



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

**CASE NO: 2023-097427,
2023-097292, 2023-097111,
2023-097076, 2023-100081,
and 2023-100526**

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

DATE

SIGNATURE

In the matter between:

DEGEFA SUGEBO LEMBORE

FIRST APPLICANT

TEKETEL TUMIRE HAJISO

SECOND APPLICANT

ADEN AHMED OSMAN

THIRD APPLICANT

ABI OSMAN YUSUF

FOURTH APPLICANT

TEMESGEN MATIWOS

FIFTH APPLICANT

THOMAS GODISO

SIXTH APPLICANT

and

MINISTER OF HOME AFFAIRS

FIRST RESPONDENT

DIRECTOR GENERAL: HOME AFFAIRS

SECOND RESPONDENT

**NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS**

THIRD RESPONDENT

**MINISTER OF JUSTICE AND CORRECTIONAL
SERVICES**

FOURTH RESPONDENT

**HEAD: BOKSBURG CORRECTIONAL SERVICE
CENTRE, BENONI**

FIFTH RESPONDENT

**HEAD: MODDERBEE CORRECTIONAL SERVICE
CENTRE, BENONI**

SIXTH RESPONDENT

Coram: Mlambo JP, Twala J and Collis J

Heard: 30 November 2023

Delivered: This Judgement was handed down electronically by circulation to the parties' legal representatives by email and by uploading to Caselines and release to SAFLII. The date and time for hand down is deemed to be 10:00 am on 8 February 2024.

Summary: *Immigration Act 13 of 2002 – section 49(1)(a) – lawfulness of detention of foreign national for illegal entry and stay in South Africa in contravention of Immigration Act 13 of 2002 – such detention is lawful and does not violate section 2 of the Refugees Act 130 of 1998 – the mere expression of an intention to apply for asylum does not trigger the protections in section 2 of the Refugees Act 130 of 1998 until good cause for the illegal entry and stay is shown – Refugees Act 130 of 1998 – section 21(1B) – requirement to show good cause for illegal entry and stay in South Africa is disjunctive to application for asylum – regulation 8(3) – requirement to show good cause for illegal entry into South Africa before being permitted to apply for asylum is consistent with Article 31 of the 1951 United Nations Convention Relating to the Status of Refugees – protection in section 2 of the Refugees Act 130 of 1998 begins when application for asylum has been made.*

Stare decisis – whether high court can deviate from Constitutional Court decision – Constitution Seventeenth Amendment Act 2012 – Constitutional Court - highest Court in all matters – decisions binding on all Courts – decision in Ashebo v Minister of Home Affairs has settled the law - binding authority.

ORDER

1. The application is dismissed.
2. The first, second, third and fourth respondents are directed, to the extent necessary, to take all reasonable steps, within 60 days from the date of this order, to afford the applicants an opportunity in terms of section 21(1B) of the Refugees Act 130 of 1998, read with regulation (8)(3) thereto, to show good cause, and to allow the whole process of any review or appeal, in the event where good cause is not established, to unfold until it is finally determined.
3. The first, second, third and fourth respondents are directed to approach the Magistrates Court, for the extension of time should the review or appeal process not be finalised within the 60-day period. This request should be accompanied by a report directed to the Magistrates Court, setting out what steps have been taken and why the processes have not been finalised within the 60-day period.
4. The applicants are ordered to pay the first to third respondents' costs for the amendment application.
5. The issue of costs in the main matter is postponed and will be dealt with after the parties have filed their representations on the issues mentioned in paragraphs 92 to 94.

JUDGMENT

MLAMBO, JP (Twala J and Collis J concurring)

Introduction

[1] The applicants in this matter are - Messrs Degefa Sugebo Lembore (Lembore), Teketel Tumire Hajiso (Hajiso), Temesgen Matiwas (Matiwas), Thomas Godiso (Godiso), Aden Ahmed Osman (Osman) and Abdi Osman Yusuf (Yusuf).

Lembore, Hajiso, Matiwas and Godiso are nationals of Ethiopia. Osman and Yusuf are Somali nationals. They are in detention at Modderbee and Boksburg Correctional Centres, respectively, having been arrested for allegedly entering and staying in this country in contravention of the Immigration Act.¹

[2] The first respondent is the Minister of Home Affairs, the Cabinet and National Executive member in charge of the Department of Home Affairs and specifically responsible for immigration and refugee matters in the Republic of South Africa. The second respondent is the Director-General responsible for the Department of Home Affairs and similarly responsible, under the first respondent, for immigration and asylum matters in the Republic of South Africa. The third respondent is the National Director of Public Prosecutions and is the head of the prosecuting authority in the Republic of South Africa. The fourth respondent is the Minister of Justice and Correctional Services, the Cabinet and National Executive member in charge of the Department of Justice and Correctional Services. The fifth and sixth respondents are the heads of the Boksburg and Modderbee Correctional Centres, who are responsible for the administration of the respective correctional centres.

[3] The applicants initiated this application on an urgent basis, seeking to interdict the respondents from detaining, prosecuting and deporting them until their status has been lawfully and finally determined in terms of the Refugees Act² as amended.

[4] They also sought declarators that their continuing detention is unlawful and that, in terms of section 2 of the Refugees Act, they are entitled to remain lawfully in the Republic of South Africa until their applications for refugee status are finally determined in terms of the same act. In addition, they also sought orders directing the Minister and Director-General of Home Affairs, that upon submission of their applications for asylum, these respondents must accept same and issue them with temporary asylum seeker permits in terms of section 22 of the Refugees Act, within 15 days, pending finalisation of their asylum seeker applications, including the exhaustion of their right of review or appeal in terms of chapter 3 of the Refugees Act and the Promotion of Administrative Justice Act.³

¹ 13 of 2002.

² 130 of 1998.

³ 3 of 2000.

Background

[5] Necessity dictates that, for reasons that will emerge later, the applicants' versions be set out fully. Lembore and Matiwos were arrested on 1 September 2023 in Germiston and Johannesburg respectively. Godiso and Hajiso were arrested on 2 June and 3 August 2023 respectively, in Daveyton. They say that while living in Tigray, Ethiopia, they were persecuted by the ruling party for their political and religious beliefs due to their mobilisation efforts as members of the Ethiopia People's Revolutionary Party, an opposition political party. They say Ethiopia's ruling party terrorised, persecuted, tortured and killed members of their political party, including their family members. This caused them to fear for their lives and led to their escape to seek refuge in any country.

[6] They left Ethiopia on different occasions, and passed through Kenya, Zambia, Malawi and Zimbabwe. They entered South Africa unlawfully through the Zimbabwe border. They say instead of entering through an official port of entry, they "jumped" the border because they were not in possession of passports and feared being arrested and returned to Ethiopia if they entered through an official port of entry. Having entered South Africa, they met their fellow countrymen and requested guidance regarding their desire to apply for asylum. They were advised to approach the Refugee Reception Office (RRO) which was, however, closed due to the Covid-19 pandemic. During this time, their countrymen refused to allow them to leave the premises they stayed in.

[7] They had no knowledge of the procedure to be followed when applying for asylum and as a result were unaware of both the old and new regulations promulgated in terms of the Refugees Act. Before they could apply for asylum, they were arrested, and tried in vain to explain to the arresting officers that they were asylum seekers and wanted to be given an opportunity to apply for asylum. This fell onto deaf ears and instead they were called economic migrants. There was no interpreter offered to them and they struggled to express themselves and failed to fully understand what was being said to them. Due to this, they signed papers without understanding their contents. They say that if they are deported, they faced the possibility of death in Ethiopia.

[8] Osman and Yusuf, the Somali nationals, also relate similar circumstances. They fled Somalia, as a result of bombing incidents carried out by the Al-Shabab and Al-Qaeda terrorist organisations. These bombing activities targeted buildings, telecommunication towers and were accompanied by the torture and killing of civilians. They do not remember the dates they escaped but used the same path as the Ethiopian nationals i.e. via Kenya, Zambia, Malawi and Zimbabwe, entering South Africa illegally. After entering South Africa, they attempted to visit the RRO but on each occasion they were turned away without assistance. They were arrested in Daveyton on 13 September 2023, and recount the same arrest experience as the Ethiopian applicants.

