IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

Case No.: 5441/20

In the matter between:

SCALABRINI CENTRE OF CAPE TOWN	First Applicant
TRUSTEES OF THE SCALABRINI CENTRE OF CAPE TOWN	Second Applicant
and	
THE MINISTER OF HOME AFFAIRS	First Respondent
THE DIRECTOR-GENERAL: DEPARTMENT OF HOME AFFAIRS	Second Respondent
THE CHAIRPERSON OF THE STANDING COMMITTEE FOR REFUGEE AFFAIRS	Third Respondent
and	
CONSORTIUM FOR REFUGEES AND MIGRANTS IN SOUTH AFRICA	*Amicus Curiae*

JUDGMENT DELIVERED ELECTRONICALLY ON 13 FEBRUARY 2023

GOLIATH DJP

[1] Applicants launched a constitutional challenge against the provisions of section 22(12) and (13) of the Refugees Act 130 of 1998 (“the Act”), as well as Regulation 9

and Form 3 of the Regulations in the amended Refugees Act and Regulations.[1] At the core of the constitutional challenge is the impugned provisions which provide that asylum seekers who have not renewed their visas in terms of section 22 of the Act within one month of the date of expiry of the visa, are considered to have *"abandoned"* their asylum applications.

[2] First applicant is a non-profit trust registered with the Department of Social Development. Its core mandate is to assist and safeguard migrant and displaced communities including asylum seekers and refugees. The Trustees of first applicant are cited as second applicant, and have authorised first applicant to institute the action. The first applicant is a member of the Consortium for Refugees and Migrants in South Africa (CoRMSA), a non-profit organisation comprising of 26-member organisations across the country. CoRMSA is committed to advancing the rights of refugees, asylum seekers, and migrants. Its main objectives include contributing to the formation and development of asylum and immigration-related legislation and best practices. CoRMSA liaises with international organisations and governments to advance and protect the interests of refugees, asylum seekers, and international migrants through policies and services. The litigation was initiated by the first applicant, and CoRMSA was subsequently admitted as amicus curiae.

[3] Applicants launched this application in two parts, primarily in the interest of asylum seekers who, due to poverty or lack of legal means, are unable to act in their own name, in terms of section 38 (b) of the Constitution of the Republic of South Africa, 1996 ("the Constitution"). In Part A, the applicants sought, and was granted interdictory relief suspending the operation of the impugned provisions pending final

[1] GNR 1707, Government Gazette 42932, 27 December 2019, regulation 9 and Form 3.

determination of Part B, which comprises both a constitutional challenge of sections 22(12) and (13) of the Refugees Act. This court is seized with Part B.

[4] Applicants argued that the resultant undocumented status of asylum seekers causes undue hardship since they are then considered and treated as illegal foreigners, subjected to arrest, detention and deportation. This means that persons with valid refugee claims may be returned to countries where they may face the risk of persecution, death, torture, sexual violence, and other forms of threats and persecution. Applicants submitted that first respondent's officials have a duty to ensure that intending applicants who are not statutorily excluded are given every reasonable opportunity to apply for a visa, and that a delay in applying for refugee status should not preclude and disqualify someone from applying for the same.

[5] The amicus made submissions about the impact of the abandonment rules on the individual asylum seekers, particularly children, their vulnerability and ability to protect themselves. The amicus submitted that the abandonment provisions are a severe threat to the rights of asylum seekers, and are counter to the protective goals and purpose of domestic and international refugee laws.

[6] The manner in which the impugned provisions are implemented, were not seriously disputed by respondents and can be summarized as follows:

6.1 There is a time limit on the validity of any visa issued to asylum applicants. Regulation 12 (8) states that within one month of the expiration of the visa, the asylum seeker must return to the Refugee Reception Office ('RRO") where they originally applied in order to

extend their visa.[2] Every asylum seekers visa has an expiry date on it. If the asylum seeker fails to renew the visa within the prescribed period, their application and claim for asylum will be "*considered to have been abandoned.*" This means that the asylum seeker will not receive a renewal of their visa, and they will be left undocumented pending the procedures set out below.

6.2 The "Notification of Abandoned Application" (Form 3 to the Regulations) is then referred to the Standing Committee for Refugee Affairs ("SCRA") for its endorsement as an abandoned application. However, the SCRA may condone or waive the purported abandonment if the asylum seeker can present "*reasons to the satisfaction of the Standing Committee*" as to why they were unable to present themselves for the renewal of their visa timeously due to hospitalisation, any other form of institutionalisation or any other compelling reason.

6.3 Regulation 9(3)[3] provides that the "*other compelling reasons*" for the SCRA to not endorse the asylum seeker's application and visa as abandoned are entry into the witness protection programme; quarantine; arrest without bail; or any other similar compelling reasons. Documentary evidence must support these compelling reasons.

6.4 If the SCRA denies a request for condonation, the asylum seeker is considered to have abandoned his or her asylum claim, is barred from reapplying for asylum, and *"must be dealt with as an illegal foreigner in*

[2] GNR 1707, Government Gazette 42932, 27 December 2019, regulation 12(8)
[3] See GNR 1707, Government Gazette 42932, 27 December 2019

terms of section 32 of the Immigration Act".[4] Save in cases where an authorisation to remain is obtained under the Immigration Act, this implies that the asylum seeker must depart South Africa or be deported. The deportation is enforced, in practice, by requiring the Refugee Reception Office Manager to refer the abandoned application to an immigration officer. The regulations require the immigration officer to submit Form 3 with supporting documentation for the deportation.

[7] The impact of the impugned provisions was dealt with succinctly by the applicants and amicus and can briefly be summarized as follows:

7.1 An asylum seeker who fails to renew their asylum seeker visa within 30 days after its expiry is automatically considered to have "abandoned" their application for asylum, regardless of the merits.

7.2 This abandonment is then referred to the Standing Committee for Refugee Affairs (Standing Committee) for endorsement. Asylum seekers are nominally entitled to make representations to the Standing Committee, but no clear procedures exist in the legislation or in practice for making such submissions.

7.3 While undocumented they face the risk of arrest, detention, and deportation. These consequences also extend to their children who are listed as dependents under their asylum applications.

