THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

CASE NO: 48/2014

Reportable

In the matter between:

SOMALI ASSOCIATION OF SOUTH AFRICA	**First Appellant**
ETHIOPIAN COMMUNITY OF SOUTH AFRICA	**Second Appellant**
DENDAMO GOBEZ AGALO	**Third Appellant**
TEFESA GEBRE MICHAEL WOELAMO	**Fourth Appellant**
JAMAL BARAKAT YUSSUF	**Fifth Appellant**
MOALID HASSAN MOHAMED	**Sixth Appellant**

and

LIMPOPO DEPARTMENT OF ECONOMIC DEVELOPMENT ENVIRONMENT, AND TOURISM	**First Respondent**
MINISTER OF POLICE	**Second Respondent**

MINISTER OF HOME AFFAIRS	**Third Respondent**
MINISTER OF LABOUR	**Fourth Respondent**
LIMPOPO PROVINCE MEC FOR SAFETY, SECURITY AND LIAISON	**Fifth Respondent**
NATIONAL POLICE COMMISSIONER	**Sixth Respondent**
PROVINCIAL COMMISSIONER OF POLICE: LIMPOPO	**Seventh Respondent**
STANDING COMMITTEE FOR REFUGEE AFFAIRS	**Eight Respondent**
GREATER TUBATSE MUNICIPALITY	**Ninth Respondent**
MUSINA MUNICIPALITY	**Tenth Respondent**

Neutral Citation: *Somali Association of South Africa v Limpopo Department of Economic Development, Environment and Tourism* (48/2014) ZASCA 143 (26 September 2014).

Coram: Navsa ADP, Brand, Ponnan and Majiedt JJA & Mathopo AJA

Heard: 16 September 2014

Delivered: 26 September 2014

Summary: **Asylum seekers and refugees' entitlement to apply for licences to trade in spaza and tuck-shops – no blanket prohibition against self-employment either in terms of the Constitution or applicable legislation – s 22 of the Constitution not a bar – right to dignity implicated – vulnerable position of asylum seekers and refugees considered – South Africa's international obligations noted.**

ORDER

On appeal from: The North Gauteng High Court, Pretoria (Ranchod J sitting as court of first instance).

The following order is made:

1. The appeal is upheld.

2. The order of the court below is set aside and substituted as follows:

'(a) It is declared that asylum seekers and refugees are entitled to:

(i) apply for new business or trading licences in terms of section 8 of the Lebowa Business and Trading Undertakings Act 6 of 1977 or for a licence in terms of section 2(3) of the Businesses Act 71 of 1991;

(ii) apply to renew existing business or trading licences in terms of section 9 of the Lebowa Business Act or in terms of the Businesses Act; and

(iii) apply for and renew written consent to operate tuck-shops or spaza shops in terms of the Musina Land Use Management Scheme of 2010.

(b) It is declared that the closure of businesses operated by refugees and asylum seekers in terms of valid permits is unlawful and invalid.

(c) The first, second, third, fifth, sixth, seventh and eighth respondents are ordered jointly and severally to pay the applicants' costs including the costs of two counsel where so employed.'

3. The second, third, fifth, sixth, seventh and eighth respondents are ordered jointly and severally to pay the appellant's costs including the costs of two counsel where so employed.

JUDGMENT

Navsa ADP (Brand, Ponnan and Majiedt JJA, Mathopo AJA concurring)

[1] This appeal concerns the rights of refugees and asylum seekers lawfully present in South Africa in terms of the provisions of the Refugees Act 130 of 1998 (the Act), to earn a living by way of self-employment in the form of trading in spaza or tuck-shops. The divergence between the appellants, who represent the interests of Somali and Ethiopian nationals, lawfully present for the time being in South Africa as refugees or asylum seekers, on the one side, and the Minister of Police, the Minister of Home Affairs, The National Police Commissioner, the Provincial Commissioner of Police, Limpopo Province and the Standing Committee for Refugee Affairs, (the second, third, sixth, seventh and eighth respondents, respectively), on the other, is set out immediately hereafter. The former assert that they have the right to be treated equally to South African citizens; that they are entitled to apply for and be granted licences to trade as aforesaid; that they, like South African citizens, are entitled to the right to dignity enshrined in our Constitution; and that preventing them from earning a living which leads to them being desperate and destitute, as the authorities referred to above have done, is tantamount to denying them the right to dignity. By contrast, the other contesting parties contend that refugees and asylum seekers do not have the same rights as South African citizens; that the differentiation based on their refugee and asylum seeker status is countenanced by the Constitution; and are emphatic that the right to seek self-employment is reserved for South African citizens. The first respondent, the Limpopo Department of Economic Development, Environment and Tourism (LEDET), participated in the high court but not on appeal. I shall, in due course, say something concerning the affidavits they filed in the court below. The fourth respondent, the Minister of Labour, the ninth respondent, the Greater Tubatse

Municipality, and the tenth respondent, the Musina Municipality, did not participate in the present appeal or in the litigation in the high court.

