**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

**Reportable**
Case No: 294/2016

In the matter between:

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| **THE MINISTER OF HOME AFFAIRS** | **FIRST APPELLANT** |
| **DIRECTOR-GENERAL: DEPARTMENT OF HOME AFFAIRS** | **SECOND APPELLANT** |
| **MS THEMBI NDLOVU, ACTING MANAGER CAPE TOWN REFUGEE FACILITY** | **THIRD APPELLANT** |

and

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| **CISHAHAYO SAIDI** | **FIRST RESPONDENT** |
| **MICHAEL BALENZI** | **SECOND RESPONDENT** |
| **LOSOKO CAMILLE MBOYO** | **THIRD RESPONDENT** |
| **FANNY AYEMBE MOTANGO** | **FOURTH RESPONDENT** |
| **NGALULA GLADYS KANULAMBI** | **FIFTH RESPONDENT** |
| **VANNY MUKEBA MUKENDI** | **SIXTH RESPONDENT** |
| **RUTH MAN YONGA KABWE** | **SEVENTH RESPONDENT** |
| **MANFRED LOBE** | **EIGHTH RESPONDENT** |
| **DIEMO MUDIK MUKUNGWA** | **NINTH RESPONDENT** |
| **JUSTINE NGALULA** | **TENTH RESPONDENT** |
| **CHIMENE KUITCHOU FOBI** | **ELEVENTH RESPONDENT** |
| **AMANI JONAS NGULWE** | **TWELFTH RESPONDENT** |
| **MINGA PAPY MINGASHANGA** | **THIRTEENTH RESPONDENT** |

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| **AYMAR WILLY MAKANGOU** | **FOURTEENTH RESPONDENT** |
| **MOUSTAPHA KANE** | **FIFTEENTH RESPONDENT** |
| **KADIMA MUKENDI** | **SIXTEENTH RESPONDENT** |
| **GERTRUDE AKIIKI NYANDOI** | **SEVENTEENTH RESPONDENT** |
| **OCHEN MUSSA** | **EIGHTEENTH RESPONDENT** |
| **ISSA NZOBONIMPA** | **NINETEENTH RESPONDENT** |
| **GRIESSE MPIANA BADIBANGA MPANDA** | **TWENTIETH RESPONDENT** |
| **KAGOMA MWAMEDI** | **TWENTY-FIRST RESPONDENT** |
| **GINA KABWIZ KAKEZ** | **TWENTY-SECOND RESPONDENT** |
| **BEMBA BENJAMIN BERTHELEMY** | **TWENTY-THIRD RESPONDENT** |
| **LOUIS MUTOMBO** | **TWENTY-FOURTH RESPONDENT** |
| **FRANCK ARSENE MAHOUNGOU** | **TWENTY-FIFTH RESPONDENT** |
| **GABRIEL SHIMBI WA-KONYI** | **TWENTY-SIXTH RESPONDENT** |
| **SOLOMON YIZAW BEHONYE** | **TWENTY-SEVENTH RESPONDENT** |
| **SAIDY WELONGO SAIDY** | **TWENTY-EIGHTH RESPONDENT** |

**Neutral citation:** *Minister of Home Affairs v Saidi* (294/2016) [2017] ZASCA 40 (30 March 2017)

**Coram:** Maya AP, Majiedt and Swain JJA and Gorven and Mbatha AJJA

**Heard**: 7 March 2017

**Delivered:** 30 March 2017

**Summary:** Refugees Act 130 of 1998 : section 21(1) : refusal of application for asylum : Chapter 4 rights of review and appeal : unsuccessful : section 22(1) : grant of asylum seeker permit : section 22(3) : Refugee Reception Officer empowered to extend permit pending outcome of judicial review : no substantive legitimate expectation that permits would be extended : no grounds for court to assume decision makers discretion to extend permits.