[4] Immigration Act 13 of 2002 No 23478

7.4 If the abandonment is ultimately endorsed by the Standing Committee, asylum seekers are handed over to immigration officials and treated as "*illegal foreigners"* who are to be deported.

7.5 Children who are listed as dependants on asylum applications are at the mercy of the bureaucratic processes governing the main applicant's claim. Their asylum seeker visas are also linked to the main applicant's asylum seeker visa. This means that when the main applicant's claim is deemed abandoned, all dependants' applications will also be automatically deemed abandoned and they will not be entitled to renewal of their asylum seeker visas. This will result in dependent children being left undocumented pending the enquiry by the Standing Committee or indefinitely should the Standing Committee endorse the application as abandoned. Children are therefore exposed to severe consequences of being undocumented and the further risk of *refoulement*, all due to actions and circumstances beyond their control.

[8] In summary, any asylum seeker who takes more than a month to renew their visa, and cannot present satisfactory reasons to the SCRA as to the cause for the delay will be disbarred from pursuing their asylum application, deprived of their visa, treated and classified as an illegal foreigner, and eventually deported.

[9] Applicants and the amicus contended that the impugned provisions are unjustifiably arbitrary and violate the right to *non-refoulement* (non-return) under international law and the Constitution of the Republic of South Africa. Respondents acknowledge that the abandonment provisions violate constitutional

rights and are thus *prima facie* unconstitutional. They contended, however, that the impugned provisions are rational and justifiable in terms of section 36 of the Constitution, primarily due to the fact that asylum seekers behave in a recalcitrant manner and fail to renew their section 22 asylum visas. This creates a backlog in the system. The measures and provisions are intended to assist in reducing the backlog of dormant asylum applications which, the respondents contend, imposes a significant administrative burden upon the resources of the Department of Home Affairs ("DHA").

[10] A constitutional challenge to any act involves a two-stage test, which is well-established. First, it must be determined whether the statutory provision infringes on any right in the Bill of Rights. Second, if there is such an infringement, whether it is reasonable and justifiable in terms of section 36 of the Constitution. The onus is therefore on the respondents to prove that any limitation on fundamental human rights are justifiable in an open and democratic society which is based on human dignity, equality and freedom, having regard to all relevant factors, including the nature of the rights that have been infringed, the importance of the purpose of the limitations and the nature and extent thereof, the relationship between the limitations and their purpose, and whether there were less restrictive means to achieve the purpose sought to be achieved by the limitations.[5]

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[5] (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.
(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

[11] In **Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another** [2002] ZACC 6; 2002 (4) SA 613 (CC); 2002 (7) BCLR 663 (CC) paras 26-27 the Constitutional Court held that this determination, "*requires a weighing-up of the nature and importance of the right(s) that are limited together with the extent of the limitation, as against the importance and purpose of the limiting enactment."* The Court further held that "*both the rights and the enactment … must be interpreted as to promote the value system of an open and democratic society based on human dignity, equality and freedom".*

[12] Currie and De Waal, *The Bill of Rights Handbook 6 ed* (Juta & Co, Cape Town) stated the following at 164: **"***A court must assess what the importance of a particular right is in the overall constitutional scheme. A right that is of particular importance to the Constitution's ambition to create an open and democratic society based on human dignity, freedom and equality will carry a great deal of weight in the exercise of balancing rights against justifications for their infringement."*

The nature of the right

[13] The principle of non-refoulement is the cornerstone of international refugee protection. It provides that no refugee should be returned to any place where there is a likelihood that he or she may risk persecution, torture, inhuman or degrading treatment. It was initially formulated in Article 45 of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War and stated that "*in no circumstances shall a protected person be transferred to a country where he or she may have a reason to fear persecution for his or her political opinions or religious beliefs."* The principle subsequently evolved to grant broader protection at universal

level by virtue of Article 33 of the 1951 Geneva Convention Relating to the Status of Refugees and its 1967 Protocol Relating to the Status of Refugees, which are the only instruments which have worldwide acceptance to deal with the rights of refugees, and regulating their status and legal obligations which States have to protect them.

[14] Article 33(1) of the 1951 Convention provides that: *"No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion."* The protection against refoulement under Article 33(1) applies not only to recognized refugees, but also to those who have not had their status formally declared.[6]

[15] The principle of non-refoulement is of particular relevance to asylum-seekers, since such persons may be refugees, and it is a well-established principle of international refugee law that they should not be returned or expelled pending a final determination of their status. Under International law the prohibition of refoulement is applicable to any form of forcible or coercive removal, including deportation, expulsion, extradition, informal transfer or "renditions". It applies not only in respect of return to the country of origin or, in the case of a stateless person, the country of former habitual residence, but also to any other place where a person has reason to fear reasonable apprehension of threats or persecution. The protection against

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[6] See United Nations General Assembly resolution 429(V) of 14 December 1950, available at http://www.unhcr.org/refworld/docid/3b00f08a27.html (Accessed on 10 February 2023).

refoulment is therefore critical and essential for refugees, migrants and asylum seekers, and is thus well-established under international law.

[16] The principle is also found in the 1948 Universal Declaration of Human Rights ("UDHR"), [7] Article 3 of the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment,[8] Article 3 (1) of the United Nations Declaration on Territorial Asylum, and the 1984 Cartagena Declaration on Refugees, and Article 16 of the International Convention for the Protection of All Persons from Enforced Disappearance.[9] The principle is recognised as an integral component of the 1949 Geneva Convention primarily to protect civilians and facilitate detainee transfers. Non-refoulement provisions modelled on Article 33(1) of the 1951 Convention have also been incorporated into extradition treaties, as well as a plethora of anti-terrorism Conventions both at universal and regional level.

South African Legislative framework

[17] South Africa ratified the 1951 Convention and the 1967 Protocol on 12 January 1996. South Africa also ratified the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention") on 15 December 1995, which includes the principle of non-refoulement.[10] The Refugees Act 130 of 1998 ("the Act") was promulgated in

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[7] The UDHR provides at article 14(1) that *"[e]veryone has the right to seek and to enjoy in other countries asylum from persecution".*

[8] Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 entry into force 26 June 1987, in accordance with article 27 (1).