[2] The first and second appellants, the Somali Association of South Africa and the Ethiopian Association of South Africa respectively, are registered non-profit organizations that promote and protect the interests of people who originate from those countries and who find themselves in South Africa. The third and fourth appellants, Mr Dendamo Gomez Agalo and Mr Tefesa Woelamo, are Ethiopian nationals. Mr Agalo is the holder of an asylum seeker's permit in terms of s 22 of the Act. Mr Woelamo has been afforded formal recognition as a refugee in terms of s 24(3)(*a*) of the Act. Mr Jamal Barakat Yussuf, the fifth appellant, is a Somali national, who is the holder of a permanent residence permit in terms of s 25 of the Immigration Act 13 of 2002 (the IA) and has a South African 'non-citizen' identification number. Mr Moalid Mohamed, the sixth appellant, is a Somali national who has been afforded formal recognition as a refugee in terms of s 24(3)(*a*) of the Act.

[3] The applicants brought an application in the North Gauteng High Court, initially for an interim order but later, by agreement with the contesting respondents, they sought a final declaratory order in the following terms:

'1. [D]eclaring that asylum seekers and refugees have the right to seek self-employment and accordingly have the right:

1.1 to apply for new business or trading licenses in terms of section 8 of the Lebowa Act or for a licence in terms of section 2(3)(b) of the Businesses Act;

1.2 to apply to renew existing business or trading licenses in terms of section 9 of the Lebowa Act or in terms of the Businesses Act; and

1.3 to apply for and renew written consent to operate tuck-shops or spaza shops in terms of the Musina Land Use Scheme.

2 declaring the decisions of the fifth, sixth, and seventh respondents to adopt and implement "Operation Hardstick" in the Limpopo Province to be invalid.

3 declaring that the closure of businesses operated by refugees and asylum seekers in terms of valid permits, issued either in their names or in the names of the owners/(s) of the businesses concerned, under the Lebowa Act, the Businesses Act or in terms of the Musina Land Use Scheme, where applicable, is unlawful and invalid;

4 declaring that the confiscation of equipment, stock or other items pursuant to the conduct described in paragraph 3 above, is unlawful and invalid.'

Furthermore, the appellants sought an order directing the MEC for Safety and Security and Liaison, the National Police Commissioner and the Provincial Commissioner of Police, Limpopo to return all equipment, stock and other items confiscated from refugees and asylum seekers when carrying out 'Operation Hardstick'.

[4] The background to that application is recorded in the judgment of that court (Ranchod J) as follows:

'The genesis of this application stems from the SAPS's actions under what it termed "Operation Hardstick". The applicants allege, and it has not been disputed, that the SAPS embarked on Operation Hardstick to shut down businesses in Limpopo that are operating without the requisite business permits. At least 600 businesses of traders have been closed down. The SAPS confiscated equipment and stock used by traders and arrested traders and their employees. It is further alleged that the SAPS officers told traders that a permit must be in the trader's own name to be valid; that foreigners are not allowed to operate businesses in South Africa, the asylum seeker and refugee permits held by the traders did not entitle them to operate a business in South Africa; and foreigners should leave the municipality.'

[5] In the founding affidavit of Mr Mohammad Ali Hirey, on behalf of the first appellant, the following is stated:

'As a consequence, refugees and asylum seekers, who are often unable to find alternative employment in South Africa, have been deprived of their only means of financial support and left destitute. The personal circumstances of each of the third to sixth applicants are set out in the confirmatory affidavits attached to this founding affidavit. Those affidavits tell a story of the most

naked form of xenophobic discrimination and of the utter desperation experienced by the victims of that discrimination.'

[6] Mr Hirey pointed to the problems encountered by refugees and asylum seekers in South Africa, and more particularly in the Limpopo Province. He explained that they faced several barriers to entering the formal job market, including language difficulties, a shortage of meaningful skills as a result of the conditions in their countries of origin, competition from local job-seekers and xenophobic prejudice. Often the only means for them to support themselves was to seek self-employment by starting their own businesses. According to Mr Hirey, and this appears to be uncontested, one of the areas in which refugees and asylum seekers have sought self-employment is through the operation of tuck-shops or spaza shops in South African townships. By establishing such businesses, traders provide accessible, convenient access to goods such as food and cell-phone airtime in the communities in which they have settled. They also sustain themselves and their families with the income earned from these businesses.

[7] It is clear from what is said by Mr Hirey that the existence of the spaza shops has provoked the ire of local traders. His assertions of xenophobic threats that were made against refugees and asylum seekers are uncontested.

[8] In respect of the police operations directed at Somali and Ethiopian nationals who hold asylum or refugee status, the appellants alleged that members of the South African Police Service (SAPS) embarked on an operation dubbed 'Operation Hardstick', in terms of which they shut down businesses run by Somali and Ethiopian nationals, whether licensed or not. The description of the police operation can hardly be said to be a public relations coup. The appellants asserted that the police often extort bribes and do not act against South African owned businesses who are similarly not licence compliant.