## ORDER

**On appeal from:** Western Cape Division of the High Court (Nuku AJ sitting as court of first instance):

1 The appeal is dismissed with costs.

2 The cross-appeal is dismissed.

## JUDGMENT

**Gorven AJA** (Maya AP, Swain and Majiedt JJA and Mbatha AJA concurring):

[1] Persons seeking to escape threatening situations in their home countries are sometimes driven to seek refuge elsewhere. They are accordingly known across the world as refugees. Such is their desperation that they almost all enter the country where they seek refuge illegally and without any official documents. As was said by this court, our legislature has responded to their plight:

'The condition of being a refugee connotes a "special vulnerability as refugees by definition are persons in flight from the threat of serious human rights abuse". . . That especial vulnerability is recognised in our legislation governing the status of refugees — the Refugees Act . . . .'[1]

Even more vulnerable are those who seek asylum while they await the outcome of an application for refugee status. This appeal concerns people in that position.

[1] *Minister of Home Affairs & others v Somali Association of South Africa Eastern Cape (SASA EC) & another* [2015] ZASCA 35; 2015 (3) SA 545 (SCA) para 2.

[2] A procedure is set out in the Refugees Act (the Act)[2] which governs applications for refugee status. An asylum seeker who is seeking recognition as a refugee must apply for asylum to the Refugee Reception Officer (the RRO).[3] Pending the outcome of the application, the RRO is obliged to issue an asylum seeker with a permit entitling her or him to remain in South Africa.[4] The permit must be issued in the form set out in the Regulations to the Act.[5] These require that the permit must be of 'limited duration and contain an expiry date.'[6] The Standing Committee for Refugee Affairs (the Standing Committee) may determine conditions for the permit.[7] The RRO is empowered to extend the period reflected in the permit from time to time and to amend the conditions.[8] The first appellant (the Minister) may withdraw the permit on the happening of specified events.[9] If the Minister has withdrawn the permit, he may cause the holder to be 'arrested and detained pending the finalisation of the application for asylum . . . .'[10]

[3] A Refugee Status Determination Officer (RSDO) decides the application for refugee status. The RSDO has four possible options once the application has been considered: the grant of asylum;[11] the rejection of the application as manifestly unfounded, abusive or fraudulent;[12] the rejection of the application as unfounded;[13] or the reference of any question of law to the Standing Committee.[14] Where the application is rejected, internal mechanisms are created

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[2] Refugees Act 130 of 1998.
[3] Section 21(1).
[4] Section 22(1).
[5] Refugees Act Regulations, GN R366, GG 21075, 6 April 2000 as amended by GN R938, GG 21753, 15 September 2000.
[6] Regulation 7(*b*).
[7] Section 22(1).
[8] Section 22(3).
[9] Section 22(6)(*b*) and (*c*) respectively.
[10] Section 23.
[11] Section 24(3)(*a*).
[12] Section 24(3)(*b*).
[13] Section 24(3)(*c*).
[14] Section 24(3)(*d*).

for the decision to be reviewed or appealed (the internal remedies). If rejected because it is found to be manifestly unfounded, abusive or fraudulent under s 24(3)*(b)*, an automatic internal review process by the Standing Committee is triggered.[15] If rejected simply as being unfounded under s 24(3)*(c)*, an asylum seeker is given the right to lodge an appeal with the Appeal Board.[16] If the asylum seeker exercises that right, the internal appeal process then takes place. Chapter 4 of the Act deals with these procedures.

[4] The outcome of both this appeal and cross-appeal hinges on the power to extend the permits which are issued to asylum seekers at the outset. The RRO is empowered to extend them by s 22(3) of the Act which provides:

'A Refugee Reception Officer may from time to time extend the period for which a permit has been issued in terms of subsection (1), or amend the conditions subject to which a permit has been so issued.'

The dispute between the parties relates to when this power terminates.