[9] According to the third respondent, the applicants were arrested for being in South Africa illegally, i.e. in contravention of sections 9(1)⁴ and 49(1)(a)⁵ of the Immigration Act. Consequently, they were charged with the offence of contravening these sections, in other words, for illegally entering and staying in this country. The third respondent also mentions that the applicants, subsequent to their arrests, have made several appearances in the Magistrates Court and their trials have been postponed on those occasions for investigation as well as for purposes of bail applications. Their detentions are in terms of orders made by the Magistrates who have presided over their matters in that court.

Preliminary issue

[10] Before setting out the issues that require determination, it is necessary, at the outset, to deal with a matter that arose at the commencement of oral argument. This was an application, issued by the applicants' lawyers, ostensibly on their behalf, on 27 November 2023, for leave to file an amended notice of motion along with a supplementary founding affidavit, deposed to by their lawyer, Mr Manamela. These documents were uploaded to the Caselines electronic bundle on the same day, i.e. three days before the hearing. Any respondent who wished to oppose was called upon to file such opposition papers the day after this application was issued, i.e. 28 November, via email to the applicants' lawyers. This was opposed by the third

⁴ This section prohibits entry into or departure from South Africa other than at a port of entry.

⁵ This section creates a criminal offence for entering, remaining or departing the Republic in contravention of the Immigration Act with a penalty on conviction of a fine or imprisonment of up to two years.

respondent who claimed that it was prejudiced and was consequently unable to file an answering affidavit due to the limited time allowed for this purpose.

[11] The crux of the amendment sought was to bring to this Court's attention, updates relating to the subsequent good cause interviews given to Hajiso, Osman and Yusuf. In all three instances the immigration official conducting the interview found that these applicants had failed to show good cause regarding their illegal entry into this country.

[12] Having heard argument from the parties' legal representatives we dismissed the application. The primary reason for the dismissal was that the relief sought in the amended notice of motion was substantively different to what was sought in the initial notice of motion and amounted to a new urgent application within the existing urgent application. This, in our view, was impermissible as it amounted to a new and completely different application. Furthermore, the relief sought was a substantive review of the good cause interview processes. Clearly such a review could not be entertained without the full record of those processes. We reserved our decision regarding costs, pending the final determination of the matter.

The parties' submissions

[13] The applicants' case is grounded on section 2 of the Refugees Act which reads:

"2. General prohibition of refusal of entry, expulsion, extradition or return to other country in certain circumstances.

Notwithstanding any provision of this Act or any other law to the contrary, no person may be refused entry into the Republic, expelled, extradited or returned to any other country or be subject to any similar measure, if as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where—

- (a) he or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or
- (b) his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing public order in any part or the whole of that country".

[14] Section 2 is the *non-refoulement* provision which outlaws the deportation or return of any asylum seeker or refugee to their country of origin or any country, if to do so would expose them to persecution on account of the factors listed in section 2(a) or if their personal safety or freedom would be at risk due to the factors listed in section 2(b).

[15] The applicants argue that section 2 accords them the right to apply for asylum and immunises them from arrest, detention and deportation. Further that the rights and protections implicit in it subsist from the moment they evince an intention to apply for asylum until the conclusion of the entire process, including any appeals and reviews they may pursue in terms of the Promotion of Administrative Justice Act, and that their current and continued detention is an unlawful violation of their rights. Lastly, they say that all the administrative actions that have been taken against them, pursuant to the Immigration Act are unlawful in so far as they ignore the applicability of the Refugees Act, particularly section 2.

[16] They say that based on the unlawfulness of their detention; they are suffering ongoing and irreparable harm. They emphasise that should they be deported, they faced certain death in their countries. They further say that their matters are inherently urgent in that their liberty is at stake in circumstances where their detention is unlawful.

[17] They submit that the critical question before us is whether the respondents have the authority to detain illegal foreigners⁶ after they evince an intention to apply for asylum. They specifically argue that the Constitutional Court's decision in *Ashebo v Minister of Home Affairs*⁷ was wrongly decided and that we should not follow it but should instead follow a Full Court decision from this Court i.e. in *Abraham and Others v Minister of Home Affairs and Another (Abraham (2))*.⁸

[18] Their argument is that the Constitutional Court was wrong not to consider and follow the Full Court's decision. They argued that even the Constitutional Court is bound by the principle of *stare decisis* – the rule that Courts must follow their own

⁶ This is the term used in section 1 of the Immigration Act (above n 1) to describe a foreigner who is in the Republic in contravention of it.

⁷ [2023] ZACC 16; 2023 (5) SA 382 (CC); 2024 (2) BCLR 217 (CC) ("*Ashebo*").

⁸ [2023] ZAGPJHC 253; 2023 (5) SA 178 (GJ).

previous decisions and those of higher courts, unless such a decision is clearly wrong. Their submission in this regard being that in *Ashebo* the Constitutional Court went against previous decisions of that Court, to wit, *Ruta v Minister of Home Affairs*,⁹ and *Abore v Minister of Home Affairs and Another*¹⁰ as well as the so-called quartet of decisions from the Supreme Court of Appeal (SCA) i.e. *Arse v Minister of Home Affairs and Others*,¹¹ *Abdi and Another v Minister of Home Affairs and Others*,¹² *Bula and Others v Minister of Home Affairs and Others*,¹³ and *Ersumo v Minister of Home Affairs and Others*.¹⁴ They argue that the SCA's decision in *True Motives 84 (Pty) Ltd v Madhi and Others*,¹⁵ is authority for the proposition that lower Courts can decline to follow "incorrect" Superior Court decisions.

[19] The Respondents' main argument is that the applicants jumped the gun by bringing these applications before the completion of the good cause interviews process. They argue that the position will become clearer once this process is over as the detention of the applicants, whilst in terms of section 49 of the Immigration Act, has the objective of aiding the good cause interview process. The Respondents further argue that the detention of the applicants is perfectly legal, sanctioned as it is by the amendments to the Refugees Act and as upheld and applied by the Constitutional Court in *Ashebo*.

[20] The Respondents further argue that the Applicants' reliance on the "SCA quartet" of decisions, and on *Ruta* and *Abore* is misguided because those decisions dealt with detention in the context of section 34 and not in terms of section 49 of the Immigration Act. They use this to further attack the reliance placed on the Full Court in *Abrahams (2)* because, there too the matter concerned detention in terms of section 34. They say only *Ashebo* shares similarity with this case because both Mr Ashebo and the current applicants were arrested and detained in terms of section 49(1)(a) of the Immigration Act.

Urgency

⁹ [2018] ZACC 52; 2019 (3) BCLR 383 (CC); 2019 (2) SA 329 (CC) ("*Ruta*").

¹⁰ [2021] ZACC 50; 2022 (4) BCLR 387 (CC); 2022 (2) SA 321 (CC) ("*Abore*").

¹¹ [2010] ZASCA 9; 2010 (7) BCLR 640 (SCA); [2010] 3 All SA 261 (SCA); 2012 (4) SA 544 (SCA) ("*Arse*").

¹² [2011] ZASCA 2; 2011 (3) SA 37 (SCA); [2011] 3 All SA 117 (SCA) ("*Abdi*").

¹³ [2011] ZASCA 209; [2012] 2 All SA 1 (SCA); 2012 (4) SA 560 (SCA) ("*Bula*").

¹⁴ [2012] ZASCA 31; 2012 (4) SA 581 (SCA); [2012] 3 All SA 119 (SCA) ("*Ersumo*").

¹⁵ [2009] ZASCA 4; 2009 (4) SA 153 (SCA); 2009 (7) BCLR 712 (SCA); [2009] 2 All SA 548 (SCA) ("*True Motives*").

[21] There can be no debate that the matter is urgent. The applicants are currently in detention which they claim is unlawful. Detention inevitably implicates the right to freedom and as such the resolution of the matter is an urgent matter. As much as the third respondent has offered not to continue with the prosecutions pending the determination of their good cause interviews, this would be cold comfort should this Court find their detention unlawful.

Detention jurisprudence in asylum and/or immigration cases

[22] It is important to mention here that the matter before us is primarily about the lawfulness of the applicants' detention. Our Courts have grappled with the lawfulness of the detention of persons arrested for being in the country illegally in a number of cases. A convenient starting point is to consider the jurisprudence developed on this issue. In the so-called quartet of cases, the SCA firmly established the position that the detention of foreign nationals alleged to be illegal in this country is unlawful once they have either expressed an intention to apply for asylum and/or after having activated the application process. This position was confirmed by the Constitutional Court in *Ruta* and *Abore*. The Constitutional Court however, deviated from that position in *Ashebo*. Prudence dictates that we consider these decisions and understand the contextual setting that applied when they were made, to inform the discussion of the legal contestations now advanced.