[9] The third, fourth, fifth and sixth appellants all set out their personal unpleasant experiences with the police in relation to their spaza shops. They described acts of extortion and confiscation of property. They also described how they were frustrated by municipal officers in their attempts to legitimise their positions as traders. The third, fifth and sixth appellants all state emphatically that they are destitute and that they are unable to buy food or support their families. It is clear that the third to sixth appellants are in dire financial straits. None of these assertions are countered by any of the respondents. The respondents' answer to these allegations constitutes a bare denial and they appear to hide behind the contention that refugees and asylum seekers do not have the same rights as South African citizens.

[10] At the heart of the present dispute are the assertions on behalf of the appellants about how some of them, and those whose interests they represent, were treated in relation to their attempts to legitimise their status as spaza and tuck-shop traders. During June and July 2012, Musina municipal officials and members of the SAPS, informed them that they required a municipal business permit in order to trade legally. They were told that the enforcement of this requirement would start immediately. When they attempted to apply for such permits they were not given any forms through which to obtain written consent to operate a spaza shop in terms of clause 22 of the Musina Land Use Management Scheme of 2010 (MLUMS). It appears that that is what the officials and the police were referring to. The permits in question are referred to as LEDET permits.

[11] In tandem with the police and municipal officials' actions referred to in the preceding paragraphs, a local business forum was agitating for South African landlords to rid themselves of their foreign trader lessees. That forum was insistent that only businesses with municipal business permits were entitled to trade and that the municipality would only permit citizens with South African identification documents to

apply for business permits.

[12] The appellants stated that subsequent to the events described in the preceding two paragraphs, closure of spaza shops run by Somali and Ethiopian refugees and asylum seekers increased significantly. A failure by a foreign national to produce a business permit or some form of official consent resulted in the immediate closure of their business and invariably confiscation of property.

[13] The appellants are adamant that the efforts of Somali and Ethiopian nationals to obtain business permits from the Musina municipal offices were frustrated either by their being denied opportunities to apply for permits or, in one instance, by an application not being processed. They were repeatedly told that, since they were not South African citizens, they did not qualify for LEDET permits. Some South African landlords who attempted to assist their lessees to obtain business permits also failed in their attempts to obtain the necessary consent.

[14] The following two paragraphs are a description by the appellants of how stock and equipment were confiscated by police when businesses were closed:

‘During the course of the spaza shop closures, the police officers confiscated stock and equipment that collectively totals thousands of Rands. Stock items that were seized included food items and household goods. The police officers also routinely seized fridges and freezers. Meat and other goods that required refrigeration were left to rot and perish in the traders’ shops.

No itemization of the confiscated stock or equipment was provided to the traders in Musina. However, in some instances the SAPS issued an Admission of Guilt fines . . . Notwithstanding the payment of Admission of Guilt fine, the SAPS generally refused to return confiscated stock and equipment to the traders.’

[15] Some traders were able to obtain temporary business permits in their own names. According to the appellants, the police closed down their businesses notwithstanding these temporary permits. Once again, save for a general denial, the specific allegations made by the appellants are not countered by any of the respondents.

[16] In early 2013 attempts by Somali and Ethiopian nationals to obtain permits or consent to trade were once again frustrated, their foreign national status proving an insuperable barrier.

[17] During January 2013 some applicants for permits were told that, in order to obtain written consents from the municipality to trade, they were required to provide building plans. In some instances officials of the first respondent told Somali and Ethiopian traders that they could have their landlords apply for permits on their behalf. After the landlords applied and received permits, traders nevertheless had their businesses closed down by the SAPS on the basis that they could not operate a business with permits in the name of their landlords. Traders then once more reverted to applying for business permits in their own names. This once again proved unsuccessful as municipal officials refused to entertain business applications from foreign nationals. Simply put, those whose interests the appellants represent found themselves in a ‘catch-22’ and perilous situation.

[18] A set of minutes reflecting the attitude of the third respondent’s department, the Department of Home Affairs, is uncontested. The following part is material:

‘Presentation by: Department of Home Affairs

The foreign Nationals should meet the following requirements to conduct business in the Republic of South Africa.

- Individuals issued with temporary Asylum Permits are not allowed to run a business.
- Asylum seekers are in the Republic of South Africa either to study or work, not to engage in business activities.
- Foreign nationals with Passports and Visa permit[s] to work, study or [do] business are allowed to run a business.
- Refugees are allowed to operate and run a business.
- Foreign nationals with work permits, their permits also indicates their work status.
- Foreign nationals who are in the country to do business invest an amount of [R2,5] million in the Republic before a permit is issued.
- Asylum permits are issued under Refugee Act 130 of 1998 section 22.'

[19] The high court, in deciding the application, had regard to the answering affidavit on behalf of the first respondent, in which it was stated that even in cases of asylum seekers, whose asylum seeker permits are valid and without restriction, it had in the past and continues to consider their applications for a trading licence and grant them in deserving cases. Relying on this, the high court stated the following:

'I am not satisfied that the first respondent denied the applicants or the refugees and asylum seekers a right to apply for trading licences and written consents to operate tuck shops and spaza shops.'

