



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

**CASE NO:
59319/2021**

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

Date: 18 November 2022

In the matter between:

NIYONKURU: ELIE

APPLICANT

and

THE MINISTER OF HOME AFFAIRS

FIRST RESPONDENT

THE DIRECTOR-GENERAL,

DEPARTMENT OF HOME AFFAIRS

SECOND RESPONDENT

JUDGEMENT

ALLY AJ

INTRODUCTION

[1] This application was heard at the same time with another application because of the reason that the facts were the same and the parties agreed thereto. I have, however, decided to give two judgements with the same effect for convenience and clarity.

[2] This application is a return day of rule *nisi* issued on 31 December 2021 by my brother Wright J.

[3] My understanding of Respondents' submissions made by Counsel was that the emphasis was based more on the law that pertained before opposition was registered and therefore the submissions dealt more with the issue of costs.

FACTUAL BACKGROUND

[4] The Applicant is a Burundi national and an asylum seeker in the Republic of South Africa.

[5] At the time of this application the interim order had ordered his release from detention pending the finalisation of this application and he was allowed to submit an asylum application to the Respondents for adjudication in terms of the prevailing laws of the Republic of South Africa.

[6] Furthermore the rule nisi also ordered that he is not to be deported pending the finalisation of this application.

[7] The Applicant indicated that he had not had the opportunity of applying for asylum and still desired to apply for asylum.

[8] The Applicant alleges that he falls within Section 21(2) of the Refugees Act¹ as interpreted by the Supreme Court of Appeal and approved in the case of **Ruta v Home Affairs**².

[9] The Respondents allege and submit that the Applicant was arrested on 13 November 2021 for contravening the Immigration Act³ as he was in the Republic of South Africa without any lawful documentation permitting him to be in the country. A warrant of detention was issued by a Magistrate authorising his detention.

[10] Furthermore, the Respondents allege that the Applicant was transferred to the Lindela Repatriation Centre for purposes of deportation.

¹ 130 of 1998

² 2018 CC

³

[11] In answer to Applicant's assertion that he is an asylum seeker and falls within the **Ruta** principles, the Respondent alleges that the **Ruta** judgement has been overtaken by the repeal of regulation 2 and the amendment of section 21 of the Refugees Act.

EVALUATION AND ANALYSIS

[12] Since the **Ruta** judgement⁴ and the Order issued by my brother Wright in this matter, the Constitutional Court⁵ has had the opportunity of reviewing the said **Ruta** judgement and the amendments to the Refugees Act.

[13] The most important pronouncement for the purpose of these proceedings and accepted by Counsel for the Respondents is that it does not matter when an asylum seeker arrives in the country but it is the date on which he or she evinces an intention to apply for asylum. The Applicant has evinced such an intention to apply for asylum.

[14] In accordance with the principle set out in **Desta Abore**⁶, it is clear that the Applicant falls within that principle and should be allowed to seek an asylum permit

⁴ supra

⁵ *Desta Abore v Min of Home Affairs & Another* 2021 CC

⁶ supra

in accordance with the prevailing laws and the rule *nisi* on that ground must be confirmed.

COSTS

[15] It is trite that the successful party is entitled to their costs unless extenuating circumstances pertain in which such principle should not be applied.

[16] The Respondents submit that at the time of entering opposition in this case, there was an amendment to the law which in their view overruled the **Ruta** principle and they thus justified in opposing the application and at the very least, each party should pay their own costs.

[17] Now that might be true, but that does not derogate from the trite principle that a successful party is entitled to costs. I see no reason in this particular case why this Court should deviate from the said principle.

[18] Accordingly the Applicant is entitled to his costs.

CONCLUSION

[19] For the reasons stated above, the rule *nisi* issued on 30 December 2021 falls to be confirmed.

[20] **Accordingly** an Order will issue in the following terms:

- a). The rule *nisi* issued on 30 December 2021 is hereby confirmed;
- b). The Respondents are ordered to pay the costs of this application as well as the costs reserved on 30 December 2021 jointly and severally, the one paying the other to be absolved.

G ALLY

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, JOHANNESBURG

Electronically submitted therefore unsigned

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 18 November 2022.

Date of virtual hearing: 14 March 2022

Date of judgment: 18 November 2022

Appearances:

Attorneys for the Applicant:

MALADZHI & SIBUYI ATTORNEYS

maladzhiandsibuyiatt@gmail.com

Counsel for the Applicant:

Adv. M. Ndubani

Attorneys for the Respondent:

STATE ATTORNEY, JOHANNESBURG

TMalape@justice.gov.za

Counsel for the Respondent:

Adv. Z. Mokatsane