The Supreme Court of Appeal's quartet

[23] The first of the quartet cases we consider is *Arse*.¹⁶ There the appellant, an Ethiopian national, had applied for and was granted a temporary asylum seeker visa in terms of section 22¹⁷ of the Refugees Act, but subsequently had his asylum application dismissed by the Refugee Status Determination Officer (RSDO). He lodged an appeal against this decision with the Refugee Appeal Board but was however, detained by the Department of Home Affairs, in terms of section 34¹⁸ of the Immigration Act, pending his deportation. This was due to the attitude of the Department of Home Affairs that the dismissal of his asylum application had rendered him an illegal foreigner liable to be deported.

¹⁶ Above n 11.

¹⁷ Section 22 provides that pending the determination of their application, an asylum seeker must be provided with an asylum seeker transit visa, which allows them to sojourn legally in the Republic. This includes the rights to study, work and be provided with social assistance in circumscribed cases.

¹⁸ Section 34 allows for warrantless arrests of illegal immigrants for the purposes of their detention.

[24] Section 34 may conveniently be referred to as the pre-deportation detention provision of the Immigration Act, it being the section the authorities use in detaining illegal foreigners pending their deportation and deporting them. This detention purpose of section 34 was also recognised by the Full Court in *Abrahams (2)*.¹⁹

[25] Mr Arse failed in an urgent application in the High Court, to secure his release from detention but thereafter pursued an appeal to the SCA. That Court held that during the period when his appeal was pending, he was entitled to be released from detention, until all his remedies were exhausted. Clearly, despite his illegal status, the Court confirmed that he was entitled to his liberty whilst he pursued his appeal against the decision that rejected his asylum application.

[26] This decision was followed by *Abdi*.²⁰ In that case the appellants had initially fled from Somalia to this country where one of them was granted refugee status and the other was a registered asylum seeker awaiting determination of his refugee status. They then fled South Africa to Namibia fearing xenophobic attacks. However, once in Namibia, they were apprehended and deported. Their flight had a stop-over in Johannesburg, in transit to Somalia. In Johannesburg they were held at a deportation detention facility and while there, attempted to prevent their deportations by asserting their intention to apply for asylum again. The High Court held that it couldn't interfere in the Namibian deportation process amongst others and dismissed the application. The applicants approached the SCA which held that they enjoyed the protection of the Refugees Act and as a result, were entitled to be released. It further said that the appellant who already had refugee status had not lost it and the one who had a pending application was similarly recognised as having applied for asylum and thus not liable for deportation. The detention at issue in that case was also pre-deportation detention in terms of section 34.

[27] The third case was *Bula*.²¹ This case involved a group of 19 Somali nationals who fled to this country and on arrival were arrested for their unlawful presence in the country. A High Court application to free them and have their applications for asylum processed had allegedly been made on their behalf and subsequently

¹⁹ At para 5.

²⁰ Above n 12.

²¹ Above n 13.

dismissed but they disavowed any knowledge or consent of that process. This became an issue because the application which they said was at their instance, aimed at securing their release from detention, was dismissed on the basis that they were having a “second bite” at the cherry. The High Court found that their stories were far-fetched and that they were not asylum seekers but were a syndicate bringing persons illegally into South Africa and that their intention to apply for asylum was merely an afterthought.

[28] They appealed to the SCA which held that the matter raised rule of law considerations. It considered the then extant regulation 2(2) which made it clear that once an intention to apply for asylum is evinced then such a person was entitled to be released from detention and to be issued with an asylum seeker permit. In paragraph 72 the court held that regulation 2(2) “ought to have been the starting point as the appellants fell within its ambit”. The Court went on to state that the protective measures kicked in from the moment that intention was evinced, as a measure to ensure that genuine asylum claimants are not turned away. In this case too, the detention of the applicants was in terms of section 34.

[29] The last case in the quartet was *Ersumo*.²² In that case an Ethiopian national fled to this country after allegedly having been tortured for his political views in Ethiopia. Once in this country, he was granted a 14-day asylum transit visa, meaning that he was expected to apply for refugee status during that time. He did not apply based on his view that only a few people were assisted at the RRO each day. It appears that subsequently he was mugged and lost his asylum transit permit but reported the incident to the police. He was thereafter arrested for being an illegal foreigner and failed to interdict his deportation in the High Court as well as secure his release from detention. He turned to the SCA.

[30] The SCA affirmed its earlier decisions in *Arse* and *Bula* that the mere assertion of an intention to apply for refugee status entitled a person detained as an illegal foreigner in terms of the Immigration Act, to their release from detention. And further that having activated the asylum application process such a person was also entitled to release from detention. The Court held that what triggers the *non-*

²² Above n 14.

refoulement protection in the Refugees Act was the mere assertion of an intention to seek refugee status. Here too, section 34 was the provision used by the authorities to detain Mr Ersumo.

[31] The SCA's quartet was followed by three Constitutional Court cases. The first was *Ruta*.²³ In that case, Mr Ruta, a national of Rwanda, unlawfully entered this country by crossing the border from Zimbabwe. He was arrested for road traffic violations after being in the country for nearly two years and without applying for refugee status. He was convicted and sentenced but it was then discovered that he was in the country illegally, i.e. in contravention of the Immigration Act.

[32] The Department of Home Affairs sought to deport him to Rwanda in terms of section 34 of the Immigration Act, but he countered by launching a successful urgent application in the High Court, which interdicted his deportation and ordered that he be allowed to apply for asylum. Mr Ruta had, it seems, indicated whilst in detention that he wished to apply for asylum. The High Court based its decision on the authority laid down by the SCA, in its quartet of cases, that the intention to apply for asylum is what triggered the protection of the *non-refoulement* principle as well as release from detention. The Department of Home Affairs appealed to the SCA which upheld the appeal on the basis that the unreasonable delay by Mr Ruta to apply for asylum was fatal to his cause. The majority, agreeing with the High Court decision in *Kumah and other related matters v Minister of Home Affairs and others*,²⁴ said that the asylum regime merely allows for a reasonable opportunity to apply for asylum, and not for an unlimited period. The Court held that Mr Ruta had never intended to apply for asylum and did so when the law caught up with him. The Court therefore upheld the Department's appeal.

[33] Mr Ruta turned to the Constitutional Court which unanimously found that the SCA had erred in ignoring its quartet of cases which had unequivocally laid down the law in relation to the principle of *non-refoulement*. The Constitutional Court held that section 2 of the Refugees Act places the principle of *non-refoulement* above any other provision in the Refugees Act or any other law, including the Immigration Act. It concluded that delay is not a bar to an application for asylum and that such

²³ Above n 9.

²⁴ [2016] ZAGPJHC 188; [2016] 4 All SA 96 (GJ); 2018 (2) SA 510 (GJ).

protection was triggered by the intention to apply for asylum as provided for in regulation 2(2). The Constitutional Court ordered that Mr Ruta be released from detention and be allowed to apply for asylum. Like in *Arse*, *Bula* and *Ersumo*, Mr Ruta was about to be deported in terms of section 34.

[34] The cases examined thus far were concerned with persons who had entered South Africa not at an official port of entry but had “jumped the border” into South Africa. In the majority of the cases, the persons involved simply stayed in the country, some for long periods, and didn’t apply for asylum. They only expressed an intention to do so when the law caught up with them, so to speak. Some had obtained asylum transit visas but these had lapsed before an application for asylum was activated. Others had applied for asylum and were unsuccessful. They were all arrested and detained in terms of section 34 of the Immigration Act, pending their deportation to their countries of origin.

[35] Therefore the law established in the cases examined is that illegal entry into the country and delay in applying for asylum, didn’t present a hurdle to an application for asylum. The cases also established that their detention was unlawful, and that they were entitled to be released immediately upon their expression of an intention to apply for asylum. This is in line with article 31²⁵ of the 1951 United Nations Convention Relating to the Status of Refugees and its 1967 Protocol. This Article mentions however that applying for asylum should be “without delay”. The cases further established the principle that having applied for asylum and if such was declined or rejected the applicants were entitled to remain free and to pursue any review or appeal against the decisions to reject their asylum applications.

[36] On 1 January 2020 a number of amendments of the Refugees Act as well as its regulations became effective.²⁶ These amendments feature prominently in the

²⁵ Article 31 provides that:

- “1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country”.

