

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO:
40516/2021

- (1) REPORTABLE:
(2) OF INTEREST TO OTHER JUDGES:
(3) REVISED.

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DATE

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SIGNATURE

In the matter between:

AZIWOH EMMANUEL ASANBENG

APPLICANT

And

THE MINISTER OF HOME AFFAIRS

1ST RESPONDENT

THE DIRECTOR GENERAL, DEPT OF HOME AFFAIRS

2ND RESPONDENT

THE HEAD OF IMMIGRATION, ORTIA OFFICE

3RD RESPONDENT

THE DEPARTMENT OF JUSTICE & CORRECTIONAL SERVICES

4TH RESPONDENT

**THE CHIEF MAGISTRATE OF THE DISTRICT COURT
KEMPTON PARK**

5TH RESPONDENT

**THE HEAD OF THE NATIONAL PROSECUTING
AUTHORITY**

6TH RESPONDENT

THE SENIOR PUBLIC PROSECUTOR

7TH RESPONDENT

KEMPTON PARK MAGISTRATE COURT

8TH RESPONDENT

JUDGMENT

MAKUME J,

INTRODUCTION

[1] The Applicant brings this urgent application seeking to declare his continued detention at Modderbee Prison unlawful and that he be forthwith released to enable him to approach the relevant authorities where he intends to apply for asylum in terms of the Refugees Act 130 of 1998 and that pending his application, the first and second Respondents be interdicted from deporting him.

THE APPLICANT

[2] The Applicant is a 27years old Cameroonian. He states that he fled Cameroon on the 28th December 2020 as a result of political persecution and in fear of his life. He states that he is a member of a separatist group in Cameroon known as the Ambazonia Liberation Force which seeks to establish an independent state of Ambazon and secede from the Republic of Cameroon.

[3] He goes on to say that as young activist propagating the separatist movement he became a target of the security arm of the government of Cameroon. He says that because of his and other actions within his separatist movements there are now constant attacks by the army as a result every young man and woman above the age of 19 is considered a threat to the Republic of Cameroon. He as an internet blogger has published incidents of oppression and atrocities committed by the Cameroon army against his separatist movement member.

[4] As a result of the fear and being targeted by the Cameroonian army he decided to flee his country. He arrived in the Republic of South Africa on the 29th December 2020 through the OR Tambo International Airport. His arrival was without problem so he says because he had been granted a study visa by the South African High Commission in Yaounde Cameroon. He attached a

copy of study permit as exhibit 2. The document itself indicates that it was issued to him on the 16th October 2020 and its expiry date is the 15th October 2023. The condition endorsed on that permit reads that he is “to take up study with Falcon Business College.”

- [5] He then in paragraph 45 of his affidavit says that when he arrived in South African all the Refugee Reception Office were closed due to the country wide covid lockdown hence he is still today without a valid document to remain in the country. This at first would appear strange and contradictory as he had a “valid study visa” which is only expiring in the year 2023. However, as it would appear late in this judgment he knew that he entered this country using falsified documents and this is what led to his arrest and present detention.
- [6] Sometime between the month of May and July he was identified by a Military attache deployed at the Cameroon Embassy in Pretoria. He was taken to the embassy where he was locked up for a week whilst being questioned about his activities. He promised to retract all the separatist movement issues that he had posted on internet.
- [7] He was then instructed by the Embassy that he is being sent back home to Cameroon and that when he arrives there he must go live on National Television and tell the Cameroon that he has been used by certain overseas agencies to create chaos in Cameroon.
- [8] The Cameroon Embassy then purchased for him a one way ticket entitling him to board on the 5th July 2021 flight WB 103 at 02h10 from Johannesburg to Kigali the capital of Rwanda.
- [9] He was taken from the Embassy to the OR Tambo Airport by his capturers. It was when his passport was scanned before he could be allowed entry to the flight that he was told that his visa was fraudulent. He was then arrested and handed over to the South African Police.