[9] The above Convention was adopted on 20 December 2006 during the sixty-first session of the General Assembly by resolution A/RES/61/177. In accordance with its article 38, the Convention shall be open for signature by all Member States of the United Nations. See also The Cartagena Declaration on Refugees, adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, Cartagena de Indias, Colombia, 22 November 1984

[10] The Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, also called the OAU Refugee Convention, or the 1969 Refugee Convention, is regional legal instrument governing refugee protection in Africa. It comprises 15 articles and was enacted in Addis Ababa on September 10, 1969, and entered into forced on June 20, 1974

compliance with its international obligations and commitments with the very purpose to protect refugees and foreigners who cannot return to their home country. The preamble sets out the purpose of the Refugees Act and the goals of its provisions, as follows:

> "***Preamble***.—*WHEREAS the Republic of South Africa has acceded to the 1951 Convention Relating to Status of Refugees, the 1967 Protocol Relating to the Status of Refugees and the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa as well as other human rights instruments, and has in so doing, assumed certain obligations to receive and treat in its territory refugees in accordance with the standards and principles established in international law*."

[18] Section 2 of the Refugees Act enshrines the right of *non-refoulement* as follows:

> *"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 or disrupting public order in either part or the whole of that country."*

[19] Section 22(12) and (13) was introduced into the Act by the Refugees Amendment Act 11 of 2017 ("*2017 Refugees Amendment Act*").[11] The 2017 Refugees Amendment Act came into effect on 1 January 2020,[12] as did the

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[11] Act 11 of 2017.

[12] Section 33 of the 2017 Refugees Amendment Act provided that it (the 2017 Refugees Act) came into effect immediately after the Refugees Amendment Act 33 of 2008 and Refugees Amendment Act 12 of 2011. The 2008 Refugees Amendment Act would commence, according to section 34

Regulations (according to regulation 25 thereof). Section 22(12) and (13) of the Refugees Act provide:

> "*(12) The application for asylum of any person who has been issued with a visa contemplated in subsection (1) must be considered to be abandoned and must be endorsed to this effect by the Standing Committee on the basis of the documentation at its disposal if such asylum seeker fails to present himself or herself for renewal of the visa after a period of one month from the date of expiry of the visa, unless the asylum seeker provides, to the satisfaction of the Standing Committee, reasons that he or she was unable to present himself or herself, as required, due to hospitalisation or any other form of institutionalisation or any other compelling reason.*
> *(13) An asylum seeker whose application is considered to be abandoned in accordance with subsection (12) may not re-apply for asylum and must be dealt with as an illegal foreigner in terms of section 32 of the Immigration Act.*"

[20] Regulation 9 of the Refugees Act Regulations reads:

> "***Abandoned application***
> *(1) The endorsement by the Standing Committee of an application as an abandoned application as contemplated in section 22(12) of the Act must be made on Form 3 contained in the Annexure.*
> *(2) The Refugee Reception Office Manager shall refer or cause an abandoned application to be referred following an endorsement by the Standing Committee as contemplated in subregulation (1), to an immigration officer to deal with such a person as contemplated in section 22(13) of the Act.*
> *(3) Compelling reasons as contemplated in section 22(12) of the Act shall relate to —*
> *(a) entry into a Witness Protection Programme;*
> *(b) quarantine;*
> *(c) arrest without bail; or*
> *(d) any other similar compelling reasons, and must be supported by documentary evidence."*

[21] Form 3 accompanies Regulation 9 and is titled the *"Notification of Abandoned Application"*. It confirms the process for the abandonment of an asylum seeker's

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thereof, on a date to be proclaimed by the President. The President determined that date to be 1 January 2020 in Proc 60, *Government Gazette* 42932, 23 December 2020.

application for refugee status, and allows the relevant official to fill in answers in response to various questions as to why or how the application was abandoned.

[22] Section 24 of the Act provides as follows:

> ***"24. Decision regarding application for asylum*** *—*
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> *(1) . . . . . .*
>
> *(2) When considering an application for asylum, the Refugee Status Determination Officer—*
>
> *(a) must have due regard to the provisions of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), and in particular ensure that the applicant fully understands the procedures, his or her rights and responsibilities and the evidence presented; and*
> *(b) may consult with or invite a UNHCR representative to furnish information on specified matters.*
>
> *(3) The Refugee Status Determination Officer must at the conclusion of the hearing conducted in the prescribed manner, but subject to monitoring and supervision, in the case of paragraphs (a) and (c), and subject to review, in the case of paragraph (b), by any member of the Standing Committee designated by the chairperson for this purpose—*
>
> *(a) grant asylum;*
> *(b) reject the application as manifestly unfounded, abusive or fraudulent; or*
> *(c) reject the application as unfounded.*
>
> *(4) If an application is rejected in terms of subsection (3) (b) or (c), the Refugee Status Determination Officer must—*
>
> *(a) furnish the applicant with written reasons within five working days after the date of the rejection; and*
> *(b) inform the applicant of his or her right to appeal in terms of section 24B.*
>
> *(5) (a) An asylum seeker whose application for asylum has been rejected in terms of subsection (3) (b) and confirmed by the Standing Committee in terms of section 24A (2), must be dealt with as an illegal foreigner in terms of section 32 of the Immigration Act.*
>
> *(b) An asylum seeker whose application for asylum has been rejected in terms of subsection (3) (c), must be dealt with in terms of the Immigration Act, unless he or she lodges an appeal in terms of section 24B (1).*
>
> *(6) . . . . . ."*

[23] Section 37 deals with penalty provisions and states as follows:

> *"**37. Offences and penalties -** Any person who—*
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> *(a) for the purpose of entering, or remaining in, the Republic or of facilitating or assisting the entry into or residence in the Republic of himself or herself or any other person, commits any fraudulent act or makes any false representation by conduct, statement or otherwise; or*
> *(b) fails to comply with or contravenes the conditions subject to which any permit has been issued to him or her under this Act; or*
> *(c) without just cause refuses or fails to comply with a requirement of this Act;*
> *(d) contravenes or fails to comply with any provision of this Act, if such contravention or failure is not elsewhere declared an offence;*
> *(e) intentionally assists a person to receive public services to which such person is not entitled; or*
> *(f) provides false, inaccurate or unauthorised documentation, or any benefit to a person, or otherwise assists such person to disguise his or her identity or status, or accepts undue financial or other considerations, to perform any act or to exercise his or her discretion in terms of this Act; or*
> *(g) …*