²⁶ Refugees Amendment Act 33 of 2008, Refugees Amendment Act 12 of 2011, Refugees Act 11 of 2017 and Refugees Regulations, GN R1707 GG 42932, 27 December 2019.

cases that subsequently came to our Courts. It is therefore prudent to also consider these amendments before considering the jurisprudence developed in their aftermath.

The amendments to the Refugees Act and its regulations

[37] The Refugees Act was amended several times since its enactment, but those enactments only took effect from 1 January 2020. We consider only those amendments relevant to the issues in this case, particularly detention. Importantly, section 2 was not amended. The first relevant amendment was to section 4 which deals with exclusion from refugee status. The amendments added two new grounds of exclusion. In addition to the existing grounds in sub-sections 4(1)(a) to (g), if the RSDO does not believe that an asylum seeker has shown compelling reasons why they did not enter South Africa through a port of entry, or for failing to approach an RRO within 5 days of their arrival in South Africa, then they could be excluded.

[38] The next relevant amendment is section 21 which underwent major revisions. Section 21(1) used to read:

“(1) An application for asylum must be made in person in accordance with the prescribed procedures to a Refugee Reception Officer at any Refugee Reception Office”.

The relevant parts now read:

- “(1)(a) Upon reporting to the Refugee Reception Office within five days of entry into the Republic, an asylum seeker must be assisted by an officer designated to receive asylum seekers.
- (b) An application for asylum must be made in person in accordance with the prescribed procedures...
- ...
- (1A) Prior to an application for asylum, every applicant must submit his or her biometrics or other data, as prescribed, to an immigration officer at a designated port of entry or a Refugee Reception Office.
- (1B) An applicant who may not be in possession of an asylum transit visa as contemplated in section 23 of the Immigration Act, must be interviewed by an immigration officer to ascertain whether valid reasons exist as to why the applicant is not in possession of such visa”.

[39] Regulation 2(2), which was the primary basis used by our Courts to order the release from detention of persons who were alleged to be illegal foreigners, was repealed in its entirety. It used to read:

“Any person who entered the Republic and is encountered in violation of the Aliens Control Act, who has not submitted an application pursuant to sub-regulation 2(1) but indicates an intention to apply for asylum shall be issued with an appropriate permit valid for 14 days within which they must approach a Refugee Reception Office to complete an asylum application”.

[40] Regulation 7 was repealed in its entirety and replaced with a new regulation 7 that now requires an asylum seeker to provide their biometric information as part of the application process. It now reads:

“7. Any person who intends to apply for asylum must declare his or her intention, while at a port of entry, before entering the Republic and provide his or her biometrics and other relevant data as required, including—

- (a) fingerprints;
- (b) photograph;
- (c) names and surname;
- (d) date of birth and age
- (e) nationality or origin; and
- (f) habitual place of residence prior to travelling to the Republic,

and must be issued with an asylum transit visa contemplated in section 23 of the Immigration Act”.

[41] Regulation 8 was also repealed in its entirety. The previous regulation 8 dealt with the “failure to appear, withdrawal of asylum seeker permit, and detention”. Now the regulation deals with how an application in terms of section 21 must be made. It now provides:

“8. Application for asylum—

(1) An application for asylum in terms of section 21 of the Act must—

- (a) be made in person by the applicant upon reporting to a Refugee Reception Office or on a date allocated to such a person upon reporting to the Refugee Reception Office;
- (b) be made in a form substantially corresponding with Form 2 (DHA-1590) contained in the Annexure;
- (c) be submitted together with—
 - (i) a valid asylum transit visa issued at a port of entry in terms of section 23 of the Immigration Act, or under permitted

circumstances, a valid visa issued in terms of the Immigration Act;

- (ii) proof of any form of a valid identification document: Provided that if the applicant does not have proof of a valid identification document, a declaration of identity must be made in writing before an immigration officer; and
- (iii) the biometrics of the applicant, including any dependant.

. . . .

- (3) Any person who upon application for asylum fails at a Refugee Reception Office to produce a valid visa issued in terms of the Immigration Act must prior to being permitted to apply for asylum, show good cause for his or her illegal entry or stay in the Republic as contemplated in Article 31 (1) of the 1951 United Nations Convention Relating to the Status of Refugees.
- (4) A judicial officer must require any foreigner appearing before the court, who indicates his or her intention to apply for asylum, to show good cause as contemplated in sub-regulation (3)".

Post-amendments jurisprudence

[42] These amendments were discussed in the cases that I now turn to, heard in this Court and the Constitutional Court. The issue in these cases was the fate of persons caught up in the criminal justice system for being in South Africa. The Refugees Act's amendments took centre stage in these cases.

[43] The first of these cases is *Abore*. In the High Court,²⁷ Mr Abore, an Ethiopian national sought two urgent orders. First to interdict his detention pending his application for asylum. Second, for his release from detention. He was charged, convicted, and sentenced for illegally entering South Africa from Zimbabwe in 2017 and subsequently living in this country for four years as an illegal foreigner, i.e. without applying for refugee status. Upon conviction, his sentence was an option of a fine or imprisonment. He paid the fine, but this was not brought to the court's attention, and he also failed to prosecute to finality a previous attempt, pending his deportation, to interdict his transfer to the Lindela deportation centre and imminent deportation. The result was that following his imprisonment for contravening the Immigration Act, he was transferred and held at Lindela for 30 days, pending deportation to Ethiopia. This was followed by a court order, further extending his

²⁷ *Desta Abore v Minister of Home Affairs & Others*, unreported judgment of the Gauteng Division, Johannesburg, Case No 12408/2021 (29 March 2021). The presiding judge in that matter, Judge M Twala, is part of the current full court.

detention by 90 days. His arrest and detention were based on his contravention of section 49 of the Immigration Act.

[44] The High Court was critical of his dilatory behaviour, i.e. entering illegally from Zimbabwe and travelling all the way to Kwa-Zulu Natal, and passing through three provinces (Limpopo, Mpumalanga and Gauteng) without approaching an RRO. Further that he had never evinced any intention to apply for asylum, even after his arrest, nor did he exercise his rights to appeal the decision to deport him, even after being alerted of his right to do so. Instead, he only made this intention known, in that application.

[45] It also did not agree that his detention was unlawful, because it found that he was lawfully detained for breaking the immigration laws, which was justifiable in terms of section 36 of the Constitution. The Court stated that it cannot be correct that Mr Abore having broken the law of this country, that when the law caught up with him, his mere utterance that he wished to apply for asylum, was enough to earn him his release from detention. In reaching this decision, it noted the SCA authority in the quartet of cases, that the mere evincing of an intention to apply was sufficient. The High Court said those decisions allowed for a case-by-case determination. In Mr Abore's case, the High Court stated that he was not approaching the Court with clean hands, having sat back and done nothing for four years, and that even if there were long lines at the RRO, this was no excuse for him to simply not activate his application for asylum. Consequently, it dismissed his application. Mr Abore turned to the Constitutional Court.

[46] On the heels of *Abore* in this High Court came the cases of *Shanko Abraham v Minister of Home Affairs and Another*; *Shambu v Minister of Home Affairs and Another*; *Bogala v Minister of Home Affairs and Another*.²⁸ The Judge²⁹ who heard the cases, prudently wrote one judgement covering all to optimise usage of judicial resources and to avoid duplication. I refer to this case as *Abraham (1)* as it was followed by the Full Court decision in *Abraham (2)*, which is central to the applicants' legal argument. In *Abraham (1)* the three applicants were detained in terms of

²⁸ [2021] ZAGPJHC 857.

²⁹ Kollapen J before his elevation to the Constitutional Court.

section 34 pending their deportation to Ethiopia. The applicants were Ethiopian nationals, having been found to be unlawful in the country.

