SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 30/2017

In the matter between:

THE MINISTER OF HOME AFFAIRS **APPELLANT**

and

ALEX RUTA **RESPONDENT**

Neutral citation: *The Minister of Home Affairs* v *Ruta* (30/2017) [2017] ZASCA 186 (13 December 2017)

Coram: Bosielo, Seriti, Willis and Mocumie JJA and Schippers AJA

Heard: 7 November 2017

Delivered: 13 December 2017

Summary: Refugees Act 130 of 1998 – ss 21 and 22 – contravention of ss 9 and 49(*i*) of the Immigration Act 13 of 2002 – respondent found in possession of fraudulent asylum seeker permit and failure on his part to apply for asylum without delay – respondent not entitled to rely on protection afforded by Refugees Act – appeal upheld - appellant entitled to deal with respondent in terms of the provisions of ss 32 and 34 of the Immigration Act.

ORDER

On appeal from: Gauteng Division, Pretoria (Tuchten J sitting as court of first instance):

1. The appeal is upheld.

2. The order of the court a quo is set aside and replaced with the following:

'(a) The application is dismissed.

(b) No order as to costs.'

JUDGMENT

Seriti JA (Bosielo, Willis JJA and Schippers AJA concurring):

[1] This is an appeal against the decision of the Gauteng Division of the High Court, Pretoria (Tuchten J) granting an order for the immediate release of the respondent who was detained at Lindela Repatriation Facility pending his deportation to Rwanda.

[2] The order granted by the court a quo reads as follows:

'1. The respondents are directed to release the applicant forthwith.

2. Directing that the applicant be afforded 5 days from the order being granted, to present himself at a Refugee Reception Office to apply for asylum in terms of section 21 of the Refugees Act.

3. Directing the first and second respondents to renew the applicant's temporary asylum seeker permit in terms of section 22(1) of the Refugees Act 130 of 1998, pending the finalisation of his claim, more specifically the exhaustion of his rights of either appeal or review in terms of Chapter 4 of the Refugee Act 130 of 1998 and the

Promotion of Administrative Justice Act.'

[3] The main issue in this appeal is what may be expected of an asylum seeker in the Republic in order to enjoy the protection afforded under section 21 of the Regufees Act.

[4] The respondent, a Rwandan national alleges that he was employed as a soldier in the Rwandan army. Between 1993 and 1994 he was promoted to the rank of a sergeant and second lieutenant of the army respectively. In 1998 he was promoted to the rank of lieutenant working in the Division of Military Intelligence. In 2000 he commenced employment with the civilians for the Republican Guards in the National Security Services (NSS) of Rwanda and became an agent of the NSS.

[5] In October 2014 he was approached by his superior in Rwanda who instructed him to travel to South Africa to engage with the Rwanda National Congress (the RNC) members. The RNC is an exiled Rwandan opposition party which has offices in South Africa. The following day he was presented with a passport and documents to facilitate his journey to South Africa. At the time he did not know what he was coming to do in South Africa and as an NSS agent, he was merely following instructions.

[6] He left Rwanda at the end of October 2014 and travelled to Tanzania where he met another NSS agent. The agent directed him to proceed further to Zimbabwe where he would be met by another NSS agent. He proceeded to Zimbabwe via Zambia and on his arrival in Zimbabwe he met another NSS agent who facilitated his transit to South Africa. This latter agent advised him that it was difficult to cross from Zimbabwe into South Africa without the required visa. Together with the

agent, they travelled to Mozambique so that they could enter South Africa via Mozambique. On arrival in Mozambique, they were informed that it will be easier to cross into South Africa, without a visa from Zimbabwe during the festive season. They went back to Zimbabwe and waited for the festive season. In December 2014 he crossed into South Africa from Zimbabwe.

[7] On arrival in South Africa, he met another person who was assigned by the Rwandan Government to advise him about the mission he was to carry out in South Africa. After two days the agent instructed him to find a channel of reaching and befriending certain identified members of the exiled Rwandan opposition party, the RNC. He was moved to a house in Regent Park Johannesburg and he was allocated a budget for accommodation and living expenses.

[8] In January 2015 he met a Rwandese national (known as Harmsa) who introduced him to the RNC party members whom he was supposed to befriend. The men did not know who he was and that made it easy for him to befriend them. During the first week of February 2015 he went back to the NSS agent and advised him that he succeeded in befriending identified RNC party members. The NSS agent then told him that they will organise a firearm for him. He then realised that this meant that he had to kill a member of the RNC party. He panicked and started avoiding contact with the agent as he did not want to kill any members of the RNC party.

[9] During February 2015 he approached the Directorate for Priority Crime Investigations (the Hawks) and alerted them about the mission he

was instructed to carry out. The Hawks reacted by advising him that he would be put under their Witness Protection Unit because his case was high profile. A few weeks after reporting the matter to the Hawks, the house which he occupied at Regent Park was attacked by unknown gunmen who fired gunshots at the house. The police came to the house to investigate and then alerted the Hawks.

[10] He approached the Hawks on 17 March 2016, a day after the alleged shooting took place at his home in Regent Park and signed the 'Placing Under Temporary Protection in terms of section 8 of The Witness Protection Act 112 of 1998' form. From 19 March 2015 onwards he was then placed at a safe house in Pretoria under the protection of Colonel Mohlamme of the Hawks. He further alleged that in March 2015 he was taken to the Refugee Reception Office (RRO) in Marabastad by Colonel Mohlamme to apply for asylum. On arrival at the Marabastad RRO they were informed that his application could not be processed because the system was down. Colonel Mohlamme informed him that they would return to the RRO on 25 March 2015.

