

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

(Inlexso Innovative Legal Services) fvs

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION HELD AT JOHANNESBURG

CASE NO: 51910/2021

DATE: 2021.12.07

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DELETE WHICHEVER IS NOT APPLICABLE (1) REPORTABLE: NO (2) OF INTEREST TO OTHER JUDGES: NO (3) REVISED

In the matter between

E L Applicant

and

MINISTER OF HOME AFFAIRS First respondent

DIRECTOR GENERAL: HOME AFFAIRS Second respondent

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J U D G M E N T

VICTOR, J: The applicant in this matter has brought an urgent application to be released from Lindela Holdings Facility forthwith and that he seeks that the respondents do not deport him, until his status under the Refugee Act 130 of 1998 as

amended by the Refugee Amendment Act 11 of 2017 has been lawful, lawfully and finally determine. He also seeks to remain in the Republic of South Africa legally for a period of 14 days alternatively five days after the refugee reception office open. He seeks a temporary asylum seekers permit, and a cost order.

A brief history of this matter is as follows: The applicant is an adult male from Nigeria. Currently detained in Lindela. The first respondent is the Minister of Home Affairs, cited in his official capacity and as an administrator who is also in
10 charge of the administration of the Refugee's Act and the Department of Home Affairs. The second respondent is the Director General of Department of Home Affairs, and he is cited herein his official capacity by virtue of the tasks that he has to oversee.

The applicant left his country under circumstances where his life was at risk. He relies on the international conventions to which South Africa is a signatory as well as the Constitutional Court case of *Ruta vs Minister of Home Affairs*, for him to be released from detention so that he can carry out
20 his asylum process.

The applicant arrived in the Republic of South Africa on 10 November 2019, through Oliver Tambo International airport. He was a member of the now Terror-fomenting Movement for the Emancipation of the Niger Delta, known as MEND. He has a real fear of persecution and also his life,

arising from his opposition to the use of violence, which in that location includes sabotage, guerrilla warfare and kidnapping of oil workers by MEND. MEND is a tool for championing the disenfranchised residents of the Niger Delta who receive very little benefit from the oil which comes out of their soil.

On his arrival in South Africa, he sought shelter from a number of people who were sympathetic to his cause which they acknowledged were trying to make a better life for the people of the Niger Delta, but without the use of violence. He did not divulge his personal details in a public document but the people who hosted him, advised him that one of the main leaders of MEND resides in South Africa and many of the group security operatives are visible and prominent in the country.

One of the prime areas where they find dissidents like himself is outside of Refugee reception offices. He therefore went underground. He stayed in Johannesburg and was advised that his chances of running into MEND's agents was very high in Johannesburg and he decided to relocate to Durban. He became increasingly uncomfortable with not having any documents to legalise his stay in South Africa. On 11 December 2019 he approached the Refugee reception office in Durban. He was turned back and advised to return the following year as it is December, and the gates were locked.

He returned on 6 January 2020, and he was then turned back for lack of travel documents. So, I do not know what that

means because presumably he would have entered South Africa on a passport. He says that he went back on several occasions in February 2020, but on each occasion there were extremely long queues, and he was sent home without anyone assisting him.

In March 2020 the refugee office closed down because of COVID and he could not therefore apply for asylum. He was arrested in Durban Central on 20 January 2021, for contravention of immigration laws. He tried to explain his
10 position but was not given an opportunity to fully describe his position. He was also not given an opportunity to make an application for asylum. Instead, they prosecuted him in terms of the Immigration Act.

He was finally detained at Lindela Repatriation Centre in September 2021 and he is of course vulnerable to being deported. He relies on Universal Declaration of Human Rights, Article 14, as well as the UNHCR Convention relating to the status of refugees, also the UNHCR protocol relating to the status of refugees of 1967 and the AOU Convention governing
20 specific aspects of refugee problems.