[47] The facts in those cases bear a striking resemblance to the facts in the applications before us and for that reason, we do not recount them. Having considered the effect of the amendments and new regulations, the High Court distinguished the position of persons who entered at a port of entry and those who did not. Regarding those who did not, as we have *in casu*, the High Court said the amendments had not taken away their right to apply for asylum.³⁰

[48] Further, regarding any entitlement to release from detention by persons who entered not using a port of entry, the High Court reasoned that the amendments were a clear departure from the previous legislative era effectively introducing a situation that in cases of illegal entry, the entitlement to apply for asylum was now dependant on good cause being shown. Regarding the detention of such persons, the Court went on to hold that the scheme introduced by the amendments would be negated if persons who entered the country illegally would be entitled to release from immigration detention on their mere expression of an intention to apply for asylum and that this “would undermine the requirement of good cause and would not allow for harmony between the Immigration Act and the Refugees Act”.³¹

[49] The High Court went on to conclude that the detention of the applicants in that case was lawful and would endure until such time as the applicants had applied for asylum i.e. after having satisfied the good cause requirement in view of their illegal entry. The Court held further that this interpretation of the amendments was consistent with both the letter and spirit of the 1951 Convention and consequently, dismissed the application. In summary – the High Court in *Abraham (1)* found that the detention of the applicants was not unlawful and confirmed that the applicants’ right to apply for asylum remained intact and further that they could exercise this after satisfying the good cause requirement for their illegal entry and stay in this country. The Court also confirmed that the applicants were not to be deported whilst all these processes were taking place.

³⁰ *Abraham (1)* above n 28 at para 24.

³¹ *Abraham (1)* above n 28 at para 39.

[50] In the meantime, the Constitutional Court heard Mr Abore's appeal.³² That Court considered the effect of the amendments that had taken effect from 1 January 2020. It identified the issues as those already decided in *Ruta* and in the SCA's quartet of cases i.e. – *non-refoulement*, an intention to apply for asylum, delay in doing so and release from detention after evincing an intention to apply for asylum. In the Court's view, the novel issue was whether the amendments and new regulations changed anything that was said in those cases.

[51] Notably, the Constitutional Court found that they did – it held that applications for asylum made after 1 January 2020 had to comply with more stringent requirements than those that existed before. The Court however held that as section 2 of the Refugees Act was not amended, the *ratio* from the previous decisions which dealt with *non-refoulement* remained good law. Although it was unclear when Abore arrived in South Africa, primarily due to the conflicting versions he gave, it accepted the date of his arrest as the date he evinced his intention to apply for asylum as the date to decide whether the new amendments applied to him. It found that they did as this occurred after 1 January 2020.

[52] The Court then went on to consider the effect of the amendments on Mr Abore's claim to be released to apply for asylum. In this regard the Court, rejected the rationale reached on this aspect in *Esther Mwale v Minister of Home Affairs*³³ to the effect that with the repeal of regulation 2(2), the good cause and asylum application options were closed to persons who entered the country illegally and who do not then go on to present themselves to an RRO, before they are arrested. The Court preferred the approach in *Abraham (1)* that aspirant asylum seekers who didn't enter this country using a port of entry, were not barred by the amendments from applying for asylum if they were successful in showing good cause for their illegal entry.

[53] The Court emphasised that the amendments had not taken away the *non-refoulment* protection in section 2, of persons like Abore. It held that the shield of *non-refoulment* persists for as long as the asylum application remains pending,

³² Abore above n 10.

³³ Unreported judgment of the High Court of South Africa, Eastern Cape Local Division, Port Elizabeth, Case No 1982/2020 (22 September 2020).

saying "the shield of *non-refoulement*" may only be lifted after that process has been completed".³⁴ The Court also reiterated the principle laid in *Ruta* that Abore's delay in applying for refugee status remained irrelevant and that the protection against deportation in section 2, for persons such as Abore remained intact.

[54] Regarding Abore's detention, what can be distilled from the Court's reasoning is that if the detention is based on a Court issued warrant it is lawful. This was in view of the fact that Mr Abore had paid a fine in line with the sentence he received for his immigration conviction. In this regard the Court found that his detention after paying the fine was unlawful but thereafter, when the authorities were able to persuade a magistrate to extend his detention, that was above board. He was eventually released at a later stage presumably because the Magistrate didn't extend his detention. The important take away from *Abore* is that the protection against deportation was affirmed in line with the *non-refoulement* protection in section 2. Even though the Court was not requested to deal with detention *per se* the Court was alive to the lawfulness thereof where the Immigration Act had been contravened.

[55] The applicants in *Abraham (1)* had in the meantime appealed their High Court loss to the Full Court. There, it was held that they were entitled to be released. The Full Court essentially reasoned that the regulations lacked statutory authority because there was no power in the Refugees Act given to state officials and judicial officers to block asylum applications and that the two-step approach (showing good cause, then applying for asylum) attempted to distinguish explanations for illegal entry or stay, from reasons for seeking asylum. This was criticised as artificial and that the two should instead be considered together as part of a single application process and that there was no consistency with the *non-refoulement* principle contained in section 2 of the Refugees Act. Referring to the *dicta* from *Abore*, it was emphasised that any trigger for invoking the Act must align wholly with section 2.

[56] Thus, so the Full Court reasoned, a power for state officials or Courts to block asylum applications (for a failure of showing good cause) contradicts section 2, and that the *Abraham (1)* interpretation of the requirement to show good cause in

³⁴ *Abore* above n 10 at para 42.

regulation 8(3) and its relationship to section 21(1B) meant that it did not align with section 2 of the Act. This was because making good cause a pre-requisite would remove that enquiry from the overall fact-finding investigation into the reasons for seeking asylum. On that basis, the regulation would be *pro-non scripto* and that only an RSDO and not the Courts can decide on refugee status. So, regulation 8(4) would be ultra-vires to the extent that it gives that power to anyone else as such powers are not found in the Act and that a regulation cannot be used to interpret the statute to which it was enacted from. For this reason, the repeal of the previous regulation 2(2) cannot have any bearing on section 2 of the Act and its meaning.

[57] In paragraph 36 the Full Court summed up the new amendments as follows and ordered the release of the applicants:

"Accordingly, the law may be summed up as follows:

36.1 The lawfulness of detention under section 34 of the Immigration Act is extinguished when the applicability of the Refugees Act is triggered.

36.2 The Refugees Act is triggered by an intimation of a desire to apply for asylum by an illegal foreigner, not by a formal application being submitted.

36.3 An illegal foreigner in detention under section 34 is entitled to be released from detention at once when an intimation to apply for asylum is expressed.

36.4 Regulation 8(3) must be read to mean that the enquiry into good cause is a part of the overall enquiry to facilitate an application for asylum and does not mean that there is any condition precedent that must be satisfied before making an application for asylum.

36.5 Regulation 8(4) is *ultra vires* and must be read *pro non scripto*".

[58] The Constitutional Court decision in *Ashebo* followed after the Full Court judgment was handed down. In this case, Mr Ashebo, a national of Ethiopia, recounting circumstances strikingly similar to those in the applications before us, including similar use of language, found himself on the wrong side of the law for being in the country illegally. It is unnecessary to deal with his version here. He was arrested and charged in terms of section 49 of the Immigration Act. Pending his trial, he unsuccessfully launched an urgent application in the High Court to prevent his deportation pending determination of his asylum application. The Court found that his urgency was self-created, so he appealed to the Constitutional Court.

[59] In the Constitutional Court, it was accepted that the matter was urgent because if convicted, he would be deported to Ethiopia, where he claimed his life was at risk. The two issues requiring attention in that Court were framed as: the effect of the 2020 amendments on Mr Ashebo's delay and whether he was entitled to be released from detention. As with the *Abore* matter, the Court found that the first question was answered affirmatively based on *Ruta*, that delay was not a bar to applying for asylum. Concerning article 31 of the 1951 UN Convention, it held that, although more stringent, the requirement that a person in the position of Mr Ashebo provide good cause for their illegal entry did not violate the principle of non-refoulement.

[60] The Court further, referring to *Ruta*, stated that the purpose of the Immigration Act – maintaining the sanctity and sovereignty of the country's borders – was of great importance.³⁵ It concluded that the amendments and new regulations meant that there was no automatic release from detention if a person detained after being charged in terms of section 49(1)(a) of the Immigration Act evinced an intention to apply for asylum. The Court held:

“The applicant in this case falls within the ambit of paragraph (a) of [section 49(1) of the Immigration Act]. However, and whether the detention was in terms of section 34 or pursuant to a criminal charge in terms of section 49(1)(a), the same question arises – whether the applicant's expression of an intention to apply for asylum entitled him to be released from such detention. The answer must be no. Once more, it is significant to mention that article 31 of the Convention does not give an illegal foreigner unrestricted indemnity from penalties. It requires them to present themselves without delay to the authorities and to show good cause for their illegal entry or presence.