[20] The high court went on to say the following:

'In any event, from what follows, it will be apparent that it would not have been acting unlawfully if it had refused to entertain applications for trading licences from refugees and asylum seekers.'

The high court went on to hold that there was no admissible evidence to substantiate the evidence of the appellants against the SAPS.

[21] In relation to the right of asylum seekers and refugees to pursue self-employment, Ranchod J first had regard to s 22 of the Constitution, which provides:

'Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.'

He went on to consider s 10 of the Constitution, which reads as follows:

'Everyone has inherent dignity and the right to have their dignity respected and protected.'

[22] In the view of the high court, s 22 of the Constitution was the determining provision. Ranchod J reasoned that it dealt specifically with the right to trade and that limiting the right to trade by citizens has not only been internationally recognised as permissible, but has been authoritatively pronounced upon by this court and the Constitutional Court. With reference to the decision of this court in *Minister of Home Affairs & others v Watchenuka & another* 2004 (4) SA 326 (SCA), which recognised that refugees have the right to employment when their dignity is affected, Ranchod J could not see his way clear to extending this to the right to self-employment. In the result, he dismissed the application and made an order that each party is to bear its own costs.

[23] Before proceeding to the merits of this matter, I find it necessary to record that I find the manner in which the respondents conducted the litigation in this matter disconcerting. In the main they avoided dealing with any of the specific allegations of maltreatment and abuse raised by the appellants. Furthermore, I fail to understand how, in the answering affidavit on behalf of LEDET, a willingness is expressed to consider applications by asylum seekers and refugees for trading permits whilst at the same time an order to that effect was resisted. It is equally disturbing that, having adopted that attitude, LEDET chose not to participate in the appeal. Furthermore, it is unsettling that, whilst one organ of state, namely LEDET, expresses a willingness to consider granting permits to asylum seekers and refugees other organs of state, namely the remaining respondents, insist that it would be unlawful to grant such permits because of the provisions of the Constitution and applicable legislation.

[24] In considering whether the appellants were entitled to any of the relief sought in the court below, it is necessary at the outset, to consider the *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* 2007 (4) SA 395 (CC) decision of the Constitutional Court. That case concerned the right of refugees to work in the security industry in South Africa, which is regulated by the Private Security Industry Regulation Act 56 of 2001 (the PSIRA). That legislation provided, inter alia, that no person may render a security service for reward unless he or she is registered as a security service provider in terms of the PSIRA. One could only so register if one was a South African citizen or had permanent resident status. The constitutionality of the provisions in relation to foreign nationals who had not obtained permanent resident status was challenged. The Constitutional Court held, in relation to the security industry, that differentiation between citizens and permanent residents on the one hand, and all other foreigners on the other, has a rational foundation and serves a legitimate governmental purpose.

[25] In that case the Constitutional Court assumed, without deciding, that the PSIRA did discriminate and went on to consider whether such discrimination was fair. In answering that question, the Constitutional Court said the following factors have to be taken into account (at para 46):

'(*a*) Under the Constitution a foreigner who is inside this country is entitled to all the fundamental rights entrenched in the Bill of Rights except those expressly limited to South African citizens.

(*b*) The Constitution distinguishes between citizens and others as it confines the protection of the right to choose a vocation to citizens.

(*c*) In the final *Certification* case this Court rejected the argument that the confinement of the right of occupational choice to citizens failed to comply with the requirements that the Constitution accord this 'universally accepted fundamental right' to everyone. It held that the right of occupational choice could not be considered a universally accepted fundamental right. It also held that the European Convention for the Protection of Human Rights and Fundamental Freedoms embodies no such right to occupational choice nor

does the International Covenant on Civil and Political Rights. The distinction between citizens and foreigners is recognised in the United States of America and also in Canada. There are other acknowledged and exemplary constitutional democracies such as India, Ireland, Italy and Germany where the right to occupational choice is extended to citizens or is not guaranteed at all.

(*d*) In *Watchenuka*, Nugent JA held that it is acceptable in international law that every sovereign nation has the power to admit foreigners only in such cases and under such conditions as it may see fit to prescribe and held that it is for that reason that the right to choose a trade or occupation or profession is restricted to citizens by s 22 of the Bill of Rights.'

[26] Significantly, the Constitutional Court continued at para 47:

'Section 27(*f*) of the Refugees Act provides that "[a] refugee is entitled to seek employment". Section 23(1)(*a*) of the Security Act limits the refugees' right to choose employment only to the extent that they may not work in the private security industry. It in no way prevents them from seeking employment in other industries.'

[27] The Constitutional Court also thought it important that s 23(6) of the PRISA enabled the regulating authority, on good cause shown, to register persons, notwithstanding the other requirements of that Act.[1] At para 57 of the judgment, the Constitutional Court once again referred to *Watchenuka,* but this time in the following terms:

'In *Watchenuka* every asylum seeker was totally prohibited, by the conditions in his or her permit, from taking up any employment or studying, pending the outcome of an application for asylum. What the SCA understandably found unacceptable in *Watchenuka* was the total exclusion from employment, thereby rendering the asylum seeker destitute. The position of the applicants herein is totally different. The Refugees Act guarantees the applicants the right to seek employment. It is the *choice* of vocation that is reserved only for citizens and permanent

[1] *Union of Refugee Women supra* para 48.

residents.'