[5] In the present matter, the respondents (the asylum seekers) seek refugee status in South Africa. They applied for asylum. They were each issued with a permit. They all had their applications for refugee status refused. They made use of the internal remedies but none of them succeeded. They then launched individual applications to the Western Cape Division of the High Court, mostly for judicial review of the decision refusing them refugee status (the review applications).[17]

[6] Some years ago, difficulties arose where asylum seekers who had exhausted the internal remedies required extensions to the permits while they prosecuted judicial review applications. The State Attorney, Cape Town, agreed

[15] Sections 24(4) and 25.
[16] Section 26.
[17] There were applications of a different nature for similar relief but for the purposes of simplicity, I shall refer to judicial review applications.

with the attorneys representing those asylum seekers that if review proceedings had been instituted in the high court, a letter would be issued requesting that the RRO extend the permit in question. Pursuant to this arrangement, the asylum seekers were each furnished with such a letter which they took to the RRO. The RRO, who was at the time a Mr Mathebula, then extended the permit in question.

[7] The third appellant was subsequently appointed as the RRO. With effect from May 2015, she refused to extend the permits of any of the asylum seekers. She considered that the power to extend permits under s 22(3) of the Act did not endure beyond the exhaustion of the internal remedies. In refusing to extend the permits of the asylum seekers, she accordingly did not enter into the merits of any applications for extensions.

[8] The asylum seekers then approached the Western Cape Division of the High Court for the following substantive relief:

'1 Ordering the [RRO] to issue, extend or re-issue to the [asylum seekers] and their families temporary asylum seeker permits in terms of section 22 of the Refugees Act 130 of 1998 within one week of the date of this Order and subsequently to extend or re-issue such permits in accordance with the [next paragraph].

2 Ordering that permits shall be extended or re-issued and shall remain valid pending the final outcome of the proceedings instituted in the High Court cases pending that were launched on behalf of the individual [asylum seekers], and in particular that:

2.1 the expiry date of the permits initially issued, extended or re-issued shall be no earlier than 31 January 2016;

2.2 each subsequent extension or re-issuing shall be for a period of not less than three months;

2.3 the further terms and conditions be the same as those which were contained in the temporary permits of the [asylum seekers] and their families held or previously held by the [asylum seekers].

3 To the extent necessary, reviewing and setting aside the decision of the RRO refusing to issue, extend or re-issue permits to the [asylum seekers] and their families.

4 Ordering the Respondents to pay the costs of this application, the one paying the other to be absolved.'

The high court, per Nuku AJ, declined to grant the orders sought in the first two paragraphs of the notice of motion. Instead it granted an order in the following terms:

'1 That Section 22 (3) of the Act empowers the Refugee Reception Officer to extend the Section 22 permits from time to time after an applicant for asylum has exhausted his or her rights of review or appeal in terms of Chapter 4 of the Act.

2 That the Third Respondent's decision to refuse to extend the Section 22 permits of the applicants is reviewed and set aside. The matter is remitted back to the Third Respondent for consideration.

3 That Respondents are to pay the costs.'

[9] The appellants were granted leave to appeal against this judgment and order. The asylum seekers were likewise granted leave to cross-appeal against the refusal to direct the RRO to issue, re-issue or extend the permits. In both instances leave was granted by the high court.

[10] The crisp issue in the appeal is whether s 22(3) of the Act empowers the RRO to extend permits once the internal remedies have been exhausted by an asylum seeker. The crisp issue in the cross-appeal is whether, if this Court finds that she is so empowered, the high court should have directed the RRO to extend the permits if an application for judicial review of the refusal of asylum is pending. I shall deal with each of these in turn.

[11] It is the interpretation of s 22(3) which is in issue. A number of principles of interpretation find application. I begin with the principle that the process of interpretation is an objective one. 'The "inevitable point of departure is the

language of the provision itself" read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'[18]

[12] There is nothing in the language of s 22 (3) itself which limits the power to extend permits to the period prior to the exhaustion of the internal remedies. No period for the exercise of the power is specified. The RRO is simply given the power 'from time to time to extend the period for which a permit has been issued . . . .'