The purpose, importance and effect of the limitation

[24] The Refugees Act is the primary statute in South Africa through which refugees and asylum seekers are protected and regulated. When an asylum claim is upheld, the person is recognized as a refugee and granted a refugee permit in terms of section 24 of the Act. However, until that occurs, asylum seekers in South Africa are issued merely with visas in terms of section 22 of the Act. They are obliged to renew these visas typically between every three to six months at a Refugee Reception Office. The purpose and objective of this visa is to safeguard and document an asylum seeker until their asylum application is finalised. It is not disputed that it takes, on average, five years for an asylum seeker to be recognised as a refugee in South Africa. As a result, throughout a period of five years, an asylum seeker must renew their visas 10 to 20 times before they are afforded refugee status.

[25] Respondents averred that the rights afforded under section 22 have always been intended to be temporary and subject to limitations and conditions. This is

apparent from the section 22(1) which provides that a visa issued under section 22 is a temporary provision that allows asylum seekers to sojourn in the Republic while their visa applications under section 21 are pending. Section 22(4) provides that the visa under section 22(1) may be periodically extended for such periods as may be required. The Act intended for the Director General to be empowered and authorised to withdraw the asylum seeker visa upon failing to comply with any of the conditions attached thereto, as envisaged in section 22 (5) of the Act.[13]

[26] Asylum seekers are permitted to work, study, and use social services such as health care, banking, insurance, and cell phone contracts under section 22. Without a valid permit, asylum seekers, as well as their children, become vulnerable to deportation as a consequence of section 32 of the Immigration Act 13 of 2002, which provides that *"illegal foreigners shall be deported*". Sections 38 to 42 of the Immigration Act prohibit the employment, educational instruction, accommodation or aiding and abetting of illegal foreigners. The children of undocumented asylum seekers are negatively affected as educational opportunities are reserved only for those who can produce a valid permit.

[27] The provisions of sections 21 and 24 of the Refugees Act are the primary provisions that effectively enables the process and the manner in which it is determined whether an asylum seeker qualifies for the long-term protection afforded under the Refugees Act and, therefore, should be afforded asylum status. It is only once a determination has been made under section 24 that an asylum seeker would be granted asylum status.

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[13] A permit issued to any person in terms of subsection (I) lapses if the holder departs from the Republic without the consent of the Minister.

[28] The essence of respondents' argument relates to alleged backlogs and exploitation of the refugee mechanisms and processes. Respondents submitted that many challenges have been encountered in having these claims finalized, including recalcitrant applicants with no merit to their claims. The respondents allege that most asylum seekers are not genuine and pursue asylum status "*to avoid meeting the requirements of the immigration laws of the Republic.*" Respondents stated that under the pre-amended Act and Regulations, these recalcitrant asylum seekers did not have sufficient incentive to pursue their applications diligently. Consequently, the threat of abandonment will provide asylum seekers with the necessary incentive to finalise their applications.

[29] Respondents submitted that section 37 and section 22(14) of the Refugees Act provide for offences and penalties in the event of a contravention of the Refugees Act or the conditions subject to which visas are issued under the Refugees Act. Previously, these monetary penalties and creation of offences were the only deterrents available to the DHA to encourage or enforce compliance in circumstances where an asylum seeker contravened the conditions of his/her visa. The practice relating to the payment of penalties often was that the asylum seeker would simply sign an admission of guilt form and pay a fine imposed by the Magistrate. Immigration officials who accompany asylum seekers and who facilitate the asylum seeker's appearance before the Magistrate are required to prepare reports and to keep a record of the proceedings.

[30] According to respondents, these procedures impose a cumbersome administrative burden on immigration officials without yielding any concomitant

progress in reducing the number of undocumented asylum seekers in the country. Resultantly, RSDO's and immigration officials are compelled to deal with asylum seekers who contravene the conditions of their section 22 visas, instead of focussing on their other responsibilities.

[31] Respondents alleged that the payment of penalties was ineffective as deterrent against future infractions. Asylum seekers continued to violate the conditions of their section 22 visas and frequently disappeared after payment of the fine and renewal of their visa. Respondents stated that the number of inactive cases significantly exceeds active cases to conclusion. Consequently, there is an urgent need for a mechanism to reach finality in respect of the inactive cases in order to ease the administrative burden and clear the backlog. The backlog created by inactive matters placed an insurmountable administrative burden on the DHA which is currently operating under severe capacity constraints.

[32] Respondents contended that penalties are counterproductive in the DHA's ability to assess and distinguish between genuine asylum seekers from those who merely use the asylum seeker framework to settle permanently and undocumented in South Africa. Respondents contend further that the impugned provisions are necessary steps towards clearing the backlog, and impose an obligation on both the asylum seeker and the state.

[33] Respondents noted that a sovereign country like South Africa is entitled to impose conditions and to require that all those who seek refugee status in the country, must within a specified time period make a formal application for the grant of

refugee status. The abandonment provisions serve as a persuasive tool or incentive to applicants for asylum status to take a real interest in ensuring that their applications are completed. This process also ensures that such applications do not remain dormant indefinitely while such persons, by means of their own deliberate default and breach, unilaterally elevate their temporary status in the Republic to a permanent, undocumented and unlawful one.

[34] Respondents therefore argued that the impugned provisions serve a legitimate government purpose that aims to:

34.1 ensure that the backlog of inactive applications is dealt with;

34.2 ease the current heavy administrative burden that the inactive applications place not only on Refugee Reception Office Officials but also on Immigration officials;

34.3 ensure that more effective and deterrent provisions are in place in order to deal with the backlog and recalcitrant asylum seekers who are evading (for ulterior purposes) finalisation of their applications; and

34.4 to provide a more effective mechanism to section 37 (penalty provisions) which were applicable in cases where asylum seekers contravened the conditions of their visa. These provisions are very similar to those in section 22(14).