[28] The Constitutional Court went on to consider, first the 1951 United Nations Convention on the Status of Refugees (the Convention), [2] to which South Africa acceded on or about 12 January 1996 (with the 1967 Protocol Relating to the Status of Refugees[3] being ratified on the same day). In this regard, it said the following (para 65):

'Insofar as the application of art 17(1) in the present circumstances is concerned, the refugees *are* accorded the most favourable treatment afforded to a national of a foreign country in the same circumstances as regards the right to engage in wage-earning employment. The applicants may not be treated as permanent residents because they are not in the same circumstances for the simple reason that they have yet to meet the requirements for permanent residence.'

The Constitutional Court went on to conclude (paras 66-67):

'Accordingly, the discrimination in this matter, objectively determined, has very little, if any, potential to impair the essential content of the dignity of the applicants in any significant or substantial manner and is fair.

I recapitulate, the discrimination is not unfair and does not breach the equality right at the threshold. This is particularly so if the entire statutory scheme of the employment qualification is taken into consideration. The scheme is for a limited fixed period; it is not a blanket ban on employment in general but is narrowly tailored to the purpose of screening entrants to the security industry; it is flexible and has the capacity to let in any foreigner when it is appropriate and to avoid hardship against any foreigner. It permits blanket exemption of categories of work within the industry and permits departure from the strict requirements of s 23(1)(*a*) on "good cause shown". In short, the discrimination is a legitimate legislative choice on a highly prized public interest which is safety and security, in a country where security workers in this industry exceed the police and the army in number.'

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[2] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, P. 137.

[3] UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267.

[29] It is now necessary to turn to the *Watchenuka* decision of this court. In that case Nugent JA was dealing with the rights of asylum seekers to be employed whilst waiting for their application for recognition as a refugee to be determined.[4] In order to give regulatory context to the position of asylum seekers and refugees, I consider it necessary to repeat the following parts of that judgment (paras 2-7):

'The rights and obligations of those who seek asylum are governed by the Refugees Act 130 of 1998, which was enacted to give effect to South Africa's international obligations to receive refugees in accordance with standards and principles established in international law. The effect of s 2 of the Act is to permit any person to enter and to remain in this country for the purpose of seeking asylum from persecution on account of race, religion, nationality, political opinion or membership of a particular social group, or from a threat to his or her life or physical safety or freedom on account of external aggression, occupation, foreign domination or disruption of public order.

A person who wishes to be given asylum must apply to be recognised as a refugee. If that recognition is granted the refugee – and his or her dependants – enjoys the various rights specified in s 27 of the Act, which include the right in certain circumstances to apply for permanent residence, the right to a South African travel document, the right to seek employment, and the right to receive basic health services and primary education. It is implicit in that section (particularly when it is read together with the Aliens Control Act 96 of 1991 and the Immigration Act 13 of 2002 that replaced it) that an applicant for asylum has none of those rights until he or she is recognised as a refugee.

An application for asylum must be made in the prescribed form to a Refugee Reception Officer at one of the Refugee Reception Offices that are established in terms of s 8 of the Act. The Refugee Reception Officer must refer the application to a Refugee Status Determination Officer who is required to make appropriate enquiries and to determine whether or not the applicant qualifies for recognition as a refugee. If the application is refused the applicant is entitled to appeal.

Section 22(1) of the Act provides that once an applicant has applied for asylum:

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[4] *Watchenuka supra* para 1.

"The Refugee Reception Officer must, pending the outcome of [the] application . . . issue to the applicant an asylum seeker permit in the prescribed form allowing the applicant to sojourn in the Republic temporarily, subject to any conditions, determined by the Standing Committee, which are not in conflict with the Constitution or international law and are endorsed by the Refugee Reception Officer on the permit."

The Standing Committee referred to in that section is the Standing Committee for Refugee Affairs established by s 9 of the Act. The Standing Committee comprises a chairperson (the third appellant) and members appointed by the Minister of Home Affairs (the first appellant) and it "must function without any bias and must be independent" (s 9(2)).

The powers and duties of the Standing Committee are, amongst others, to formulate and implement procedures for the grant of asylum, to regulate and supervise the work of the Refugee Reception Offices, to advise the Minister and the Director-General, to review certain decisions made by Refugee Status Determination Officers, and to monitor such decisions (s 11). Section 11(*h*) provides that the Standing Committee

"must determine the conditions relating to study or work in the Republic under which an asylum seeker permit may be issued".'