He urges the Court to take into account that he will, that his life will definitely be threatened should he go back to his home. He does not refer to an option to live in another part of Nigeria. It seems that his only option is then to go back to the place from which he fled.

He also relies on section 22 of the Refugees Act and the situation is now as such that he has already been taken to the refugee Status Determination Office (RSDO) and of course the decision was that his application was rejected.

The answering affidavit, as well as a report suggests that his application is not genuine, and it has no merits. In particular he was taken to the office and the decision is contained in a three page report. The report was drawn up by Mr Matotsi Monyagane, who asked him a number of questions
10 and the answers were completely contrary to the facts in the founding affidavit to which I have just referred.

One of the questions was: "Why did you leave your country?" Mr Monyagane reports that the applicant told him that he left Nigeria because he wanted to travel the world and he wanted to be far away from Nigeria. He applied for a passport in Nigeria and came to South Africa. He claims to be a barber by profession, and he wanted to open up his own barber shop in South Africa and he was staying with his brother, V N in Durban.

20 He also claimed not to be involved in politics and he also then told Mr Monyagane that nothing will happen to him if he is forced to go back to his country, but he would just like to stay in South Africa to open up his barber shop. Mr Monyagane then states in his report what the law is and he states that section 3 of the Act allows for certain persons to

apply for asylum and according to him the applicant does not fit into any of the categories.

He also refers to the burden of proof which is in the UNHCR handbook and quotes that it is a general link of principle that the burden of proof lies on the person submitting the claim and he also finds that the applicant did not discharge the burden of proof. He also states that there are no credibility concerns in the answers given to him. The reason for rejecting the application for asylum is described as
10 manifestly unfounded in terms of section 24(3)(b) read with section 1(xii) of the Refugee's Act.

That makes the following provision:

“Kindly take notice that as per the stipulations section 24(3)(b) of the Refugee's Act 130 of 1998 your application for asylum will be referred to a standing committee for refugee affairs to confirm or set aside the decision of the status determination officer in terms of section 25(3)(a) of the Act. You therefore must return to the asylum detention centre
20 upon the expiry of your section 22 visa to ascertain the status of your applicant for refugee status in South Africa.”

However, on the facts before me, it seems as if the applicant is still at Lindela and presumably they, Lindela will then take him to find out what the final ruling is. A form has

been completed, giving the details of the applicant. His address and the capital city of the area in Nigeria. There were no details of family members or a spouse and children so presumably there are no family members that the officer took into account when he made the assessment.

The applicant then signed this form, acknowledging receipt thereof. There is declaration by applicant that he understands the contents and the implications of the questionnaire and declares that the particulars given by him
10 are true and correct, and that he answered the questions freely and voluntarily. He understands that false information is punishable.

There is also a warrant for his placement under correctional supervision and that was on 13 August 2021 when he was arrested and kept at Durban Medium C. It also appears that he appeared at the Magistrate Court. This is from the document attached to the decision, presumably it is the record, and he was sentenced to 60 days of imprisonment.

There is also a notification of his deportation which he
20 received in Durban on 13 August 2021. The profile, therefore, as it exists, is that the applicant made out a very detailed case in his founding affidavit. It could have been a little more detailed but be that as it may, his interview, when he was taken to the refugee office in Pretoria comes up with a totally different answer.

I therefore asked the applicant's attorney, Mr Sibuye to please go to Lindela and find out what the correct version is. Mr Sibuye has deposed to an affidavit which detail the circumstances under which this changed version arises. I directed that interview to take place on 1 December, when the matter came before me once again and this is what Mr Sibuye said:

10 “He was not allowed to record the consultation because one cannot enter the Lindela Repatriation Centre with any recording device. The applicant informed him that he was transported to Pretoria to the Desmond Tutu Refugee Reception Centre for the purposes of submitting his asylum application. He advises that on the way to Pretoria the immigration officer told him that his transportation to Pretoria was merely a formality as his asylum application would be rejected on the spot. He cannot remember the name of that officer who took him to Pretoria. When he arrived in Pretoria he was informed by the
20 refugee status determination officer that he was a troublemaker and Nigerian citizens are well known for selling drugs and under no circumstances would he be released. He informed me that the first question that was posed to him: “Why did he come to South Africa?” He responded that he came to the

Republic to seek refuge from a notorious group called MEND which is a terror fermenting movement which seeks to persecute him. He repeated the submissions in his founding affidavit as to why he came to South Africa and that the RFDO officer chose to ignore his submissions. He also feels aggrieved by the conduct of the RFDO officer and will lodge a formal complaint when he has an opportunity to do so.”