[11] On 25 March 2015 a certain Paul of the National Prosecuting Authority (NPA) came to him where he was staying in Pretoria and informed him that they were moving him to Durban. He informed Paul that he had an appointment at the Marabastad RRO to apply for asylum. Paul told him that the application would be made at the Durban RRO.

[12] On arrival in Durban he was handed over to a certain Bernard who placed him in a hotel. Bernard informed him that he would take him to the RRO at a later stage but failed to do so. After three months in Durban he was moved back to Pretoria and handed over to Paul who took him to

a safe house where he was handed over to one Solly of the NPA. The respondent informed Solly about his desire to apply for asylum. Solly also failed to assist him.

[13] Later Solly advised him to look for a job because the monthly allowance that the NPA was giving him whilst in its protective custody was insufficient for his sustenance. He then began searching for a job and later received a job offer from a local pizzeria restaurant. He further alleged that he informed Solly about the job offer including the fact that the offer might be jeopardised by the fact that he does not have the relevant immigration documents. Solly then asked him for the details of the manager of the restaurant so that he could contact the said manager and explain to him the position of the respondent. After Solly spoke to the manager of the restaurant, the manager no longer asked the respondent about the permit. However, a few days later the manager asked the respondent to provide him with his identity photo and thereafter the manager provided him with an asylum seeker permit.

[14] On 19 March 2016 the respondent was arrested and charged with the possession of a fraudulent permit; riding a motorbike without a driver's license and being an illegal foreigner.

[15] In its answering affidavit the appellant, amongst others, denied that the respondent was ever taken by Colonel Mohlamme to the RRO. The appellant further denied that Paul, Bernard and Solly ever discussed with the respondent the question of his desire to go to the RRO or to take him to the RRO in order to apply for an asylum seeker's permit. The appellant further denied that Solly ever advised the respondent to look for a job. The appellant stated further that the respondent failed to disclose to the

authorities that he secured employment. In this regard, the principles governing disputes of fact in motion proceedings are well-established. An applicant who seeks final relief on motion must accept the version of his opponent in the event of a conflict, unless the latter's allegations do not raise a real or bona fide dispute of fact, or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers (*Plascon-Evans Paints (TVL) Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634E-635C).

[16] As stated earlier, the respondent was arrested on 19 March 2016 after he was found to be on a public road riding a motorcycle without having a licence and being in possession of a fraudulent Temporary Asylum Seekers Permit. The respondent's first appearance in court took place on 22 March 2016. The proceedings were postponed to 4 April 2016 and he was refused bail.

[17] Prior to his arrest and on 22 December 2015 the respondent was discharged from the Witness Protection Programme. Some of the reasons offered for such a discharge was that he flouted some of the Witness Protection Programme rules and he also failed to disclose to the Office for Witness Protection the fact that he had obtained employment and was working in South Africa without a valid work permit and had therefore placed the integrity of the Office for the Witness Protection Programme at risk.

[18] On 15 April 2016 the respondent's legal representatives addressed a letter to the Department of Home Affairs and requested that whatever the outcome of the respondent's criminal trial, it had to be ensured that the respondent was not deported to Rwanda pending the investigation of his

protection.

[19] On 28 July 2016 the respondent appeared in court. A plea explanation in terms of section 112 of the Criminal Procedure Act 51 of 1977, signed by the respondent and his legal representative was handed to the court. In the plea explanation he partly said the following:

'I confirm that I [plead] guilty voluntarily, without any undue influence and with a sound mind.

. . . .

I was stopped by a marked metro police vehicle of which he requested my driver's licence of which I produced my [Rwandese] driver's license which was not translated in English. He further asked me if I had another one and I informed him that was the only one I had. He requested to search me and I complied and upon the search he found an Asylum document that was in my name. He informed me that he was arresting me for driving a motorbike without a valid driver's license. I was taken to Garsfontein SAPS for detention.

I further admit that the Asylum document that was found in my possession was not lawfully obtained of which I admit that I contravened the provisions of section 18(1)(*i*) of the Identification Act.'

[20] The respondent was convicted on both counts after his plea explanation was handed to court. On count 1 he was fined an amount of R1000 or five years' imprisonment and; in respect of count 2 he was sentenced to six months' imprisonment half of which was suspended for five years on condition that he was not convicted of any offence under s 18(1) of the Identification Act 68 of 1997 committed during the period of suspension.

[21] In a letter dated 12 September 2016 addressed by the legal representatives of the respondent to the Department of Home Affairs, the respondent's legal representatives demanded that the respondent must not be deported to Rwanda; he must be released from detention and be given

an opportunity to apply for asylum in terms of the Refugees Act. On the other hand, the appellant was of the view that the respondent, after serving his sentence, must be deported to Rwanda.

[22] Although convicted for possession of a fraudulent Temporary Asylum Seeker Permit, the respondent in fact obtained two fraudulent Temporary Asylum Seeker Permits. Both permits had the same date, ie 1 December 2015. One of the permits indicates Rwanda as his country of origin and the other indicates the Democratic Republic of Congo as his country of origin. There is no explanation regarding how and where he got the Temporary Asylum Sekeer Permits. The respondent obtained the fraudulent permits prior to his release from the Witness Protection Programme.