[35] Applicants stated that the DHA had six functional RRO's in urban centres, but intended to close them. Pursuant to various court orders the DHA was directed to re-open these facilities. Applicants attributed numerous factors contributing to the backlogs. Firstly, the DHA has significantly reduced capacity over the past decade. Secondly, centres were supplied with insufficient resources. Thirdly, the DHA began to insist that asylum seekers renew visas only at the centre at which they originally

applied. Fourthly, the DHA insisted on issuing visas for limited duration which compelled asylum seekers to constantly return to RRO's to renew their permits. This resulted in longer queues outside the RRO and culminated in overcrowding and nuisance at the centres.

[36] Respondents claimed that the backlog was caused by inactive cases, which imposed a cumbersome administrative burden on the DHA since those asylum seekers do not visit RRO's, and do not require the attention of administrative staff. According to applicants, the increase in inactive cases may actually lower the administrative load. Applicants averred that the backlog within the asylum system begins at the level of the Refugee Appeal Authority ("RAA"), previously known as the Refugee Appeal Board. If asylum seekers fail to appear for their hearings before the RAA, the RAA is empowered to dismiss the appeal solely on that ground. Applicants contended that the RAA is empowered to invoke these powers, and therefore non-attendance cannot in law be the reason and cause why the backlog developed, since appeals in which asylum seekers fail to attend can and are finalised. Applicants pointed out that although the number of asylum seekers has decreased significantly over the past decade, the DHA is still dealing with a backlog in the system.

[37] Applicants also disputed the respondents' proposition that the impugned provisions will reduce the administrative burden on the DHA by incentivising asylum seekers to attend the RROs timeously and diligently. Applicants noted that the fact that asylum seekers are at risk of losing all the benefits attached to the visa is sufficient incentive for them to renew their visas. However, the excessive queues and lack of capacity may hinder asylum seekers from renewing their visas timeously

due to circumstances beyond their control. They may be required to return in circumstances where they lack the funds to do so, risk losing their work due to their absence, or have difficulty in finding child carers while attending RRO's. The amicus supported this contention by providing examples of the real-life experiences of asylum seekers.

[38] Applicants and the amicus submitted that the backlog exists as a result of respondents' lack of capacity to address it. They contended that the generalised approach adopted by respondents is flawed since legitimate asylum seekers are denied the opportunity for a proper determination of their asylum claims. The amicus highlighted the challenges faced by legitimate asylum seekers whose permits expired due to circumstances beyond their control, as well as catastrophic effects when their applications were deemed abandoned.

[39] The applicants submit that the impugned provisions are not rational, in that there is a disconnect between their intended purpose and the actual impact. This disconnect arises from a fundamental failure of the respondents to appreciate the true causes of the backlog within the South African asylum system. The respondents claim that the impugned provisions are rational (and justifiable) firstly, because it is the failure of asylum seekers to present themselves for renewal of the visa that causes the backlog. Secondly, the backlog of inactive cases imposes a severe burden and administrative hardship on the DHA. Thirdly, the impugned provisions remedy the backlog, and therefore alleviate the burden on the DHA by incentivising asylum seekers to attend RRO's timeously and diligently.

<u>The impact of the limitation on children and children's rights</u>

[40] The amicus provided the court with a detailed exposition of the impact of the impugned provisions on children. Children who are listed as dependants on asylum applications are at the mercy of the bureaucratic processes governing the main applicant's claim. Their asylum seeker visas are also linked to the main applicant's asylum seeker visa.[14] This means that when the main applicant's claim is deemed abandoned, all dependants' applications will also be automatically deemed abandoned and they will not be entitled to renewal of their asylum seeker visas.

[41] Consequently, dependent children remain undocumented pending the enquiry by the Standing Committee, or indefinitely should the Standing Committee endorse the application as abandoned. Children are therefore exposed to severe consequences of being undocumented as well as the additional risk of refoulement, all as a result of actions and circumstances beyond their control. Unaccompanied[15] and separated[16] children are also particularly vulnerable and experience great difficulty in accessing documentation. The abandonment provisions add a new barrier that children may face when attempting to legalise their stay in South Africa.

[42] The amicus argued that the abandonment provisions violate several established principles which underpin the best interests of the child under domestic and international law. Section 28(2) of the Constitution provides that every child has the right to parental (or family) care[17] and to be protected from maltreatment and

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[14] CoRMSA FA p 433 at para 88.
[15] Unaccompanied children are children who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so.
[16] Separated children are children who have been separated from their previous legal or customary primary caregiver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members.
[17] Every child has a right -…….to family care or parental care, or to appropriate alternative care when removed from the family environment

neglect,[18] (and in every matter concerning a child their "*best interests are of paramount importance"*.**[19]** In **Centre for Child Law and Others v Media 24 Limited and Others**,[20] the Constitutional Court explained that the "*best interests of the child principle enshrined in section 28(2) of the Constitution is a right in and of itself and has been described as the 'benchmark for the treatment and protection of children'*."[21] This is the "*golden thread*" which runs throughout our law relating to children.[22]

[43] The Children's Act[23] expands and gives further content and effect to these constitutional rights and give effect to the State's obligations concerning the well-being of children, in terms of international instruments which are binding on it,[24] which instruments amongst others include the [25] United Nations Convention on the Rights of the Child (UNCRC)[26] and the African Charter on the Rights and Welfare of the Child (ACRWC)[27] is also of paramount importance. Both instruments protect the inherent right to dignity of children, and asserts that the best interests of the child shall be the primary consideration in all actions taken by the State, any person or authority. Both instruments require that member States shall take all appropriate legislative and administrative measures to ensure that children within their

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[18] Every child has the right -… to be protected from maltreatment, neglect, neglect or abuse or degradation
[19] A child's best interest are of paramount importance in every matter concerning the child
[20] [2019] ZACC 46; 2020 (3) BCLR 245 (CC); 2020 (1) SACR 469 (CC).
[21] Id at para 37.
[22] Brigitte Clark '*A "golden thread"? Some aspects of the application of the standard of the best interest of the child in South African family law*' 2000 Stellenbosch Law Review 3**.**
[23] 38 of 2005.
[24] To give effect to the Republics obligations concerning the well-being of children in terms of international instruments binding on the Republic
[25] Section 6(2) and 9 of the Children's Act.
[26] adopted by the UN General Assembly in 1989 and ratified and acceded to by SA in 1995
[27] Adopted by the OAU in 1990 and entered into force in November 1999

jurisdiction are protected against all forms of discrimination, more particularly in regard to their nationality and status.[28]