[30] In *Watchenuka,* this court was dealing with the prohibition against work and study in relation to asylum seekers which, at that time, had been determined by the Standing Committee. It is necessary to record that, in respect of the present case, no such restrictive conditions have been determined by the Standing Committee. *Watchenuka* recognised that the restriction to citizens of the right to choose one's occupation is in accordance with international human rights instruments.[5] Nugent JA said (paras 31-32):

'Those considerations alone, in my view, constitute reasonable and justifiable grounds for limiting the protection that s 10 of the Bill of Rights accords to dignity so as to exclude from its scope a right on the part of every applicant for asylum to undertake employment – a limitation that is implied by s 27(*f*) of the Refugees Act, and that has been expressed in the Standing Committee's decision.

[5] *Watchenuka supra* para 30.

But where employment is the only reasonable means for the person's support other considerations arise. What is then in issue is not merely a restriction upon the person's capacity for self-fulfilment, but a restriction upon his or her ability to live without positive humiliation and degradation. For it is not disputed that this country, unlike some other countries that receive refugees, offers no State support to applicants for asylum. While the second respondent offers some assistance as an act of charity, that assistance is confined to applicants for asylum who have young children, and even then the second respondent is able to provide no more to each person than R160 per month for a period of three months. Thus a person who exercises his or her right to apply for asylum, but who is destitute, will have no alternative but to turn to crime, or to begging, or to foraging. I do not suggest that in such circumstances the State has an obligation to provide employment – for that is not what is in issue in this appeal – but only that the deprivation of the freedom to work assumes a different dimension when it threatens positively to degrade rather than merely to inhibit the realisation of the potential for self-fulfilment.'

[31] The court below and the respondents relied on *Union of Refugee Women* and on s 22 of the Constitution for the conclusion that only South African citizens have the right to engage in self-employment, and that there is thus a blanket prohibition against foreign nationals who are asylum seekers and refugees engaging in self-employment – which in this case would amount to a prohibition on trading. It was submitted on behalf of the respondents that s 27(*f*) of the Act limits refugees to wage earning employment. Section 27(*f*), under the title 'Protection and general rights of refugees' reads as follows:

'A refugee –

. . .

(*f*) is entitled to seek employment; . . . .'

[32] The stance referred to in the preceding paragraph is misconceived. It was not suggested by any of the respondents that *Watchenuka* was wrongly decided. The view of the court below and the attitude adopted by the respondents reflects an unjustifiably

narrow approach to the Constitution and interpretation of *Union of Refugee Women*. It is also, with respect, myopic in relation to the real problems experienced by asylum seekers, refugees and ultimately the regulating authorities, and has the effect of diminishing the status of asylum seekers and refugees.

[33] The following paragraphs of *Union of Refugee Women*, under the heading 'Vulnerability of refugees', compel consideration (paras 28-30):

'Refugees are unquestionably a vulnerable group in our society and their plight calls for compassion. As pointed out by the applicants, the fact that persons such as the applicants are refugees is normally due to events over which they have no control. They have been forced to flee their homes as a result of persecution, human right violations and conflict. Very often they, or those close to them, have been victims of violence on the basis of very personal attributes such as ethnicity or religion. Added to these experiences is the further trauma associated with displacement to a foreign country.

The condition of being a refugee has thus been described as implying "a special vulnerability, since refugees are by definition persons in flight from the threat of serious human rights abuse". This is reflected in South African legislation governing the status of refugees. In terms of s 3 of the Refugees Act, which draws on the definition of "refugee" in the 1951 United Nations Convention Relating to the Status of Refugees ("UN Convention"), a person qualifies as a refugee if:

"*(a)* owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or

(b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere; or

(c) is a dependant of a person contemplated in para *(a)* or *(b)*".

In South Africa, the reception afforded to refugees has particular significance in the light of our history. It is worth mentioning that *Hathaway* lists apartheid as one of the "causes of flight" which have resulted in the large numbers of refugees in Africa. During the liberation struggle many of those who now find themselves among our country's leaders were refugees themselves, forced to seek protection from neighbouring States and abroad.'

[34] In the minority judgment in *Union of Refugee Women*, Mokgoro J and O'Regan J, said the following about the situation in which refugees find themselves (para 101):

'A reading of these provisions gives some understanding of the predicament in which refugees generally find themselves. Refugees have had to flee their homes, and leave their livelihoods and often their families and possessions either because of a well-founded fear of persecution on the grounds of their religion, nationality, race or political opinion or because public order in their home countries has been so disrupted by war or other events that they can no longer remain there. Often refugees will have left their homes in haste and find themselves precariously in our country without family or friends, and without any resources to sustain themselves.'

[35] The learned judges noted that a refugee has a range of rights found in s 27 of the Refugees Act, which, in its entirety reads as follows:

'A refugee –

(*a*) is entitled to a formal written recognition of refugee status in the prescribed form;

(*b*) enjoys full legal protection, which includes the rights set out in Chapter 2 of the Constitution and the right to remain in the Republic in accordance with the provisions of this Act;

(*c*) is entitled to apply for an immigration permit in terms of the Aliens Control Act, 1991, after five years' continuous residence in the Republic from the date on which he or she was granted asylum, if the Standing Committee certifies that he or she will remain a refugee indefinitely;

(*d*) is entitled to an identity document referred to in section 30;

(*e*) is entitled to a South African travel document on application as contemplated in section

31;

(*f*) is entitled to seek employment; and

(*g*) is entitled to the same basic health services and basic primary education which the inhabitants of the Republic receive from time to time.'