[23] Section 21(1) of the Refugees Act, provides that an application for asylum must be made in person in accordance with the prescribed procedures to a Refugee Reception Officer at any RRO and section 21(4)(*a*) pertinently states:

'**21 Application for asylum**

. . . .

(4) Notwithstanding any law to the contrary, no proceedings may be instituted or continued against any person in respect of his or her unlawful entry into or presence within the Republic if-

(a) such person has applied for asylum in terms of subsection (1), until a decision has been made on the application and, where applicable, such person has had an opportunity to exhaust his or her rights of review or appeal in terms of Chapter 4; or

. . . .'

[24] Section 32 of the Immigration Act 13 of 2002 reads as follows:

'**Illegal foreigner**

(1) Any illegal foreigner shall depart, unless authorised by the Director General in the prescribed manner to remain in the Republic pending his or her application for a status.

(2) Any illegal foreigner shall be deported.'

Section 34 deals with the deportation and detention of illegal foreigners and subsection 1 thereof stipulates that:

'**34 Deportation and detention of illegal foreigners**

(1) Without the need for a warrant, an immigration officer may arrest an illegal foreigner or cause him or her to be arrested, and shall, irrespective of whether such foreigner is arrested, deport him or her or cause him or her to be deported and may, pending his or her deportation, detain him or her or cause him or her to be detained in a manner and at a place determined by the Director-General . . . .'

[25] Section 9 of the Immigration Act prescribes that no person shall enter or depart from the Republic at a place other than a port of entry – it further provides for procedures that must be followed when a person enters the country, and also stipulates that a foreigner who is not a holder of a permanent residence permit may only enter the Republic if her or she is issued with a valid visa.

[26] Section 21(4) of the Refugees Act; however, provides that 'notwithstanding any law to the contrary . . . unlawful entry into or presence within the Republic' may be condoned where that person has applied for asylum under ss (1).

[27] I agree with Satchwell J when, in *Kumah & others v Minister of Home Affairs & others* [2016] 4 All SA 96 (GJ) in paras 33 to 39 she observed, after referring to *Bula & others v Minister of Home Affairs &*

others [2011] ZASCA 209; 2012 (4) SA 560 (SCA) *and Ersumo v Minister of Home Affairs & others* [2012] ZASCA 31; 2012 (4) SA 581 (SCA), that asylum seekers who enter the Republic illegally are merely given a reasonable opportunity but not an indefinite or unlimited period in which to apply for that asylum. It is plain that, apart from any other considerations, the respondent delayed unreasonably in applying for his asylum.

[28] Section 49 of the Immigration Act deals with offences and it provides that anyone who enters or remains in, or departs from the Republic in contravention of this Act, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding two years. Section 49(8) of the Immigration Act also criminalises the production of a false certification and further mentions possible penalties in the case of a conviction.

[29] Regulation 2 of the Refugee Regulations GN R366, *GG* 21075, 6 April 2000 deals with an application for asylum. Regulation 2(1) stipulates that an application for asylum in terms of section 21 of the Refugees Act must be lodged by the applicant in person at a designated RRO without delay. Regulation 2(2) states that any person who entered the Republic and is encountered in violation of the Aliens Control Act 96 of 1991, who has not submitted an application pursuant to subregulation 2(1), but indicates an intention to apply for asylum shall be issued with an appropriate permit valid for 14 days within which they must approach a RRO to complete an asylum application.

[30] Section 23(1) of the Immigration Act underscores the requirement that an application for asylum must be made without delay. It provides

that an asylum transit visa, which is valid for only five days, may be issued to a person who at a port of entry claims to be an asylum seeker, to enable him or her to travel to the nearest RRO. In terms of section 23(2), when the asylum transit visa expires before the holder reports in person to a RRO to apply for asylum, the holder shall become an illegal foreigner and be dealt with in accordance with the Immigration Act.

[31] In its judgment, the court a quo relied on the judgment of this court in *Bula*. There the appellants were Ethopian nationals and they arrived in Johannesburg on 16 June 2011. On the same day they were confronted by the police at a house in Mayfair where their fellow Ethopian had accommodated them. The police asked them to prove that they were lawfully resident in South Africa. When they could not produce the relevant documents they were detained at a police station from 16 June 2011 until 24 June 2011 and were transferred to Lindela, a holding facility and repatriation centre. On 27 July 2011 after consulting with their legal representatives, the latter directed a letter on their behalf to the Department of Home Affairs in which they demanded that all deportation proceedings against them be halted and that they be released immediately and offered the opportunity to apply for asylum. This court then dealt with the provisions of the Refugees Act and its regulations and in para 80 said '[i]t follows ineluctably that once an intention to apply for asylum is evinced the protective provisions of the Act and the associated regulations come into play and the asylum seeker is entitled as of right to be set free subject to the provisions of the act.'

[32] The respondent’s counsel supported the approach adopted by the court a quo and also relied on the decision in *Bula* supra. The facts of the *Bula* decision are distinguishable from the case before us. On the facts of

this case there is no indication that the respondent had any intention of applying for asylum prior to his arrest. On the contrary he was arrested while driving around in an unlicensed motorbike using two fraudulently obtained Temporary Asylum Seeker Permits. The idea of applying for asylum came to his mind when he was detained and the appellant was in the process of arranging for his deportation. The behavior of the respondent is not consistent with the behavior of a person who wanted to apply for asylum. At the time of his incarceration the respondent was an illegal foreigner in terms of the Immigration Act and liable to arrest and deportation. He was not covered by the provisions of the Refugees Act as he failed to apply for asylum in terms of section 21 of the Refugees Act read in conjunction with regulation 2(1)(*a*).