10 In my view, in evaluating the evidence before me it is clear that his about-turn in his version does not appear to be genuine. He was interviewed in the absence of his attorney and the interview was not vide recorded. If the applicant indeed is fleeing from a dangerous organisation it would be implausible that at the reception office he would change his version which any reasonable person would realise that the officer interviewing him can only come to one conclusion and that would be to send him back to Nigeria.

20 The first and second respondents rely very heavily on this version. In fact it is their focus of their defence. They do not accept for one moment that he was fleeing from Nigeria because he took a long time to apply for refugee status. This is so even when coming to South Africa and even after his incarceration in Durban. The first and second respondents submit that the law upon which the applicant relies has

changed and because of the delay and the contradictions in his case he will not succeed .

They submit that the case of Ruta was concerned with the exclusionary provisions of section 41 of the Refugees Act. The respondents submit that the interplay between the Refugees Act and the Immigration Act does not allow for the immediate release of someone who is in custody. Moreover, the delay in question is unacceptable and the applicant, according to the respondents, has not set out any compelling reasons why he delayed in making an application for asylum and why he willingly contravened the regulations of the Immigration Act.

In my view the charade which the applicant has been taken through by the respondents in taking him to Pretoria to the RSDO office, in my view, is reprehensible in the circumstances. Any reasonable person assessing those two versions, knowing that the applicant is claiming to be desperate and fleeing persecution can only conclude that the only explanation is that the respondent have changed his version.

The matter does not end here because it is important that Mr Matotsi Monyagane's version and his actions in this matter, must be investigated by the National Prosecuting Authority and if so indicated he must then, the law must then take its course. I am of the view that the applicant, whilst he

is still incarcerated at Lindela Holding Facility, or Repatriation Facility, will not be able to attend to his asylum process in any meaningful way.

It is then indicated, in these circumstances, that he should be released, but on condition that he completes his processes and as I have indicated to Ms Ngobane, the applicant's counsel, there is now a decision, and it seems as if there is also an order in the Magistrate's Court in Durban that has found him guilty. So those two formalities will have to be
10 dealt with as I have set out in my judgment in

Accordingly I make the following order:

ORDER

The matter is urgent. It is declared that the detention of the applicant from 12 November 2021 up to the date in which he is released which is today, is unlawful. The first and second respondents are directed to release the applicant from detention at the Lindela Repatriation Facility forthwith.

The first and second respondents are directed to issue
20 the applicant with a temporary asylum seeker permit in accordance with section 22 of the Refugees Act, pending finalisation of this claim and also any other legal process that he may wish to institute in order to regularise his stay in the Republic of South Africa. These also include the his rights to review or appeal in terms of chapter 3 of the Refugee Act and

any other statute which his rights as a convicted person which he may be advised appeal or review.

The first and second respondents are to pay the costs of this application jointly and severally. The one paying the other to be absolved which costs shall include the revert costs of 9 November, 12 November and 1 November 2021.

The signatory to the RSDO decision dated 11 November 2021 completed by Mr Matotsi Monyagane is referred to the National Prosecuting Authority for investigation and
10 prosecution, if so indicated as to whether he lied about the facts given to him by the applicant and the contents of the report produced pursuant to his interview and which the respondents handed dot Court.

It is so ordered.

VICTOR, J

20 **JUDGE OF THE HIGH COURT**

DATE: 20 December 2021