[36] The minority judgment recognised that many of these rights arise from international law and that they need to be understood in the light of South Africa's international obligations arising under the Refugees Convention and the 1967 Protocol Relating to the Status of Refugees. That this is so emerges from: (*a*) the long title of the Refugees Act which acknowledges that the purpose of the Act is to:

' . . . give effect within the Republic of South Africa to the relevant international legal instruments, principles and standards relating to refugees. . . .' and

(*b*) the preamble of the Act which reads:

'Whereas the Republic of South Africa has acceded to the 1951 Convention Relation to [the] 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.'

[37] It is now necessary to deal with the applicable articles of the Convention. Article 17 recognises that there may be restrictive measures put in place by a State Party in respect of the employment of foreign nationals. It nevertheless obliges States party to the Convention to accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment. Article 17(2) grants refugees exemption from restrictive measures under certain circumstances. Article 17(3) reads as follows:

'The Contracting States shall give sympathetic consideration to assimilating the rights of all refugees with regard to wage-earning employment to those of nationals, and in particular of those refugees who have entered their territory pursuant to programmes of labour recruitment or under immigrations schemes.'

Article 18 of the Convention deals with self-employment and provides:

'The Contracting States shall accord to a refugee lawfully in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the right to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies.'

[38] Section 22 of the Constitution protects the right of citizens to 'choose' their trade, occupation or profession freely. The majority judgment in *Union of Refugee Women* did not consider the restrictive provisions of PRISA in that case to prevent refugees from seeking employment in other industries. Section 22 of the Constitution does not, as contended for by the respondents, prevent refugees from seeking employment. The emphasis in that section of the Constitution is on a citizen's right to choose his or her trade, occupation or profession freely. It also recognises that the practice of a trade, occupation or profession may be regulated by law. Furthermore, s 27 of the Act entitles a refugee to seek employment. When legislative restrictions are placed on the employment of refugees or asylum seekers, the legality of such restrictions may then be considered, if and when they are challenged.

[39] The approach of Ranchod J in considering the constitutional right to dignity as against the constitutional right of citizens to freely choose their trade, occupation or profession and then holding that s 22 is the decisive provision of the Constitution, is also fallacious. There is no trump card when constitutional rights are considered alongside each other. As pointed out by Mokgoro J and O'Regan J, the Constitutional Court has repeatedly held that the rights in the Bill of Rights must be interpreted in a manner

which recognises that they are mutually reinforcing and interdependent.[6]

[40] Neither *Union of Refugee Women* nor *Watchenuka* considered s 22 of the Constitution as placing a blanket prohibition on asylum seekers and refugees seeking employment. Section 27(*f*) of the Act entitles refugees to 'seek employment' and does not restrict that expression to wage-earning employment.

[41] In addition to reliance being placed on s 22 of the Constitution and on *Union of Refugee Women*, the respondents also pointed to legislation regulating the granting of licences and permits in Lebowa. They contended that the provisions of the applicable legislation reflect that only South African citizens may apply for licences or permits. That legislation now falls to be considered. Section 2 of the Lebowa Business and Trading Undertakings Act 6 of 1977 (the Lebowa Business Act) specifically provides that no person shall carry on any business or trade undertaking mentioned in Schedule 1 in Lebowa without the necessary licence. Section 13 of the Lebowa Business Act is of particular importance and specifically provides that the clerk of the Local Licensing Board shall post a notice in respect of every application received, setting out, inter alia, the full name and identity number of the applicant. Section 1 of the Businesses Act 71 of 1991 has the following definitions:

'**"licence",** in relation to a business, means a licence referred to in section 2(3);

"licence holder" means a person who is the holder of a licence.'

Accordingly, section 2(3) of the Businesses Act specifically provides that no person shall carry on any business in the area of a licensing authority, unless he is the holder of a licence. Article 22.1 of the MLUMS specifically provides for the issue of a temporary

[6] *See Government of the Republic of South Africa & others v Grootboom & others* 2001 (1) SA 46 (2000 (11) BCLR 1169) (CC) paras 23 and 83; *Khosa & others v Minister of Social Development & others; Mahlaule v Minister of Social Development & others* 2004 (6) SA 505 (2004 (6) BCLR 569) (CC) para 40; and *Kaunda & others v President of the Republic of South Africa & others* 2005 (4) SA 235 (2004 (10) BCLR 1009) (CC) para 274.

consent for the use of land or buildings for a particular business.

[42] It was contended that the requirement that each applicant for a licence is obliged to supply an identification number must mean that only South African citizens could qualify. This submission is misguided. First, there is no express or implied prohibition in any of the applicable legislation of foreign nationals applying for a licence or permit. Second, asylum seekers' temporary permits as well as the permits in terms of which formal recognition of refugee status is granted both contain unique identification numbers. This would make it easy to comply with the procedures to obtain a licence or permit. Simply put, both asylum seekers and refugees would be able to supply an identification number when applying for a licence.