[33] In my view the respondent has failed to apply for asylum in terms of section 21 of the Refugees Act and he has also failed to apply for asylum without delay as required by regulation 2(1)(*a*). He had ample opportunity to approach the RRO to apply for asylum but he failed to do so and instead stayed in the country, secured employment and relied on a fraudulent Temporary Asylum Seeker Permit. As a result thereof he was neither covered nor protected by the provisions of the Refugees Act and the regulations thereto.

[34] Further, the respondent has contravened ss 9 and 49(*i*) of the Immigration Act by entering South Africa at a place other than a port of entry and remaining in the country in contravention of the Immigration Act. The appellant is entitled to deal with the respondent in accordance with the provisions of ss 32 and 34 of the Immigration Act.

[35] The court a quo granted the appellant leave to appeal and paragraphs 3 and 4 of that order read as follows:

'It is a condition of the grant of leave to appeal that the applicant for leave (the Minister) must pay the costs of appeal of the respondent in the application for leave (Mr Ruta).

The applicant must pay the respondent's costs in this application.'

I do not agree with the costs order of the court a quo when granting leave to appeal. The appellant has succeeded in its appeal but my view is that it will not serve any purpose to grant costs against the respondent.

[36] In the result the following order is made.

1. The appeal is upheld.

2. The order of the court a quo is set aside and replaced with the following:

'(a) The application is dismissed.

(b) No order as to costs.'

_____

WL SERITI

JUDGE OF APPEAL

Mocumie JA

[37] I have read the judgment of Seriti JA. However I regret that I cannot agree with him that the appeal should be upheld. In para 32 my colleague finds that on the facts of this case there is no indication that the respondent had any intention of applying for asylum prior to his arrest and on this basis holds that he was not covered by the provisions of the Refugees Act 130 of 1998 (the Refugees Act). Simply put, my view is

that based on the decisions of this court in *Bula v Minister of Home Affairs*[1] and *Ersumo v Minister of Home Affairs and others,*[2] once a refugee has evinced an intention to apply for asylum, the protective provisions of the Refugees Act and the associated regulations come into play and the asylum seeker is entitled to be afforded access to the application process stipulated in the Refugees Act. In light of this conclusion, I would dismiss the appeal with costs.

[38] The background facts are set out in detail in the judgment by my colleague for which I am grateful. Thus I shall not repeat them in this judgment save to the extent that they support my reasoning. Before I set out my reasons for reaching a different conclusion, I must start by saying that I did not understand the issue before us to be 'what may be expected of an asylum seeker in the Republic of South Africa (South Africa) in order to enjoy the protection afforded under section 21 of the Refugees Act.' I understood the issue to be whether the facts relating to the respondent as presented in his application in the court below justified his automatic exclusion from the refugee status determination procedure in terms of section 4 of the Refugees Act. This is the issue that was debated at length by the parties in this court. A determination of this issue requires the interpretation of section 4 of the Refugees Act as amended.

[39] In addition to the main issue, which the appellant did not pursue with the same vigour as in his heads of argument and initial oral argument, the appellant raised two other issues linked to the main issue in substance: ie (a) the non-applicability of *Bula v Minister of Home Affairs,*[3] and (b) the applicability of the principles set in *Kumah v Minister of*

[1] *Bula & others v Minister of Home Affairs & others* [2011] ZASCA 209; 2012 (4) SA 560 (SCA).
[2] *Ersumo v Minister of Home Affairs & others* [2012] ZASCA 31; 2012 (4) SA 581 (SCA).
[3] *Bula* fn 1 above.

Home Affairs.[4] However, case law, which will further be discussed below, directs us to regulation 2 and section 21 of the Refugees Act as the starting point of an inquiry relating to any illegal foreigner who has been encountered by an immigration officer without having indicated an intention to apply for asylum prior to having been encountered or detained by such officer. Because the respondent, at the relevant time, was an illegal foreigner who had been encountered by an immigration officer, as well as arrested for crimes committed inside the Republic, the case before us requires a two-step enquiry: Firstly, the meaning of regulation 2 read with section 21 of the Refugees Act in South African case law; and secondly, if the respondent is in fact entitled to protection in terms of the above provisions and whether he is an excluded person in terms of section 4(1)(*b*) of the Refugees Act**.**

The meaning of regulation 2 in South African case law

[40] The preamble to the Refugees Act states that the Act is designed to give effect to the relevant international instruments, principles and standards relating to refugees and to provide for the reception of asylum seekers into South Africa. The Refugees Act regulates applications and the recognition of refugee status and provides for the rights and obligations flowing from that status.

[41] Regulation 2 of the Refugee Regulations, GN R366, *GG* 21075, 6 April 2000 deals with an application for asylum. Regulation 2(1) stipulates that an application for asylum in terms of section 21 of the Refugees Act must be lodged by the applicant in person at a designated Refugee Reception Office (RRO) without delay. Regulation 2(2) states that any person who entered the Republic and is encountered in violation

[4] *Kumah & others v Minister of Home Affairs & others* [2016] 4 All SA 96 (GJ).

of the Aliens Control Act 96 of 1991, who has not submitted an application pursuant to sub regulation 2(1), but indicates an intention to apply for asylum, shall be issued with an appropriate permit valid for 14 days within which they must approach a RRO to complete an asylum application.