Further, this Court in *Ruta* made clear that the Refugees Act, despite its wide compass, is meant to cater only for authentic asylum seekers and genuine refugees. This Court left no doubt as to the great importance of the responsibility which this legislation is intended to regulate – the sanctity of our country's sovereignty and the protection of our national borders”.³⁶ (My emphasis.)

[61] The Court had earlier accepted that the 1951 Convention does not provide blanket immunity from all penalties – instead, it required asylum seekers to promptly

³⁵ *Ashebo* above n 7 at para 52.

³⁶ *Id* at paras 50-52.

present themselves to officials and show good cause for their illegal entry. With reference to *Abore*, it was noted that–

“[i]n *Abore* this Court was not required to decide the lawfulness of detention under the Immigration Act before an application for asylum had been submitted. But it did make findings which support the view that the detention of an illegal foreigner pending the submission of an application for asylum that is authorised by a court’s warrant of detention is valid as the Court order must be obeyed until set aside”.³⁷

[62] Concerning the conduct of the Department of Home Affairs, the Constitutional Court took issue with their failure to assist Mr Ashebo to apply for asylum once he evinced an intention to do so. It concluded that detention in such circumstances would only be lawful for a reasonable period and beyond that would be unlawful. Thus, although not ordering his release, it held that the department had a duty to assist him, and if he shows good cause for his illegal entry then an entitlement to be released exists and remains until the finalisation of the application process.

Discussion

[63] As is apparent in the discussion of the *Abore* case, the statutory regime that applied when the SCA decided its quartet of cases as well as when the Constitutional Court handed down its *Ruta* decision, had changed when this Court dealt with the *Abrahams* and *Ashebo* cases and obviously when the Constitutional Court decided the *Abore* and *Ashebo* cases.

[64] The applicants counsel relied predominantly on the reasoning and conclusions of the Full Court in *Abraham (2)*. It is therefore apposite to turn our attention to the conclusions reached therein. At first blush the Full Court appears to have ignored what the High Court in *Abraham (1)* stated, i.e. that the regime introduced by the amendments provided a harmonious relationship between the Immigration and Refugees Acts. This was confirmed by the Constitutional Court in *Abore*. In fact, the High Court had confirmed that the right to apply for asylum had not been taken away but that good cause for illegal entry and stay was now required. The High Court was clear that until such time as the good cause requirement was satisfied, the mere assertion of an intention to apply for asylum, was no longer

³⁷ Id at para 55.

sufficient to earn the person concerned their release from detention. Differently put, such person concerned may only be released from detention, once the good cause requirement has been met and the asylum application activated. These conclusions carried the day in the Constitutional Court in *Ashebo*.

[65] It is clear in the reasoning of the Full Court that its firm view was that the good cause requirement had to be conflated with the asylum application process. This was based on the Full Court's view that separating the good cause interview from the asylum application enquiry was a violation of the *non-refoulment* right in section 2. This is also clear from the Full Court's reasoning that any trigger of the Refugees Act must align with section 2. In our view this reasoning is misconceived, and we respectfully differ. In *Abraham (1)*, the High Court and Constitutional Court in *Afore* and *Ashebo* confirmed that asylum seekers now faced more stringent requirements when seeking asylum in this country. This specifically applies to persons who violate the Immigration Act by entering South Africa illegally and fail to apply for asylum. In *Afore* and *Ashebo* the Constitutional Court affirmed the two-stage process of showing good cause first before being allowed to apply for asylum in the case of persons who had entered the country illegally and as a result had no asylum transit visas.³⁸

[66] Our view is that the amendments must be understood to be provisions introduced to strengthen the control measures regarding persons who enter South Africa illegally. The Constitutional Court in *Ruta* recognised this important function of this country's government i.e. the maintenance of the sanctity of this country's borders. Our view is also that the objective of the amendments is to assist in upholding the rule of law by authorising the arrest and detention of persons who knowingly break the immigration laws through illegal entry and stay.

[67] The amendments also ordain that anyone, especially asylum seekers, who enter this country illegally may be arrested and detained and should they wish to apply for asylum, will be required to show good cause for their illegal entry and stay before being allowed to apply for asylum. The Constitutional Court in *Ashebo* specifically, confirmed that it was no longer sufficient for asylum seekers who break

³⁸ *Afore* above n 10 at para 29; *Ashebo* above n 7 at para 43.

the law, to escape the consequences of their misdeeds, when the law caught up with them, to simply pronounce their intention to apply for asylum to trigger the Refugees Act's protections.

[68] It will be recalled that the Full Court in *Abraham (2)* found that this was still the law. Clearly the law now is that such persons must show good cause for their conduct before they can benefit from triggering the Refugees Act. The Full Court had ordered the release of the applicants there on the basis that their detention violated the *non-refoulment* principle. With respect, this reasoning was based on an incorrect reading of section 2. The overriding purpose of section 2 is to disallow the refoulment i.e. deportation, return or refusal of entry of asylum seekers fleeing persecution. *Ashebo* has put this issue beyond doubt that the detention of illegal foreigners in terms of the amendments is not unlawful and remains so until good cause has been shown leading to the triggering of the Refugees Act.³⁹ This doesn't violate the *non-refoulment* principle as it doesn't amount to countenancing the deportation of asylum seekers fleeing persecution. It must be in the interest of any country desiring to protect its borders, to expect anyone entering its territory to do so lawfully, with certain exceptions such as persons entering its borders directly from the country where the persecution is taking place.

[69] It is also our respectful view that the Full Court erred when it decreed regulation 8(3) and 8(4) to be *pro non scripto* and *ultra vires*. This was based on the Full Court's understanding that the Constitutional Court in *Aboe* decreed that section 2 prevailed over any amendment that was at odds with it. It was on this reasoning that the Full Court held that the good cause interview was inseparable from the general enquiry involved in an application for asylum. Whilst it is correct that the Constitutional Court in *Aboe* emphasised that section 2 remained central to the asylum application process, nowhere did that Court overrule the application of any of the amendments including regulations 8 (3) and (4). The Constitutional Court, must be understood to have decreed that any amendment that provided for the deportation (refoulment) of asylum seekers, fleeing persecution and who evince an intention to apply for asylum, was unlawful. None of the amended provisions provide for the deportation of asylum seekers.

³⁹ *Ashebo* id at para 44.

[70] It is safe to conclude that in *Abore* and *Ashebo* the Constitutional Court has actually given its imprimatur to the amendments and given guidance on how illegal foreigners in trouble with the law are to be treated. The Constitutional Court was alive to the conclusions arrived at in the *Abraham* (2) Full Court decision, which it rejected. There, in a unanimous decision, the Court, said:

“It should be noted that the high court decision in [*Abraham* (1)], which I favour for reasons set out later in this judgment, has recently been overturned by the Full Court of its Division”.⁴⁰ (Emphasis added and footnote omitted.)

[71] Two things are clear from this statement. First, the applicants’ contentions that the Constitutional Court failed to consider, and secondly, to give reasons for overturning *Abrahams* (2) are meritless.

[72] An important aspect we feel constrained to deal with is that the applicants before us are detained for contravening section 49 of the Immigration Act, as was the case in *Ashebo*. It should immediately be apparent that the applicants’ reliance on the Full Court, the SCA quartet as well as *Ruta* and *Abore*, is misplaced as those cases were concerned with detention in terms of section 34. This raises a question as to whether there is a difference in the detention brought about by these two sections. We are of the view that there is a difference.

[73] To begin with, section 34 does not create any offence, it merely forms part of the procedures before the deportation of foreign nationals who have contravened the Immigration Act. This is contrasted to section 49(1)(a) which explicitly makes it an offence to unlawfully enter and stay in the Republic. An arrest and detention in terms of section 49(1)(a) is not for the purposes of deportation, but rather for the prosecution of an illegal foreigner charged with committing an offence in terms of this section. A foreign national who is arrested for contravening section 49(1)(a) can apply for bail and as this decision propounds, may intimate his desire to apply for asylum, which will entitle him to be assisted to attend an interview to show good cause for entering and staying in South Africa illegally.

⁴⁰ *Ashebo* above n 7 at para 22.