[44] Article 22 of the UNCRC has particular application to the rights of children who are asylum seekers. It provides that:

> *"22.1 State Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.*

[45] This provision echoes Article 23.1 of the ACRWC, headed "refugee children", which states that:

> "*State Parties to the present Charter shall take all appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law shall, whether unaccompanied or accompanied by parents, legal guardians or close relatives, receive appropriate protection and humanitarian assistance in the enjoyment of the rights set out in this Charter and other international human rights and humanitarian instruments to which the States are Parties."*

[46] In applying the abovementioned provisions holistically, it is evident that first, it is not in the best interests of children to deem their applications abandoned and to render them undocumented for extended periods due to bureaucratic circumstances beyond a child's control. The added threat of arrest, detention, deportation and *refoulement* is plainly not in a child's best interests. By stripping children of existing protections, the abandonment provisions also fail to provide asylum seeker children

[28] Article 3.1 CRC, Article 4.1 Charter

with "*appropriate protection and humanitarian assistance in the enjoyment of applicable rights*", as required under the UNCRC and ACRWC.

[47] Second, the impugned abandonment provisions violate the principle that there should be individualised decision-making in all matters concerning children. **In AD and Another v DW and Others**[29] the Constitutional Court stressed that "*child law is an area that abhors maximalist legal propositions that preclude or diminish the possibilities of looking at and evaluating the specific circumstances of the case*".[30]

[48] In **S v M,**[31] Sachs J added that:

> *"A truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved. To apply a predetermined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned.*"

[49] The abandonment provisions take effect automatically after the expiry of 30 days, with no individualised regard to the impact on affected children. The mere fact that an application can be made to the Standing Committee, after-the-fact, to lift the abandonment is meaningless where the rights of children have already been severely infringed by being rendered undocumented for substantial periods of time. Furthermore, no provision is made for the Standing Committee to assess the impact of abandonment on children's rights in determining whether to endorse abandonment. The sole consideration is whether there is good reason for the failure

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[29] *AD and Another v DW and Others* 2008 (3) SA 183 (CC); 2008 (4) BCLR 359 (CC).
[30] Id at para 55. See also *Centre for Child Law v Minister for Justice and Constitutional Development and Others* [2009] ZACC 18; 2009 (2) SACR 477 (CC); 2009 (6) SA 632 (CC); 2009 (11) BCLR 1105 (CC) at para 46 – 47 and *S v M (Centre for Child Law as Amicus Curiae)* [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) at para 24.
[31] *S v M* id.

to renew the visa in time, regardless of the consequences for the affected asylum seekers and their children.

[50] Third, the abandonment provisions violate the duty to ensure that children are heard in all matters concerning their interests before actions are taken that have an adverse effect on their rights**.** In **AB v Pridwin**[32] the Constitutional Court confirmed that *"section 28(2) incorporates a procedural component, affording a right to be heard where the interests of children are at stake".*[33] The Court further explained that:

> *"This "overarching principle" has been codified in the provisions of the Children's Act. Section 10 of the Children's Act confers a specific right on children to participate in all decisions affecting them, taking into account their age, maturity and development."*[34]

[51] The automatic application of the abandonment provisions clearly violates these principles. The mere fact that representations can be made to the Standing Committee after-the-fact, once a child is already rendered undocumented for extended periods, is of no use and assistance. This is aggravated by the absence of no formal procedures to make representations to the Standing Committee, let alone any procedure to ensure that the voices of affected children are heard in this process.

[52] Fourth, abandonment provisions violate the principle that children must be seen as individuals with their own inherent dignity and rights, not as mere appendages of

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[32] *AB and Another v Pridwin Preparatory School [2020] ZACC 12; 2020 (9) BCLR 1029 (CC); 2020 (5) SA 327 (CC*) at para 141.
[33] See also *Centre for Child Law v The Governing Body of Hoerskool Fochvile* 2016 (2) SA 121 (SCA*)* at para 19, where the Supreme Court of Appeal held that children have a right to be heard in matters affecting their interests, either directly or through their representatives.
[34] *AB v Pridwin* at para 143.

their parents or caregivers. In **S v M**[35] the Constitutional Court enunciated the principle as follows:

> *"Every child has or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them. The unusually emancipatory character of section 28 presupposes that in our new dispensation the sins and traumas of fathers and mothers should not be visited upon their children."*

[53] This was also echoed in **AB v Pridwin** (supra) where Khampepe J, concurring with the full support of the majority, stated that "*[a]s a point of departure, it must be emphasised that children are individual right-bearers and not "mere extensions of [their] parents, umbilically destined to sink or swim with them*".[36]

The accessibility to achieve less restrictive means

[54] Applicants submitted that there are a wide range of less restrictive means that would better achieve the objectives intended in a more proportionate manner by addressing the causes of the backlogs such as:

54.1 Increasing the resources within the asylum system itself in order to ensure that asylum claims are processed more quickly. The DHA has, in fact, already implemented this solution by announcing a partnership with United Nations High Commissioner for Refugees ("UNHCR") in terms of which the UNHCR is providing R147 million to resolve the

[35] S v M at para 18.
[36] AB v Pridwin at para 234.

backlog. This money will fund administrative support, IT tools, and 36 new staff for the RAA alone.

54.2 Fixing the bottlenecks within the RAA (which is where the largest backlog exists) by, *inter alia*, sourcing more interpreters, improving the communication between the RAA and appellants, and empowering the RAA to spend more time at RROs.

54.3 Allowing RAA appeals to be heard by a single RAA member (a change which already came into effect along with the impugned provisions).[37]

54.4 Re-opening RROs that have been closed.

54.5 Retaining and expanding the online system for visa renewals that has come into operation since the advent of the national lockdown.