[42] It is correct, as my colleague indicates in para 32, that the facts of *Bula*, as well as *Ersumo*, are somewhat different to the facts of the matter before us. But the majority judgment does not state that applications of this nature are based on the legal principles propounded in *Bula* and restated in *Ersumo.* I am alive to the fact that this court did not deal with the interpretation of section 4(1)*(b)* in *Bula*. However, the court did formulate fundamental principles which a court faced with an application under the Refugees Act, read with the Immigration Act 13 of 2002, must keep in its mind. This court said the following in paras 80-81:

'[O]nce an intention to apply for asylum is evinced the protective provisions of the Act and the associated regulations come into play and the asylum seeker is entitled as of right to be set free subject to the provisions of the Act.

This court has a keen appreciation of the problems that must inevitably be visited on the Department in keeping track of numerous persons in the position of the appellants. As pointed out above, the [Refugees Act] is in keeping with international conventions and international best practice in relation to refugees. Section 21(2) obliges applicants for asylum to provide fingerprints and photographs to enable them to be monitored. The permit in terms of section 22(1) of the [Refugees Act] enabling a sojourn in South Africa may be issued subject to conditions determined by the Standing Committee, which are not in conflict with the Constitution or international law. It does not appear that such conditions have in fact been determined. Section 38(1)*(e)* of the [Refugees Act] enables the minister to make regulations relating to "the conditions of sojourn in the Republic of an asylum seeker, while his or her application is under consideration". Such regulations appear not to have been made. It is for another arm of Government to prescribe the conditions under consideration. In

this regard see the comments of this court in *Arse v Minister of Home Affairs & others* (2010) (7) BCLR 640 (SCA) para 23.[5] It is not for the judicial arm to do so. The logistical logjam in the processing of applications for asylum of people detained at Lindela is in part due to the absence of a RSDO [Refugee Status Determination Officer] at Lindela. It is a problem that is easily resolved but it requires an act of will on the part of the Department.'

[43] On the meaning of regulation 2 this court in para 72 of *Bula* held that:

'The regulation does not require an individual to indicate an intention to apply for asylum immediately [after] he or she is encountered, nor should it be interpreted as meaning that when the person does not do so there and then he or she is precluded from doing so thereafter. The purpose of subsection 2 is clearly to ensure that where a foreign national indicates an intention to apply for asylum, the regulatory framework of the [Refugees Act] kicks in, ultimately to ensure that genuine asylum seekers are not turned away.' (My emphasis.)

[44] Further, in paras 73 and 74, the court said:

'That does not mean that a decision on the *bona fides* of the application is made upfront. Once the application has been made at a Refugees Reception Office, in terms of section 21 of the [Refugees Act], the Refugee Reception Officer is obliged to accept it, see to it that it is properly completed, render such assistance as may be necessary and then ensure that the application together with the relevant information is referred to a RSDO.

In terms of section 22 of the Refugees Act an asylum seeker has the protection of the law pending the determination of his application for asylum. To that end he or she is entitled to an asylum seeker permit entitling a sojourn in South Africa.'

I will revert to these provisions later in the judgment.

Is the respondent an excluded person in terms of section 4(1)(*b*)?

Section 4(1)(*b)* of the Refugees Act provides as follows:

[5] *Bula* fn 1 above.

'*Exclusion from refugee status*

(1) A person does not qualify for refugee status for the purposes of this Act if there is reason to believe that he or she –

(a) has committed a crime against peace, a war crime or a crime against humanity, as defined in any international legal instrument dealing with any such crimes; or

(b) has committed a crime which is not of a political nature and which, if committed in the Republic, would be punishable by imprisonment; or

(c) has been guilty of acts contrary to the objects and principles of the United Nations Organisation or the Organisation of African Unity; or

(d) enjoys the protection of any other country in which he or she has taken residence.

(2) For the purposes of subsection (1)(*c*), no exercise of a human right recognised under international law may be regarded as being contrary to the objects and principles of the United Nations Organisation or the Organisation of African Unity.'

[45] Consonant with section 4, section 21 provides:

Application for asylum

(4) Notwithstanding any law to the contrary, no proceedings may be instituted or continued against any person in respect of his or her unlawful entry into or presence within the Republic if –

(a) such person has applied for asylum in terms of subsection (1), until a decision has been made on the application and, where applicable, such person has had an opportunity to exhaust his or her rights of review or appeal in terms of Chapter 4 . . . .'

[46] Section 4 must also be read with section 23(1) of the Immigration Act which provides that an asylum transit visa, which is valid for only five days, may be issued to a person who at a port of entry claims to be an asylum seeker, to enable him or her to travel to the nearest Refugee Reception Office. In terms of section 23(2) of the Immigration Act, when the asylum transit visa expires before the holder reports in person to a RRO to apply for asylum, the holder shall become an illegal foreigner and be dealt with in accordance with the Immigration Act.

Proceedings in the court below

[47] In adjudicating the application for an interdict by the respondent against the appellant's decision to deport him to his country of origin, the court below in para 11 of the judgment relied on *Bula* to conclude that in an application of this nature:

'it is not for the court to determine whether the would-be refugee has any prospects of success in his or her proposed application for refugee status. The power and the duty to make this determination is vested in the Refugee Status Determination Officer alone. Once a person communicates to an Officer of the DHA [Department of Home Affairs] that it is his or her wish to apply for refugee status, it is the duty of that officer and, indeed, all the authorities, to place no obstacles in the way of the prospective applicant to have his or her case considered by a Refugee Status Determination Officer.'