[74] Thus, a foreign national arrested, charged and detained pending a trial in terms of section 49(1)(a) is in the same position as any other accused charged with an offence and awaiting their trial. If they are denied bail, their detention is not unlawful. If they are found not guilty at their trial, they will be entitled to release. If they are found guilty and sentenced to a fine or imprisonment, then they will be entitled to be released after paying the fine or serving the term of imprisonment provided that illegal foreigners seeking asylum must still apply for refugee status. This much was confirmed in *Ashebo* where Maya DCJ said:

“To the extent that the applicant’s detention was authorised pursuant to section 49(1) of the Immigration Act read with the Criminal Procedure Act, the immigration officials’ failure to facilitate his asylum application would not render his detention unlawful. In my view, a just and equitable remedy under section 172(1)(b) in all the circumstances would be to compel the respondents to facilitate his application for asylum, failing which to release him from detention unless he may lawfully be detained under the Criminal Procedure Act”.⁴¹

[75] This comes with an important rider arising from section 2 of the Refugees Act and the circumstances in which it trumps the provisions of any other law. In *Ruta*, Cameron J said of this rider:

“The Refugees Act makes plain principled provision for the reception and management of asylum seeker applications. The provisions of the Immigration Act must thus be read together with and in harmony with those of the Refugees Act. This can readily be done. Though an asylum seeker who is in the country unlawfully is an “illegal foreigner” under the Immigration Act, and liable to deportation, the specific provisions of the Refugees Act intercede to provide imperatively that, notwithstanding that status, his or her claim to asylum must first be processed under the Refugees Act. That is the meaning of section 2 of that Act, and it is the meaning of the two statutes when read together to harmonise with each other”.⁴² (Footnotes omitted and emphasis added.)

[76] Previously, this meant that once an asylum seeker reached the stage of applying for asylum, only then would a prosecution in terms of section 49(1)(a) be prevented by the Refugees Act. Then, all it took to get to this position was evincing an intention to apply for asylum. However, following *Ashebo*, this is no longer the

⁴¹ *Ashebo* above n 7 at para 58.

⁴² *Ruta* above n 9 at para 43.

position after the amendments. It follows that the requirement to show good cause, in section 21(1B) of the Refugees Act read with regulation 8(3), precedes and is disjunctive to the main application for asylum. Clearly therefore, the conjunctive approach favoured by the Full Court in *Abrahams (2)* is not the correct legal position.

[77] This conclusion finds support in *Abore*, where the Constitutional Court said:

“Section 21(1B) of the Refugees Amendment Act imposes its own requirements which seem to be aimed at eliciting more information from an illegal foreigner. It provides that a person who may not be in possession of an asylum transit visa, contemplated in section 23 of the Immigration Act, must be interviewed by an immigration officer to ascertain whether valid reasons exist as to why that person is not in possession of such a visa. It is not clear at what stage the interview envisaged in section 21(1B) should be conducted. However, it seems that the requirement in regulation 8(3) that the applicant for asylum should show good cause for his or her illegal entry or stay in the Republic prior to them being permitted to apply for asylum, means that this must be done during the interview”.⁴³ (My emphasis.)

[78] This statement does not mean that an illegal foreigner must be released from detention in order for them to go to their interview. What emerges from this discussion is that an illegal foreigner who fails to report to an RRO within 5 days is not stripped of their right to apply for asylum *per se*. Instead, what happens is that they now carry the further burden of providing good cause for their failure to enter at an official port of entry and explain the delay in applying for asylum. The reasons for this are supported by article 31 of the 1951 Convention, and in *Ashebo* they were articulated as follows:

“In my view, these provisions [the new amendments] do not offend the principle of non-refoulement embodied in section 2 of the Refugees Act. Their effect is by no means out of kilter with article 31 of the Convention, the fount of section 2. Rather, they accord with its import because it too does not provide an asylum seeker with unrestricted indemnity from penalties. The article provides that a Contracting State may not impose penalties on refugees on account of their illegal entry or presence in the country provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence”.⁴⁴

⁴³ *Abore* above n 10 at para 29.

⁴⁴ *Ashebo* above n 7 at para 44.

[79] The refugee and asylum regime both pre and post amendments has always catered to ensuring that genuine asylum applicants are protected. In both *Ruta* and *Ashebo* the importance of reaching this goal along with the national security implications that could arise were not lost. Starting with *Ruta*, Cameron J said:

“None of this provides a sweethearts’ charter for bogus asylum seekers or an open door for non-refugees. Nor do the provisions render our borders leaky to a flood of importuning supplicants posing as asylum seekers. The Refugees Act’s provisions and its mechanisms are hard-headed and practical. In design and concept they protect our national sovereignty and our borders. It may be that in their application administrative capacity or skills have been lacking, but the source of the difficulty cannot fairly be located in the statute’s provision for receiving genuine asylum seekers and facilitating and processing their applications”.⁴⁵

[80] In *Ashebo* it was held that:

“The absence in the legislation of provisions similar to the old regulation 2(2) poses an anomalous and highly undesirable scenario that could result if an illegal foreigner in the applicant’s position were simply allowed to remain at large on their mere say-so that they intend to seek asylum. That person would remain undocumented and there would be absolutely no means of checking whether they indeed promptly applied for asylum. There would be nothing to stop them from making the same claim to the next immigration officer who encounters them, thus repeatedly preventing their detention. That is not a result the Legislature could have intended”.⁴⁶

[81] It follows that there is not an undue burden on genuine asylum seekers. The new amendments have not removed the right to apply for asylum. The amendments have simply affirmed that there is no automatic release from detention once an intention to apply for asylum has been evinced. If it so happens that anyone unlawfully enters the Republic and finds themselves arrested before they are able to present themselves at an RRO within 5 days, they will be given an opportunity to show good cause for their conduct. If an RSDO finds that they failed to show good cause, there are appeal and review mechanisms available to them, just as there are for those whose applications for asylum are rejected.

⁴⁵ *Ruta* above n 9 at para 40.

⁴⁶ *Ashebo* above n 7 at para 54.

[82] There is one further issue, which we briefly alluded to in para [67] above, and which we feel constrained to clarify as we feel it has become clouded, in the *Ruta* and the Full Court decisions specifically. In these decisions, detention was conflated with deportation. Nowhere does one find in section 2 of the Refugees Act the term “detention”. Similarly, such a term is nowhere to be found in Article II (3)⁴⁷ of the OAU Convention as well as in Article 33⁴⁸ of the 1951 UN Convention. We can also not conceive any interpretation of section 2 and the mentioned articles to suggest that these provisions have anything to do with the detention of asylum seekers. This, in our view, shows conclusively, that they have nothing to do with detention but are concerned with the deportation or return of asylum seekers to countries where their lives are at risk and/or where they will be subjected to persecution.

[83] It must therefore follow that the objective of section 2 is the prevention of deportation of genuine asylum seekers fleeing persecution in their own countries. The High Court in *Abraham (1)* was alive to this objective of the provision and forthrightly held that the detention of persons alleged to be in the country illegally was not at odds with the *non-refoulement* protection embedded in it. The Full Court, in rejecting that interpretation, interpreted section 2 to encompass detention. We disagree with respect. Therefore, the applicants’ argument, that they are, on the basis of section 2, entitled to be released on their mere assertion of an intention to apply for asylum, is manifestly misconceived and must be rejected.

[84] Having demonstrated that the detention of persons alleged to be illegal in the country, pending their good cause interviews and asylum application process, is not unlawful, it is similarly necessary to say a word or two regarding the regulation of such detention. As was mentioned in *Abore* and *Ashebo*, such detention must be supervised through the Courts to ensure that it conforms with acceptable standards and doesn’t violate human rights norms. We mentioned, above, that in a sense persons detained for contravening the provisions of the Immigration Act, are in a

⁴⁷ Article 11 (3) provides:

“No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article 1, paragraphs 1 and 2”.

⁴⁸ Article 33 provides:

“No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of particular group or political opinion”.

position similar to anyone arrested and detained in terms of the Criminal Procedure Act⁴⁹.

[85] We think, perhaps a differential treatment for illegal asylum seekers may be appropriate. In the first place it would make sense to ensure that upon arrest the illegal foreigner must be brought to Court within forty eight (48) hours from the time of arrest or not later than the first Court day after the expiry of the forty eight (48) hours, if forty eight (48) hours expired outside ordinary Court hours.⁵⁰ Our view is that once a detained illegal foreigner evinces an intention to apply for asylum, they should be assisted to have the interview aimed at establishing if they have good cause for their illegal entry and stay. It makes no sense to initiate the prosecution of such a person if there remains the possibility that he could demonstrate good cause. And once good cause is established, there would be no point in continuing with the prosecution of such a person. The whole basis of the charge and prosecution would have been extinguished. Such a person must then be assisted to apply for asylum, within the required timeframes, and possibly be released from detention. Such a person would also be subjected to the processes in terms of regulations 7 and 8 to aid the Department of Home Affairs to keep track of the application process.

