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

21 May 2024 _____
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: 14 March 2024

Delivered: This Judgment was handed down electronically by circulation to the parties' legal representatives by email and by uploading to Caselines. The date and time for hand down is deemed to be 10:00 am on 21 May 2024.

ORDER

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1. The application for leave to appeal is dismissed.

2. The applicants are ordered to pay the first to third respondents' costs.

JUDGMENT (LEAVE TO APPEAL)

MLAMBO, JP (Twala J and Collis J concurring)

Introduction

[1] The applicants seek leave to appeal to the Supreme Court of Appeal (SCA) against the whole Judgment and orders, handed down by this Court on 8 February 2024. It is necessary, at the outset, to point out that Counsel for the applicants used the leave to appeal hearing to reargue almost all the points he raised during the hearing of the main application. That said, distilled to their bare essentials, the crux of the applicants' grounds in their application for leave to appeal, are that this Court erred in dismissing their application to amend the notice of motion and, regarding the main merits, in failing to follow the Full Court Judgment from this Court in *Abraham and Others v Minister of Home Affairs and Another*.[1]

[1] [2023] ZAGPJHC 253; 2023 (5) SA 178 (GJ) ("*Abraham Full Court*").

[2] The applicants rely on section 17(1)(a)(i) and (ii) that there are reasonable prospects that the SCA will reach a different conclusion, and that there is a compelling reason for the SCA to hear this matter because this Court's Judgment conflicts with the *Abraham Full Court*. Section 17 of the Superior Courts Act[2] governs applications for leave to appeal. Of particular relevance is section 17(1)(a) which provides:

> "(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that
>
> (a) (i) the appeal would have a reasonable prospect of success; or
>
> (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration."

[3] The applicants' submission regarding the dismissal of their amendment application is a non-starter. Nothing new was raised to counter the view that, that application was self-evidently a review of the good cause interviews process. The applicants listed a number of what they regarded as defects in that process. In substance what the applicants sought was a review of that process and the decisions taken pursuant thereto. Without the full record of the process, this Court could not make any pronouncements, as those would be premature. In *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others*,[3] the Supreme Court of Appeal explained this principle as follows:

> "In the constitutional era courts are clearly empowered beyond the confines of PAJA to scrutinise the exercise of public power for compliance with constitutional prescripts.… It can hardly be argued that, in an era of greater transparency, accountability and access to information, a record of decision related to the exercise of public power that can be reviewed should not be made available, whether in terms of Rule 53 or by courts exercising their inherent power to regulate their own process. Without the record a court cannot perform its constitutionally entrenched review function, with the result that a litigant's right in terms of s 34 of the Constitution to have a justiciable dispute decided in a fair public hearing before a court with all the

[2] 10 of 2013.
[3] [2012] ZASCA 15; 2012 (3) SA 486 (SCA); [2012] 2 All SA 345 (SCA); 2012 (6) BCLR 613 (SCA).

issues being ventilated, would be infringed."[4] (Footnote omitted.)

[4] The applicants have further submitted that this Court erred in ordering all the applicants to pay the costs for the unsuccessful amendment application, when in fact, the application was only in relation to three of the applicants, Hajiso, Osman and Yusuf. This submission is misguided as well. The costs in relation to the amendment application refers to the applicants in that application. Furthermore, the argument that only one respondent opposed the application is incorrect. All three respondents opposed the main application and that point was made by counsel who appeared for the respondents during the hearing of the main application. This was not challenged by the applicants so they cannot now take issue with it. Thus, it was well within this Court's discretion to award the costs for the failed amendment application in the manner that it did. It must also be pointed out that no costs order has been made regarding the main application. In terms of the order issued, the parties were invited to file further written submissions on why an order of costs should not be made against them. The intervention of this application for leave to appeal has placed this process on hold and the result is that no order on costs has been made regarding the main application.

[5] The applicants submit that this Court made its own law by granting orders that are not sourced within the Refugees Act.[5] They take specific issue with orders 2 and 3 which were to the following effect:

> "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

[4] Id at para 37.
[5] 130 of 1998.