[13] Counsel for the appellants submitted that the limitation contended for emerges when s 22(3) is interpreted in the light of ss 21(1), 21(4) and 22(1). The first of these sections simply provides that an application for asylum must be made to the RRO. The relevant parts of s 21(4) provide:

'(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 . . . .'

And s 22(1) obliges the RRO to issue a permit 'pending the outcome of an application . . . .' Counsel for the appellants submitted that, read together, this means that the permit endures only until the asylum seekers have had the opportunity to exhaust the internal remedies.[19] It was submitted that this is so because the moratorium against proceedings granted by s 21(4) ends once the internal remedies have been exhausted. The outcome referred to in s 22(1) must thus have been reached when the internal remedies have been exhausted.

[18] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18 (references omitted).

[19] Because the asylum seekers in the present matter all made use of the opportunities, I shall simply refer to the internal remedies having being exhausted and not that they had had the opportunity to do so.

Accordingly, a permit may also not be extended beyond the date when the internal remedies have been exhausted.

[14] There are a number of difficulties with these submissions. The words relied on in s 22(1) – 'pending the outcome of an application' – are used in relation to the issuing of a permit. They do not find echo in s 22(3) dealing with the extension of permits. In any event, they cannot mean that the permit is issued in order to lapse once the internal remedies have been exhausted. I say this for a number of reasons. First, a permit is issued with an expiry date which must be specified on the document. That is why it requires extension 'from time to time'. There is no way of knowing when the internal remedies will have been exhausted. It is thus not possible to insert a date that will coincide with the date on which the internal remedies will have been exhausted. It is accepted by all that a permit can be extended prior to that date. Unless the asylum seeker fails to have it extended, it will be extended beyond that date. If s 22(1) must be interpreted to mean that the permit automatically expires or lapses on that date, one would have expected the legislature to say so expressly. This was done in s 22(5) which provides that if asylum seekers depart South Africa without permission from the Minister to do so, their permits lapse.

[15] Secondly, if a permit was issued, until the internal remedies had been exhausted, the power to extend would only be required once the internal remedies had been exhausted. There would be no need to extend the permits 'from time to time' before that date. This gives an interpretation which is precisely the opposite of the one contended for by counsel for the appellants.

[16] Thirdly, the submission does not take into account other provisions in s 22. In the scheme of the Act, s 21 deals with applications while s 22 deals with permits. The immediate context for s 22(3) is, accordingly, the rest of s 22.

Counsel for the appellants candidly conceded that the provisions of s 22(6) had been overlooked in approaching this matter. In my view, this section is of great significance in the present matter. Section 22(6) provides:

'The Minister may at any time withdraw an asylum seeker permit if-

*(a)* the applicant contravenes any conditions endorsed on that permit; or

*(b)* the application for asylum has been found to be manifestly unfounded, abusive or fraudulent; or

*(c)* the application for asylum has been rejected; or

*(d)* the applicant is or becomes ineligible for asylum in terms of section 4 or 5.

[17] It was accepted by counsel for the appellants in argument that the discretion given to the Minister to withdraw a permit in the circumstances set out in s 22(6)*(b)* and *(c)* arises only once the internal remedies have been exhausted. This supports the interpretation that a permit can survive the date on which the internal remedies have been exhausted. If this were not so, there would be nothing for the Minister to withdraw. More important is the fact that the Minister is not obliged to withdraw a permit once the internal remedies have been exhausted. He has a discretion whether or not to do so. Since he has a discretion to withdraw or leave a permit intact, the interpretation contended for cannot be correct. If the Minister can leave a permit intact, it seems to envisage that this may be while an application for judicial review of the refusal of asylum is being dealt with. No other reason was suggested as to why a permit would otherwise not be immediately withdrawn. It stands to reason that in those circumstances a permit may also be extended.