[86] In the event that good cause is not established, a different approach must be followed. The illegal foreigner in these circumstances is not entitled to be released from detention but is entitled to initiate review and/or appeal proceedings against the decision that good cause was not established. Obviously longer periods must be allowed for this.

[87] We lastly turn to a pressing concern arising from the applicants' persistence that this Court is not bound by the decision in *Ashebo* because "it was clearly wrong" and can simply be ignored. That, in our view, would make a mockery of the rule of law and the very doctrine of *stare decisis* they rely on. To begin with, the decision in *True Motives* 84,⁵¹ forming the basis of their argument, does not establish the principle they rely on – that a decision of the Constitutional Court can be ignored by

⁴⁹ Act 51 of 1977, as amended.

⁵⁰ This form of order was adopted in *Lawyers for Human Rights v Minister of Home Affairs and Others* [2017] ZACC 22; 2017 (10) BCLR 1242 (CC); 2017 (5) SA 480 (CC).

⁵¹ *True Motives* above n 15.

lower Courts if it is “clearly wrong”. In that matter, the question was identified as “whether it is permissible for [the SCA] to decline to follow a decision of the Constitutional Court if it holds the view that such decision is wrong”. It then went on to answer this question in two parts, as follows:

“The answer to this question must be sought from two sources: the structure of our courts as outlined by the Constitution and the doctrine of judicial precedent. In relation to matters that fall outside the jurisdiction of the Constitutional Court, this court enjoys a status equal to that of the Constitutional Court. But when it comes to constitutional matters, the Constitutional Court assumes a status higher than this court”.⁵²

[88] What the Applicants’ fail to consider is that this judgment was handed down before the Constitution 17th Amendment took effect.⁵³ The effect of this amendment was that the Constitutional Court and SCA no longer had concurrent jurisdiction on non-constitutional matters. The Constitutional Court is the highest Court on all matters and its decisions are binding on all courts. Thus, simply put, *Ashebo* is binding on all Courts and cannot simply be ignored because a litigant, or a Judge for that matter, differs from its approach.

[89] We therefore conclude that the applicants have failed to make out a case to interdict the respondents from detaining and prosecuting them. Their detention and prosecution are lawful. Quite obviously no declarator may be granted that their detention is unlawful. Furthermore, nowhere have the applicants made out a case that the respondents intend to or are in the process of deporting them. The respondents have actually disavowed any such intention. Thus, no case to interdict this has also been made. The respondents have actually confirmed that they will assist the applicants to attend their good cause interviews and in the event that they are successful on that score, section 22 asylum transit visas will be issued to them and they will be allowed to apply for refugee status.

[90] In actual fact, the third respondent, has since the judgment in *Ashebo* was handed down, issued a directive whereby its officials either take persons in the position of the applicants to an RRO or to bring the officials to them at the

⁵² Id at para 77.

⁵³ Constitution Seventeenth Amendment Act of 2012.

correctional service centre for their good cause interviews. Indeed, and as stated in the introduction of this judgment, three of the applicants have already been assisted to attend their good cause interviews.

[91] Accordingly, the law may be restated as follows –

- 91.1 It is an offence in terms of section 9(1) and 49(1) not to enter South Africa at a port of entry and to stay in the country in contravention of the Immigration Act.
- 91.2 It is not unlawful to arrest and detain any person who has contravened the Immigration Act regarding entry and stay in South Africa.
- 91.3 The arrest and detention of persons who have contravened the Immigration Act does not violate the non-refoulment protection in section 2 of the Refugees Act.
- 91.4 The mere expression of in intention to apply for asylum does not entitle any person to be released from detention where such person is detained for contravening the Immigration Act.
- 91.5 It is unlawful and therefore a violation of the non-refoulment principle to deport persons who contravened the Immigration Act, if they express an intention to apply for asylum.
- 91.6 Persons detained for contravening the Immigration Act and who express a desire to apply for asylum must first show good cause for their illegal entry and stay in South Africa.
- 91.7 Upon the first appearance of a person arrested for contravening sections 9 and 49 of the Immigration Act, who expresses in intention to apply for asylum, the Magistrate “must require such to show good cause” in line with section 21(1B) and regulation 8(4) read with regulation 8(3).

91.8 At any stage of a person's detention and who evinces an intention to apply for asylum, the Department of Home Affairs must assist such a person by facilitating their interview to show good cause.

91.9 Any foreign national convicted and sentenced for transgressing sections 9 and 49 of the Immigration Act is liable to be deported in terms of section 34 unless he at that stage expresses an intention to apply for asylum. In that event such person must be assisted to attend an interview to show good cause.

91.10 Upon the successful showing of good cause, the detained person must be assisted to apply for asylum and a temporary asylum transit visa must be issued to such a person.

91.11 Upon the issuing of a temporary asylum transit visa such a person is entitled to be released and must apply for asylum within the prescribed timeframes.

[92] Regarding the issue of costs, other than in respect of the amendment application, we require further representations from the parties regarding how this litigation was initiated. This is based on our view that it is misleading to regard the matters as separate and distinct and therefore liable for consolidation. In effect we have one application that has been issued as six separate applications, the basis supposedly being that there are six applicants. All six applications were initiated by the same attorneys i.e. Manamela MA Attorneys in a span of one week between 22 September and 2 October 2023. The date of hearing reflected in respect of Lembore, Hajiso, Osman and Yusuf is 3 October 2023 and in respect of Godiso and Matiwas the date is 10 October. They were enrolled on the urgent roll of this Court. Each notice of motion notified any respondent who wished to oppose, to deliver their notice of intention to oppose via the applicant's attorneys email address.

[93] Further to the above, the allegations made in each separate application are similar and evince identical backgrounds save for certain specifics such as the dates when they left their countries of origin, when they entered South Africa, when and

where they were arrested. Lastly on this point, the same grammatical errors appear in each application giving the inescapable impression that one application was drafted and that cutting and pasting resulted in the other applications. In fact, a quick glance at the *Ashebo* papers in this Court evince the same factual matrix as we have in the applications before us. It appears that these matters are the product of template processes. This raises the question whether this conduct doesn't amount to a serious abuse of the Court process, especially that they are issued on the urgent roll of this Court.

[94] Our view is that the six applications initially issued were essentially one application. As pointed out above the allegations in each application are the same. The applications were also issued by the same lawyers. The inescapable impression is that one application was prepared which was then followed by cutting and pasting from that first version to produce six different applications. The issues raised in each of these applications are the same hence the subsequent consolidation of the applications. This is an issue that we feel should be considered further. We have therefore decided to suspend making an order as to costs and direct that the parties file further affidavits addressing this matter. The applicants are directed to file an affidavit to explain why a finding shouldn't be made that their conduct amounted to an abuse of the judicial process and further why a punitive order as to costs shouldn't be made against them and/or their lawyers. The applicants and/or their lawyers are to file these further representations within fourteen days from the date of this Judgment and the respondents must file their representations within fourteen days thereafter.

[95] In the circumstances the following order is granted:

Order

1. The application is dismissed.
2. The first, second, third and fourth respondents are directed, to the extent necessary, to take all reasonable steps, within 60 days from the date of this order, to afford the applicants an opportunity in terms of section 21(1B) of the Refugees Act 130 of 1998, read with regulation (8)(3)

thereto, to show good cause, and to allow the whole process of any review or appeal, in the event where good cause is not established, to unfold until it is finally determined.

3. The first, second, third and fourth respondents are directed to approach the Magistrates Court, for the extension of time should the review or appeal process not be finalised within the 60-day period. This request should be accompanied by a report directed to the Magistrates Court, setting out what steps have been taken and why the processes have not been finalised within the 60-day period.
4. The applicants are ordered to pay the first to third respondents' costs for the amendment application.
5. The issue of costs in the main matter is postponed and will be dealt with after the parties have filed their representations on the issues mentioned in paragraphs 92 to 94.

D Mlambo
Judge President of the High Court
Gauteng Division

Appearances

For the Applicants:

S I Vobi; A Nase and T Mdingi
instructed by Manamela Attorneys,
Pretoria

For the First to Third Respondents:

Hephzibah Rajah instructed by State
Attorney, Pretoria

Date of hearing: 30 November 2023

Date of judgment: 8 February 2024