> Magistrates Court, setting out what steps have been taken and why the processes have not been finalised within the 60-day period."

[6] The submission that this Court created its own law is misguided. Counsel for the applicants, was constrained to concede that section 172(1)(b) of the Constitution gives this Court the power to make an order that is just and equitable. The impugned orders were practical and aimed at ensuring judicial oversight of the applicants' detention, whilst exercising their rights in terms of the provisions of the Refugees Act. The same approach was adopted by the Constitutional Court in *Ashebo v Minister of Home Affairs*.[6]

[7] The other submission made is that this Court failed to consider the section 27A argument, which formed the applicant's basis of their reliance on the *non-refoulment* principle. Although the main judgment did not mention section 27A, the Court dealt with the substance of the applicants' case, i.e. that their detention was unlawful. Section 27A provides in relevant part that:

> "An asylum seeker is entitled to –
> (a) a formal written recognition as an asylum seeker in the prescribed form pending finalisation of his or her application for asylum;
> (b) the right to remain in the Republic pending the finalisation of his or her application for asylum;
> *(c) the right not to be unlawfully arrested or detained.*…" (Emphasis added.)

[8] In paragraphs 72 to 81 of the main judgment, this Court extensively discussed the difference between pre-deportation detention in terms of section 34 and detention for committing an offence in terms of section 49(1) of the Immigration Act. This discussion included the effect of the repeal of regulation 2(2) that allowed for release from detention upon the intimation of an intention to apply for asylum. The effect of this repeal cannot be gainsaid, and it is disingenuous for the applicants to now state that this Court did not consider their argument. Their argument was to the effect that once they declared their intentions to apply for asylum, they had a right to

[6] [2023] ZACC 16; 2023 (5) SA 382 (CC); 2024 (2) BCLR 217 (CC) (*"Ashebo"*).

be released. The Constitutional Court in *Ashebo* jettisoned this argument and nothing more need be said further in this regard.

[9] Following from this ground is the claim that the Court erred in finding that the Constitutional Court in *Ruta v Minister of Home Affairs*[7] and the *Abraham Full Court* conflated detention and deportation. The main judgment fully ventilated the difference between detention and deportation. In line with *Ashebo*, there is no bar, post amendment, to holding an illegal foreigner in detention for a violation of the Immigration Act. The Constitutional Court made it clear that detention permitted in terms of the Criminal Procedure Act[8] is lawful. The effect of the crime created by section 49(1) was fully discussed in the main judgment. The judgment dealt with persons who had not yet shown good cause. In any event, it bears repeating that neither persons who have not shown good cause, nor *de-jure* or *de-facto* refugees can be deported after intimating their intention to apply for asylum, or once being granted asylum as in the case of *de-facto* refugees. However, unlike *de-jure* and *de-facto* refugees, for those who have not shown good cause, as the main judgment went to great lengths to explain, there is no protection from detention arising from a contravention of section 49(1) of the Immigration Act.[9]

[10] A further submission raised by the applicants was that this Court should grant leave as there was a conflict between two Full Court judgments of this Court, i.e. the *Abraham Full Court* Judgment and the Judgment of this Court. This submission does not leave the starting blocks. In paragraphs 69 to 71 of the main judgment it is explained that the Constitutional Court considered the *Abraham Full Court* Judgment, and expressly rejected it and as such there can be no talk of a conflict between two Full Court Judgments.

[11] From all the above, there is no reasonable prospect that the Supreme Court of Appeal will reach different conclusions than this Court on all those issues. This Court clearly followed and applied the binding authority of the Constitutional Court in *Ashebo*.

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[7] [2018] ZACC 52; 2019 (3) BCLR 383 (CC); 2019 (2) SA 329 (CC) ("*Ruta*").
[8] Act 51 of 1977, as amended.
[9] 13 of 2002.

[12] In the circumstances the application must fail and consequently the following order is made:

Order

1. The application for leave to appeal is dismissed.

2. The applicants are ordered to pay the first to third respondents' costs.

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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: 14 March 2024

Date of judgment: 21 May 2024