[48] On whether the respondent feared for his life if the South African Government deported him to his country of origin, the court below held that on the basis of one of the listed exclusions in section 4(1)(*b*):

'Assuming that the respondents are suggesting that the law of Rwanda renders them punishable by imprisonment, the applicant's decision, on his own version, not to commit the crime of murder in the Republic and to sever his connection with the organisation which wanted him to be an assassin, I cannot exclude the strong possibility that the alleged crimes are political in nature.'

Submissions of the appellant in this court

[49] Counsel for the appellant both in his heads of argument and oral argument in this court, submitted that the intention of the legislature manifest in section 4(1) of the Refugees Act is that offences listed in the section should have occurred prior to the potential asylum seeker applying for asylum. This section is aimed at past conduct of an individual prior to his entry into the Republic. Accordingly, so he argued, to have committed such offences after entry into the Republic even before

the person concerned has indicated the desire to apply for asylum, should not result in any form of distinction and that section 4 should be equally applicable even in situations where the offences were committed inside the Republic. Counsel argued that there should therefore be an onus on such a person to show why under such circumstances the host country should nevertheless consider his application for asylum. This interpretation is based on the interpretation of the provisions of section 4(1)*(b)*.

[50] Counsel further submitted that the court below should have applied the approach adopted in *Kumah*[6] in relation to the reasonable period within which a person or a prospective refugee should apply for a permit to be in the Republic. He argued that to confine the application of section 4 to offences committed outside the Republic only, was untenable. It was evident, so the argument went, that the respondent came into the Republic illegally and stayed illegally until he was arrested. It was further argued that he did not apply for asylum seeker status within a reasonable time upon entry into the Republic, and that the objective facts demonstrate that he had ample opportunity to apply for asylum if he wished to do so. That he was found in possession of at least one fraudulent section 22 permit ineluctably leads one to the conclusion that he had no intention of applying for asylum. Therefore, the respondent was excluded from the protection of the Refugees Act and it was consequently not necessary to give effect to the asylum procedure provided for in sections 21, 22 and 23 of the Refugees Act.

[6] See fn 4 above.

Submissions of the respondent in this court

[51] Counsel for Lawyers for Human Rights on behalf of the respondent, submitted that the scheme of the Refugees Act was such that once the respondent indicated his intention to apply for a refugee permit, the appellant was statutorily and duty bound to take him through the process provided for in sections 21, 22 and 23 of the Refugees Act. The appellant was not entitled to close the door before allowing the respondent an opportunity to access the process provided in sections 21, 22 and 23. From the scheme of the Refugees Act, it was incumbent on the appellant, considering the seriousness of the impending deportation of the respondent by the appellant, the international obligation on South Africa as a signatory to the United Nations Convention read with the Constitution of South Africa, in particular section 36, to allow the respondent to present his case before the designated officer who is, in terms of the Refugees Act, the only person who can make a determination one way or the other regarding the status of the respondent.

[52] The term 'without delay' used in regulation 2, is not defined in the Act. In order to clarify the interpretation thereof, the adopted interpretation should be in line with the object and purpose of the Refugees Act. This generally rules out strict literal interpretations, particularly as the purpose of the Refugees Act is to protect the rights of refugees as set out in its preamble, whilst acknowledging the realities of refugees. *Kumah* is not the answer, as the appellant was at pains to convince this court. Therefore, the interpretation of the term 'without delay' should apply on a case by case basis. The interpretation of this provision must be in line with section 39(2) of the Bill of Rights.

[53] The case that came close to addressing this issue is *Ersumo*,[7] where this court held that the final decision on the truthfulness of an applicant's claims will need to be taken by a Refugee Reception Officer and not by this or any other court. The court further held in para 15 that:

'The grounds upon which an application for asylum may be refused are set out in section 24(3) of the [Refugees Act]. They are that the application is "manifestly unfounded, abusive or fraudulent" or simply "unfounded". There is nothing to indicate that a meritorious application may be refused merely on the grounds of delay in making the application.'

[54] The court held further in para 16:

'It makes no difference whether the individual entered the country and never sought an asylum transit permit, or whether they obtained such a permit and allowed it to lapse by not reporting to a Refugees Reception Office. Nor is there any reference to the duration of the illegal presence, or to any mitigating factors, such as poverty, ignorance of these legal requirements, inability to understand any of South Africa's official languages and the like. There is also no reference to aggravating factors, for example, that their illegal entry was deliberate and that they have deliberately sought to avoid the attentions of the authorities. Regulation 2(2) applies to any foreigner encountered in South Africa, whose presence in this country is illegal.'

The same should apply to the respondent, even more so as he was kept in a safe haven by legal authorities.

[55] In addition, this court said that 'Regulation 2(2) ought to have been the starting point as the appellants clearly fell within its ambit. They had not lodged an application within the terms set out in Regulation 2(1)(*a*)'. What follows is that the asylum seeker who has the intention to apply for asylum must be taken through the process accordingly. Lest it be

[7] See fn 2 above para 8.

forgotten, it is this court in *Abdi & another v Minister of Home Affairs*[8] that expressed the following when describing section 21 which gives effect to the Refugee Convention and the surrounding scheme in the Refugees Act:

'The words of the Act mirror those of the [Refugee] Convention and the OAU Convention of 1969. They patently prohibit the prevention of access to the Republic of any person who has been forced to flee the country of her or his birth because of any of the circumstances identified in section 2 of the Act. Refugees entitled to be recognized as such may more often than not arrive at a port of entry without the necessary documentation and be placed in an inadmissible facility. Such persons have a right to apply for refugee status, and it is unlawful to refuse them entry if they are *bona fide* in seeking refuge.'

