come to learn of the decision by this Court. All that could easily have been avoided had the Department's officials taken a practical and sensible view of matters instead of engaging in costly and, as it turns out, fruitless litigation. This is not what we are entitled to expect from our public servants.

[19] In the result I make the following order:

1 Paragraph 2 of the order of the court below is amended to read as follows:

'That First Respondent is hereby directed, upon the Applicant presenting herself at the Refugee Reception Office in Cape Town within 30 days of the date of this order being served upon her, to restore to the Applicant her asylum seeker permit in accordance with s 22 of the Refugees Act 130 of 1998, which permit shall remain valid until the hearing and final determination of her appeal to the Refugee Appeal Board against the decision by the Refugee Status Determination Officer rejecting her application for asylum and the final determination of any further appeal or review of the decision by the Refugee Appeal Board, whether under the Refugees Act or the Promotion of Administrative Justice Act 3 of 2000.'

2 The appeal is otherwise dismissed and the First and Second Appellants are directed to pay the travel and accommodation costs of and any out of pocket expenses incurred by the *amici curiae*, such expenses to include those incurred in respect of the attendance of three counsel.

M J D WALLIS
JUDGE OF APPEAL

Appearances

For appellant: E A De Villiers-Jansen

Instructed by:

State Attorney

Cape Town and Bloemfontein

For respondent: Anton Katz SC (with him David Simonsz and Robin Bizony) as *amici curiae*.