54.6 Increasing the period for which visas are issued, so that asylum seekers need not attend on RROs as often, and thereby decreasing the problematic queues outside RROs.

54.7 Allowing visa renewals to be done at any RRO instead of limiting such renewals to the RRO at which the asylum seeker originally applied for asylum.

54.8 If asylum seekers do fail to attend hearings without good cause, using RAA Rules 12 and 13 to finalise the appeals on the basis of the papers filed alone.

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[37] Section 8C (2) of the Act.

54.9 Maintaining the current system of (a) requiring asylum seekers to pay fines for the late renewal of their visas, and (b) treating inactive applications as dormant. Doing so does not impose an administrative burden on the respondents, and it is an effective and proportional system.

Discussion

[55] According to section 1A of the Refugees Act, the interpretation and application of a statute must be in a manner consistent with the UN Convention and its Protocol**,** the OAU Convention, and the UDHR. South Africa has ratified or acceded to international agreements, and is bound by such ratification in terms of section 231(2) of the Constitution. South Africa is also bound by customary international law to the extent that it is consistent with the Constitution and legislation in terms of section 232 of the Constitution. The Refugees Act is therefore aimed at giving effect to the country's international obligations, and embodies the humanitarian essence of the 1951 Convention and its Protocol.

[56] In **Ruta v Minister of Home Affairs** 2019 (3) BCLR 383 (CC) at paragraphs 24-26 the Constitutional Court expressed the nature of the provisions regarding the right of non-refoulement as follows:

> *"This is a remarkable provision. Perhaps it is unprecedented in the history of our country's enactments. It places the prohibition it enacts above any contrary provision of the Refugees Act itself – but also places its provisions above anything in any other statute or legal provision. That is a powerful decree. Practically it does two things. It enacts a prohibition. But it also expresses a principle: that of non-refoulement, the concept that one fleeing*

persecution or threats to "his or her life, physical safety or freedom" should not be made to return to the country inflicting it.

It is a noble principle – one our country, for deep-going reasons springing from persecution of its own people, has emphatically embraced. The provenance of section 2 of the Refugees Act lies in the Universal Declaration of Human Rights (Universal Declaration), which guarantees "the right to seek and to enjoy in other countries asylum from persecution".

[57] In **Saidi and Others v Minister of Home Affairs and Others** 2018 (4) SA 333 (CC) (24 April 2018) at paragraph 13, the Constitutional Court held that "*[t]emporary permits issued in terms of [section 22] are critical for asylum seekers. They do not only afford asylum seekers the right to sojourn in the Republic lawfully and protect them from deportation but also entitle them to seek employment and access educational and health care facilities lawfully*". The Constitutional Court emphasised that the Act should be interpreted in a manner that ensures that asylum seekers always have access to visas. The Court further stated:

"This interpretation better affords an asylum seeker constitutional protection whilst awaiting the outcome of her or his application. She or he is not exposed to the possibility of undue disruption of a life of human dignity. That is, a life of: enjoyment of employment opportunities; having access to health, educational and other facilities; being protected from deportation and thus from a possible violation of her or his right to freedom and security of the person; and communing in ordinary human intercourse without undue state interference."[38]

[38] Saidi at para 18. See also Minister of Home Affairs and Others v Watchenuka and Another 2004 (4) SA 326 (SCA) ("Watchenuka") at para 32.

[58] South Africa is obliged to establish systems and allocate resources to ensure the international human rights law protection of refugees and asylum seekers, including asylum determination mechanisms. It is evident that the impugned provisions create an extremely adverse limitation on the right to *non-refoulement*. It essentially allows for asylum seekers to be returned to the countries from which they fled without any consideration of the reasons and grounds why they fled such countries. The respondents pointed out that abandonment decisions are subject to an automatic review by the SCRA. If the asylum seeker is able to show that he or she was prevented by hospitalization, institutionalization or any other compelling reason from renewing his or her visa timeously, the SCRA may elect not to endorse the abandonment of the application.

[59] However, a bureaucratic review by the SCRA on the other hand, can never serve as a legitimate constitutional basis for limiting the right to *non-refoulement*. No matter how generously the SCRA exercises its discretion under section 22(12), it is limited to considering questions of condonation. This is distinct from determining whether refugee status should be afforded to an asylum seeker. The former asks what the reason for the delay in renewing the visa while in South Africa is, and the latter asks why the asylum seeker fled their country. The former is concerned with dilatory excuses, whereas the latter with gross human rights violations. Respondents acknowledge that the merits of an asylum seeker application are not evaluated during the section 22 process. Consequently, the deprivation of the right to *non-refoulement* created by the impugned provisions is absolute and any asylum seeker who is deemed to have “abandoned” his or her asylum application is completely barred from the protections of the asylum system.

[60] It appears that the ostensible purpose of the impugned provisions is to incentivise asylum seekers to attend on RRO's more regularly, in order to reduce the backlog of inactive cases. However, this purpose has no importance or value at all, because a lack of incentives is not the main cause of the backlogs, and inactive cases do not impose any significant burden on the DHA. I am in agreement with the applicants that there is no defensible and logical connection between the limitation and its purpose. Even if the impugned provisions result in more asylum seekers attending RROs, this simply means that more inactive cases become active. It does not imply that the backlog is genuinely resolved, or that the lack of capacity and structural constraints within the asylum system have been rectified in any way.

[61] And even if the impugned provisions did somehow reduce the overall backlog, it would do so by imposing grossly disproportionate sanctions.[39] By depriving late asylum seekers of their right to *non-refoulement*, it contemplates that a person could be sent to face torture, or death only because they are late in renewing a visa. Instead of advancing the purpose of reducing the backlog, the impugned provisions have the potential to increase such backlog as they will require an already under resourced system to refocus its energies not on the finalisation of refugee applications but on the various steps in the abandonment process.