[56] To my mind the contentions made on behalf of the appellant on the interpretation to be applied on section 4(1)(*b*) are plainly unsustainable. They fly in the face of the plain language of section 4 which unambiguously provides that only offences committed outside the Republic and before entry into the Republic would disqualify an asylum seeker. Suffice to say that to hold otherwise would result in an absurdity. The legislature could never have contemplated such absurdity. The respondent had committed no offence outside the Republic.

[57] It follows that I do not agree with para 27 of the main judgment where it is stated:

'I agree with Satchwell J when, in *Kumah and other related matter v Minister of Home Affairs & others at paras 33 to 39* she observed, after referring to Bula & others v Minister of Home Affairs & others, *Abdi & another v Minister of Home Affairs & others and Ersumo v Minister of Home Affairs & others*, that asylum seekers who enter the Republic illegally are merely given a reasonable opportunity but not an indefinite or unlimited period in which to apply for that asylum. It is plain that, apart

[8] *Abdi & Another v Minister of Home Affairs & others* [2011] ZASCA 2; 2011 (3) SA 37 (SCA) para 22.

from any other considerations, the respondent delayed unreasonably in applying for his asylum.'

In my view, the respondent came into the Republic illegally but handed himself over to the law enforcement agencies. It is surprising that the law enforcement agencies did not regulate his status while he was in their care and custody. They knew he was in the Republic illegally, yet they kicked him out of the programme and unleashed him onto the unsuspecting society. Thus, the blame that he 'delayed unreasonably' cannot and should not be apportioned to him alone.

[58] In para 30 of the main judgment it is stated:

'Section 23(1) of the Immigration Act underscores the requirement that an application for asylum must be made without delay. It provides that an asylum transit visa, which is valid for only five days, may be issued to a person who at a port of entry claims to be an asylum seeker, to enable him or her to travel to the nearest RRO. In terms of section 23(2), when the asylum transit visa expires before the holder reports in person to a RRO to apply for asylum, the holder shall become an illegal foreigner and be dealt with in accordance with the Immigration Act.'

My view is that the law enforcement agencies involved should have invoked section 23 of the Immigration Act to ensure that the respondent is taken through the process to its finality.

[59] I also cannot agree with para 34 of the main judgment which states that:

'Further, the respondent has contravened sections 9 and 49*(i)* of the Immigration Act by entering South Africa at a place other than a port of entry and remained in the country in contravention of the Immigration Act. The appellant is entitled to deal with the respondent in accordance with the provisions of sections 32 and 34 of the Immigration Act.'

In my view, once more, the respondent's illegal entry was made legal when he handed himself over to the law enforcement agencies. When

they kicked him out of the Witness Protection Programme, they should have warned him of the risk that he ran if he did not approach the RRO without any delay.

[60] That having been said, it makes no difference whether the respondent entered the Republic and never sought an asylum transit permit. Nor is there any reference to the duration of the illegal presence in regulation 2, or to any mitigating factors, such as poverty, ignorance of these legal requirements, inability to understand any of South Africa's official languages and the like. There is also no reference to aggravating factors, for example, that his illegal entry was deliberate and that he has deliberately sought to avoid the attention of the authorities. Regulation 2(2) applies to any foreigner encountered in South Africa whose presence in this country is illegal.[9]

[61] On these facts alone, the respondent was and still is entitled to be afforded access to the asylum process under the Refugees Act. The fact that he committed offences in the Republic long after his entry cannot and should not serve as an automatic exclusion from the protective provision of section 4(1)(*b*). Whether he gave a plausible explanation for his presence in the Republic and when and how he entered the country, are not matters for a court to decide before the departmental process has run its course. That is for the designated officers in the offices of the appellant under the provisions of sections 21, 22 and 23 read with other relevant sections of the Immigration Act as well as relevant international treaties and the Constitution to decide. Accordingly, the reliance on *Kumah* above cannot assist the appellant.

[9] See fn 2 above.

[62] But even on the basis of *Kumah*, although not authoritative in the light of *Bula* and *Ersumo*, on the facts of this matter, the respondent approached the Hawks within 2 months of his arrival in the Republic when he decided not to go through with the plan to assassinate a person within the boundaries of the Republic. It is surprising that law enforcement agencies should have kicked the respondent out of the Witness Protection Programme with full knowledge that he did not have the required documents to be in the Republic. They should have ensured that he had the necessary documentation from the onset.

[63] It should be borne in mind that the rationale for the exclusion clauses, when considering their application, is that certain acts are so grave as to render their perpetrators undeserving of international protection as refugees. Their primary purpose is to deprive those guilty of heinous acts, and serious common crimes, of international refugee protection and to ensure that such persons do not abuse the institution of asylum in order to avoid being held legally accountable for their acts. The exclusion clauses must be applied 'scrupulously' to protect the integrity of the institution of asylum.

[64] In respect of international law, Article 1F(*b*) of the 1951 Convention Relating to the Status of Refugees[10] contains similar provisions to section 4(1)(*b*) of the Refugees Act. Article 1F(*b*) requires the crime to have been committed 'outside the country of refuge prior to [the individual's] admission to that country as a refugee'. Individuals who commit 'serious non-political crimes' within the country of refuge are subject to that country's criminal law process and, in the case of

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

particularly grave crimes, to Articles 32 and 33(2) of the 1951 Convention.