- [10] He appeared in the Kempton Park Magistrate Court on the 6th July 2021 under case number D1182/2021. He is being charged with the offence of contravention of Section 49(1)(a) of the Immigration Act 13 of 2002. The charge sheet alleges that his Cameroon passport has been endorsed with a fraudulent study visa.
- [11] On his first appearance in the Magistrate Court he was represented by one Adv Khoza who informed the court that his instructions are that the Applicant would like to pay an admission of guilt. The matter was then postponed to the following day being the 7th July 2021 for that purpose. Advocate Khoza did not appear on the 7th as a result the case was once more postponed to the 8th July then to the 9th July 2021, the 22nd July, the 28th July, the 3rd August, 12th August and to the 3rd September 2021.
- [12] During all the appearances specified above the Applicant's legal representative indicated that the Applicant wishes to admit guilt and pay a fine.
- [13] On the 12th August 2021 the Applicant was represented by Mr Lebelo his attorney of record in this application who postponed the matter to the 3rd September 2021 and then took instructions to bring this application seeking his release. It is common cause that the Applicant is still in custody at Modderbee Prison.
- [13] He has not pursued an application for bail and his matter before that court I am told by counsel has now been postponed to the 13th September 2021.
- [14] In this application he says that he is being held unlawfully and that he requires to be released to enable him to apply for asylum.
- [15] In answer to the Applicant's averments the Respondent says that it was only after he was told that his travel documents especially the study permit were fraudulent did he remembered that he is an asylum seeker.

- [16] When the parties appear before me on the 3rd September 2021 and after having read the answering affidavit it became clear that the Applicant had held back information as well as circumstances relating to his arrest when he appeared in the Magistrate Court. It was only after the court had asked that more details be furnished about his pending appearance in the Kempton Park Court that information surfaced when I have now detailed above.
- [17] It is clear that the Applicant has not been open to this court. He is held at Modderbee Prison because he has not been released on bail until his case of fraud should have been finalised. He is certainly not being held at Modderbee for purposes of deportation. There has been no pronouncement by the Magistrate Court or by the Immigration Department that he should be deported to Cameroon.
- [18] His detention at Modderbee is not unlawful he has committed fraud for which he was already indicated that he is going to plead guilty to and hopefully pay a fine.
- [19] The issue in this matter is whether in fact the Applicant is an asylum seeker or not. If he was an asylum seeker, he had an opportunity on his arrival on the 29th December 2020 to approach the immigration office at the port of entry being OR Tambo wherein the department could have in terms of Section 23 of the Immigration Act issued him with an asylum transit permit. He did not do that and entered the country using false documents.
- [20] There is further no proof that he even did attend school at Falcone Business College. He entered the country to do something except to attend school and never had any intention to apply for asylum.

- [21] When he is “kidnapped” by his fellow country man he does not tell them that he in fact is an asylum seeker. He stayed in that “detention” for one week but is unable to tell this court who the names are of the people who kidnapped him for seven days.
- [22] When he is finally released by his countrymen they tell him that he must go back home and yet they “purchase” for him a one-way ticket to Kigali in Rwanda which is not his home country. When I posed the question to Applicant’s counsel he speculated that Applicant was to get a connecting flight from Kigali to Cameroon. I am unable to accept that version.
- [23] The Applicant has been dishonest from the time he left Yaoundé with a false study permit well knowing that it is false he withheld information about his detention at Modderbee. He has failed to take this court into confidence.
- [24] It is trite law that the courts have a critical role to play in the protection of refugees when such a refugee seeks relief in terms of the Refugees Act. Where an asylum seeker is arrested and detained and the arrest cannot be justified in terms of the Refugees Act, it follows that such a person is entitled to the relief. The onus to justify the arrest and detention lies with the arrestor.
- [25] In this instance the Applicant is arrested for having entered the country on false documents and then charged with fraud. His arrest and detention is accordingly justified.
- [26] There has as yet been no decision about his status in the country as the Magistrate Court is still to hear the matter. If this court orders his release it will be interfering with the criminal prosecution still pending in the same court.

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

ORDER:

- i) The application is dismissed.
- ii) The Applicant is ordered to pay the costs of this application.

Dated at Johannesburg on this day of November 2021.

**M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Appearances:

DATE OF HEARING	:	31 AUGUST 2021
DATE OF JUDGMENT	:	NOVEMBER 2021
FOR APPLICANT	:	ADV MATLAPENG
INSTRUCTED BY	:	LEKA Z LEBELO ATTORNEYS
FOR RESPONDENT	:	ADV MAGANO
INSTRUCTED BY	:	STATE ATTORNEY