Conclusion

[62] The impugned provisions are clearly arbitrary, because asylum seekers will no longer be deported based solely on the merits of their claims, but on external

[39] Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Security and Others 1996 (3) SA 617 (CC), para 49:

> "To determine whether a law is overbroad, a court must consider the means used (that is, the law itself, properly interpreted), in relation to its constitutionally legitimate underlying objectives. If the impact of the law is not proportionate with such objectives, that law may be deemed overbroad."

circumstances such as the location of the nearest RRO, the length of the queues at the RROs, or the workload of DHA officials on the day. The current system indiscriminately renders an asylum seeker's rights to have been abandoned in circumstances where they have no control over these factors. Furthermore, legitimate asylum seekers are deprived of their rights to fair hearing merely because respondent indiscriminately believes that other asylum seekers may not intend to pursue their asylum claims.

[63] At the heart of the respondents' justification is an unlawful presumption and prejudgment: that most asylum seekers have no valid claims and no interest in pursuing these claims. This violates the core principle of refugee law that asylum seekers must be treated as presumptive refugees, with all protections this entails, until the merits of their claims have been finally determined through a proper process. As the Constitutional Court acknowledged in **Saidi**, '[a] *person does not become a refugee because of recognition, but is recognised because he or she is a refugee.*'[40] In its recent judgment in **Abore,** the Constitutional Court added the following:[41]

> *"[T]he 1951 [UN Refugees] Convention protects both what it calls "de facto refugees" (those who have not yet had their refugee status confirmed under domestic law), or asylum seekers, and "de jure refugees" (those whose status has been determined as refugees). The protection applies as long as the claim to refugee status has not been finally rejected after a proper procedure. This means that the right to seek asylum should be made available to every illegal foreigner who evinces an intention to apply for asylum, and a proper determination procedure should be embarked upon*

[40] Saidi and Others v Minister of Home Affairs and Others 2018 (4) SA 333 (CC) at para 34.
[41] Abore v Minister of Home Affairs [2021] ZACC 50 (30 December 2021) at para 42.

and completed. The "shield of non-refoulement" may only be lifted after that process has been completed."

[64] It is evident that this prejudgment is not only unlawful, but it is also indiscriminate. Furthermore, it is contrary to the aims and objectives of the refugee protection framework to prejudge applications and assume that most asylum seekers have no valid claims. The manner in which the current system is implemented is in clear violation of the core principles of refugee law that asylum seekers must be treated as presumptive refugees, with all the protections this entails, until the merits of their claims have been finally determined through a proper process. Respondents had failed to provide a rational and cogent reason why an asylum seekers application is prejudged without due process and a proper consideration of the merits of the case.

[65] The principle of non-refoulement and its impact on children must also be considered. In particular, a child should not be returned if such return would violate their fundamental human rights. This includes the risk of inadequate provision of basic needs such as food, health and education. The abandonment provisions operate automatically after the expiry of 30 days without any regard to the impact on affected children. The State has not advanced any acceptable justification for this profound limitation of children's rights.[42] In my view children's rights cannot be sacrificed and surrendered in this way, without individualised determination, merely for the sake of alleged administrative convenience.

[42] See Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development [2013] ZACC 35; 2014 (2) SA 168 (CC); 2013 (12) BCLR 1429 (CC) at para 84

[66] The respondents' appeals to administrative backlogs in the asylum process are also no answer to these rights limitations. In the absence of an explanation for these limitations, I find that there is no rational explanation to justify these limitations. The result is that no rational connection has been established between the limitations and their ostensible purpose. They are also disproportional because their necessity has not been demonstrated.

[67] The right to non-refoulement is of great importance in the overall constitutional scheme, as it recognises human beings right to dignity. In **S v Makwanyane**[43] the Constitutional Court stated that the right to dignity and the right to life are intertwined, and are the most important of all human rights. The right to dignity is afforded to everyone. In **Lawyers for Human Rights v Minister of Home Affairs**[44] the Constitutional Court held that as such, it should be understood to apply to everyone, both citizens as well as foreigners who may be in the country but have not been granted permission to enter or remain. In **Minister of Home Affairs and Others v Watchenuka and Another**[45], the principal was affirmed in the Supreme Court of Appeal.

[68] Consequently, it has been demonstrated that the impugned provisions infringe on the right to protection under refugee laws as enunciated in Article 33 of the Convention and Protocol, as well as the Refugees Act. I am accordingly satisfied that the respondents' justification for the infringement on the right to non-refoulement does not withstand constitutional scrutiny. Accordingly, after balancing all the relevant factors listed in section 36 (1), the infringements of fundamental rights

[43] 1995 (3) SA 391 (CC)
[44] 2004 (4) SA 125 (CC)
[45] 2004 (4) SA 326 (SCA) at paragraph 25

brought about by the impugned provisions have not been justified. It follows that the impugned provisions are inconsistent with the Constitution, and therefore invalid.

[69] With regard to costs, the applicants launched this application to assert the constitutional rights of indigent, vulnerable and marginalised asylum seekers, and to compel the respondents to act in accordance with its constitutional and statutory. Consequently, the Biowatch principle is applied.

[70] In the result the following order is made:

It is declared that:

(a) In terms of section 172(1)(a) of the Constitution of the Republic of South Africa, 1996 section 22(12) and 22(13) of the Refugees Act 130 of 1998 are declared to be inconsistent with the Constitution and invalid to the extent that it provide that asylum seekers who have not renewed their visas in terms of section 22 of the Act within one month of the date of the expiry of the visa, are considered to have abandoned their asylum applications.

(b) It is declared that the State is obliged by section 7(2) of the Constitution to respect, protect, promote and fulfil the rights in sections 9, 10, 28, and 34 of the Constitution by preparing, initiating, introducing, enacting and bringing into operation, diligently and without delay as required by section 237 of the Constitution, legislation to ameliorate and amend part (a) of the order above-mentioned.

(c) Regulation 9 and Form 3 of the Refugee Regulations, published in GNR 1707 Government Gazette 42932, on 27 December 2019 ("the Regulations") are declared to be:

(i) Inconsistent with the Constitution and invalid; and

(ii) Reviewed and set aside as unlawful and invalid.

(d) The declaration of invalidity is referred to the Constitutional Court for confirmation in terms of section 172 (2) (a) of the Constitution.

(e) Respondents are ordered to pay the applicants' costs, such costs to include the costs of two counsel, the one paying, the other to be absolved.

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DEPUTY JUDGE PRESIDENT GOLIATH