[65] Clearly, the intention both under the Refugees Act and international law, is that only crimes that have been committed outside the country of refuge should be given consideration. Thus it is still essential for an illegal foreigner who seeks to go through the refugee status determination process to determine whether he is entitled to the protections that fall under the Refugees Act to be afforded the opportunity to do so. This is so, due to the exceptional nature of the exclusion provisions under section 4(1), particularly section 4(1)*(b)* and its severe consequences of exclusion for an individual. The exclusions should be applied in a restrictive manner. To do otherwise, as the appellant strenuously attempted to convince this court, would be on the basis of sheer speculation on the possible outcome of the refugee status of the respondent.

[66] Taking into account the interpretation of this judgment there is no doubt that a sensible approach is one that allows for due process of the law when dealing with refugee law, the Refugees Act and its regulations that prescribe the procedure to be followed when applying for asylum. The respondent is entitled to be taken through the refugee status determination application process as he has indicated his intention to apply for asylum, regardless of whether he committed offences that are political or non-political in nature. This resonates with the approach adopted in *Bula* in para 77 where it was said:

‘As is abundantly clear the scheme of the Act is that it is for the RSDO to determine the merits of an application for asylum and not for a prior interrogation by a court. In the passage in *Abdi*, relied on by the Minister and the DG, this court was stating the obvious. It does not follow that in the passage referred to this court intended to

convey what is presently submitted on behalf of the Minister. On the contrary, the concluding sentence in para 22 of *Abdi* makes it clear that the Department's officials are obliged to ensure that once there is an indication of an intention to apply for asylum they assist the person concerned to lodge such an application at a Refugee Reception Office.'[11]

[67] Finally, on the proper interpretation of section 4(1)(*b*) the Constitutional Court in *Mail and Guardian Media Ltd and Others v Chipu NO & others*[12] stated:

'A literal reading of section 4(1)*(b)* is that an applicant for asylum who has committed a non-political crime which, if committed in South Africa, would be punishable by imprisonment is disqualified from refugee status. However, it may well be that section 4(1)*(b)* should not be read literally and rigidly. *Section 4(1)(b) seeks to give effect to, among others, the 1951 Refugee Convention. A reading of part of the United Nations High Commissioner for Refugees Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status (UNHCR Handbook) dealing with the provisions of the 1951 Refugee Convention reveals that the relevant provision of the convention should not be read rigidly and that there are circumstances in which a person who has committed a non-political crime may, nevertheless, qualify for refugee status.*

Under the Act a person who wants to obtain refugee status is required to attend in person at the Refugee Reception Office (reception office) where he or she must apply for that status. At the Reception Office an asylum seeker will be attended to by a reception officer. The Reception Officer has the power to conduct an inquiry in order to verify the information furnished in the application. The reception officer is required to forward the application to an RSDO who has the power to make a decision on that application. An RSDO is required to grant asylum or reject the application as manifestly unfounded, abusive or fraudulent or reject the application as unfounded or refer any question of law to the Standing Committee established in terms of s 9 of the Act. An RSDO may request any information or clarification from an applicant or the Refugee Reception Office. He or she may also, where necessary,

[11] See fn 1 above.
[12] *Mail and Guardian Media Ltd & others v Chipu NO & others [2013] ZACC 32; 2013 (6) SA 367 (CC)* para 30-31.

consult with and invite a UNHCR representative to furnish information on specified matters. With the permission of the asylum seeker, an RSDO may also provide the UNHCR representative with such information as the latter may request.' (My emphasis.)

[68] In line with *Bula, Ersumo* and *Mail & Guardian* there can be no doubt that the respondent is entitled to the protection of the Refugees Act whether the offences are political or non-political and regardless whether they were committed inside or outside the Republic. We as a nation have chosen to advance human rights, especially in respect of refugees. By ratifying the UN Convention and other regional treaties we have committed ourselves not to be party to the deportation of any refugee or potential refugee to another country without the assurance that he or she will not be subjected to any form of severe punishment, including torture. This is what the Constitutional Court in *Minister of Home Affairs & others v Tsebe & others*[13] warned courts against, *albeit* in somewhat extreme circumstances than in this matter.

[69] Interpreting and applying the Refugees Act and the Regulations in the manner suggested by the appellant, goes against the very objective of the Refugees Act set out in its preamble – which is to give effect to the relevant international instruments, principles and standards relating to refugees and to provide for the reception of asylum seekers into South Africa. To interpret it otherwise would lead to results that the legislature never intended, ie not to give potential asylum seekers protection at any time that they apply for such status. This is so because the legislature had the opportunity to address this on more than one occasion when it amended the Refugees Act in 2011 and subsequently promulgated the

[13] *Minister of Home Affairs & others v Tsebe & others* [2012] ZACC 16; 2012 (5) SA 467 (CC)paras 67-68.

Prevention of Combating and Torture of Persons Act 13 of 2013, but it did not. Section 8 of the Prevention of Combating and Torture of Persons Act provides that:

'no person shall be expelled, returned or extradited to another State where there are substantial grounds for believing that he or she would be in danger of being subject to torture.'

[70] In my view the conclusion reached by the court below cannot be faulted. In the result, I would dismiss the appeal with costs.

BC Mocumie

Judge of Appeal

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