[43] To sum up, there is no blanket prohibition against asylum seekers and refugees seeking employment. There appears to be no restrictive legislation or conditions in place that we could discern that prohibits foreign nationals from being granted spaza or tuck-shop licences. In any event, paragraph 32 of *Watchenuka,* referred to above, makes it clear that in circumstances such as this, where persons have no other means to support themselves and will as a result be left destitute, the constitutional right to dignity is implicated. I can see no impediment to extending the principle there stated in relation to wage-earning employment to self-employment. Put differently, if, because of circumstances, a refugee or asylum seeker is unable to obtain wage-earning employment and is on the brink of starvation, which brings with it humiliation and degradation, and that person can only sustain him- or herself by engaging in trade, that such a person ought to be able to rely on the constitutional right to dignity in order to advance a case for the granting of a licence to trade as aforesaid. In fact in those circumstances it would be the very antithesis of the very enlightened rights culture proclaimed by our Constitution for us by resorting to s 22 of that very Constitution (as contended by the respondents and appears to have found favour with the high court) to condemn the appellants to a life of humiliation and degradation. That I do not believe

our Constitution ought to countenance.

[44] It was accepted by the parties that, in a number of instances, a three year sojourn in South Africa could be expected in relation to persons awaiting refugee status. South Africa, unlike some states, does not provide financial support to asylum seekers and refugees. Even if one were to accept as legitimate the State's concern that there be a form of regulation to ensure that asylum seekers can be tracked and that non-genuine applicants for asylum seeker status be properly processed and ultimately excluded from such benefits as extend to genuine asylum seekers and refugees, it is difficult to understand the attitude adopted by the respondents. When, during argument before us, we enquired of counsel what was to happen to destitute asylum seekers and refugees, no answer was forthcoming. There appeared to be some suggestion that, regrettably, some persons might be left to their destitution. This attitude is unacceptable and contrary to constitutional values. The frustration experienced by the authorities as they deal with a burgeoning asylum seeker and refugee population must not blind them to their constitutional and international obligations. It must especially not be allowed to diminish their humanity. The authorities must also guard against unwittingly fuelling xenophobia. In the present case, one is left with the uneasy feeling that the stance adopted by the authorities in relation to the licensing of spaza shops and tuck-shops was in order to induce foreign nationals who were destitute to leave our shores. The answer to the frustration experienced by the respondents, and in particular by the third respondent's department, is to facilitate and expedite applications for refugee status.

[45] When the relief sought by the appellants was debated with counsel on their behalf, he was reluctantly constrained to accept that parts of what was sought were either too broad or unenforceable. Furthermore, whilst 'Operation Hardstick' is no longer in place, thereby rendering an interdict in that regard moot, and whilst the lack of inventories of goods seized and their whereabouts does not make an order in that regard viable, it is still a matter of grave concern that specific allegations of police abuse

were not dealt with in the answering affidavits. Ultimately, the respondents all made common cause in respect of the legal issues enumerated above and therefore should, because of the result that follows, be held jointly and severally liable for costs. In the light of the conclusions reached above, the substituted orders that appear hereafter are, in my view, fully justified.

[46] The following order is made:

1. The appeal is upheld.

2. The order of the court below is set aside and substituted as follows:

'(a) It is declared that asylum seekers and refugees are entitled to:

(i) apply for new business or trading licences in terms of section 8 of the Lebowa Business and Trading Undertakings Act 6 of 1977 or for a licence in terms of section 2(3) of the Businesses Act 71 of 1991;
(ii) apply to renew existing business or trading licences in terms of section 9 of the Lebowa Business Act or in terms of the Businesses Act; and
(iii) apply for and renew written consent to operate tuck-shops or spaza shops in terms of the Musina Land Use Management Scheme of 2010.

(b) It is declared that the closure of businesses operated by refugees and asylum seekers in terms of valid permits is unlawful and invalid.

(c) The first, second, third, fifth, sixth, seventh and eighth respondents are ordered jointly and severally to pay the applicants' costs including the costs of two counsel where so employed.'

3. The second, third, fifth, sixth, seventh and eighth respondents are ordered jointly and severally to pay the appellant's costs including the costs of two counsel where so employed.

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MS NAVSA

ACTING DEPUTY PRESIDENT

APPEARANCES:

FOR APPELLANTS:	Adv N Ferreira (with him D Watson and J Mitchell)
	Instructed by:
	Lawyers for Human Rights, Pretoria
	Webbers, Bloemfontein
FOR THRID AND EIGHTH	
RESPONDENTS:	Adv. G. Bofilatos (with him K Kollapen)
	Instructed by:
	The State Attorney, Pretoria
	The State Attorney, Bloemfontein
FOR SECOND, FIFTH, SIXTH AND	
SEVENTH RESPONDENTS:	Adv. I Ellis (with her M Majozi)
	Instructed by:
	The State Attorney, Pretoria
	The State Attorney, Bloemfontein