[18] This finds some support in s 23 of the Act.[20] If the Minister has withdrawn a permit, s 23 gives the Minister a discretion to cause an asylum

[20] This provides:
'If the Minister has withdrawn an asylum seeker permit in terms of section 22 (6), he or she may, subject to section 29, cause the holder to be arrested and detained pending the finalisation of the application for asylum, in the manner and place determined by him or her with due regard to human dignity.'

seeker to be arrested and detained 'pending the finalisation of the application for asylum'. The words 'pending the finalisation of the application' presuppose that, at that stage, an application has not been finalised. These words – and those in s 22(1), 'pending the outcome of an application' – differ from the words in s 21(4), 'a decision has been made on the application'. The latter phrase clearly refers to the decision of the RSDO since it is followed by a reference to the asylum seeker then having 'an opportunity to exhaust his or her rights of review or appeal in terms of Chapter 4'. No mention is made in that section of the finalisation or outcome of an application for asylum. This lends credence to an interpretation that 'finalisation of an application' would include any judicial review application. Only once this has been dealt with is the application for asylum finalised.

[19] In addition, if the discretions to withdraw, and arrest and detain, in s 22(6) and s 23 respectively, arise after the exhaustion of the internal remedies, those provisions dovetail with the time when the s 21(4) moratorium against proceedings involving asylum seekers is lifted. In those circumstances neither the actions of the Minister to arrest or to detain an asylum seeker at that time would offend against the provisions of s 21(4).

[20] Counsel for the asylum seekers also relied on ss 21(4) and 22(1) to submit that the RRO is given the specific power to extend pending the outcome of a judicial review. It was submitted that the phrase in s 21(4), 'rights of review or appeal in terms of Chapter 4', supports this interpretation. In this regard, much was made of the fact that the word 'rights' is rendered in the plural. This plural, it was submitted, applies to the word 'review' giving more than one right of review. The second right of review would be a judicial review. On this

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Section 29, inter alia, provides for review by a judge of the high court having jurisdiction after the expiry of 30 days in detention.

approach, only the word 'appeal' is qualified by the words 'in terms of Chapter 4'. Counsel conceded that the inherent difficulty with this submission is that it requires the addition of a comma to the text. The relevant part would then read 'rights of review, or appeal in terms of Chapter 4'. But no comma has been included. And Chapter 4 deals with two rights, that of internal review and internal appeal. There is nothing in the text to suggest that the word 'rights' does not refer to the two rights in Chapter 4. No absurdity arises from a straightforward textual reading. It is therefore inappropriate to read in a comma where none has been included.

[21] But the process of interpretation does not stop at considering the language in its context. Regard must be had to 'the purpose of the provision and the background to the preparation and production of the document'.[21] Prior to the promulgation of the Act, persons seeking asylum in the Republic were dealt with under the Aliens Control Act 96 of 1991. In general terms, that legislation was couched in prohibitive terms and sought to exclude refugees from the Republic. This Court has already recognised that the Refugees Act signalled a decisive break with such past legislation.[22] This break from the past is signalled by the stated purpose of the Act:

'To give effect within the Republic of South Africa to the relevant international legal instruments, principles and standards relating to refugees; to provide for the reception into South Africa of asylum seekers; to regulate applications for and recognition of refugee status; to provide for the rights and obligations flowing from such status; and to provide for matters connected therewith.'

[22] The purpose of the Act and the background to its promulgation clearly seeks to apply the values espoused in the Constitution,[23] including human

[21] *Endumeni* para 18.
[22] *Minister of Home Affairs & others v Somali Association of South Africa Eastern Cape* note 1, para 2.
[23] Constitution of the Republic of South Africa, 1996.

dignity, the advancement of human rights and freedoms and the supremacy of the Constitution and the rule of law. It also seeks to give effect to a commitment to the comity of nations and a desire to bring our legislation concerning refugees into line with the human rights and other instruments mentioned in the Act and the standards and principles of international law. And, in case this is not sufficiently clear, s 6(1) of the Act itself states that the Act must be interpreted with due regard to: the Convention Relating to the Status of Refugees (UN, 1951); the Protocol Relating to the Status of Refugees (UN, 1967); the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU, 1969); the Universal Declaration of Human Rights (UN, 1948) and any other relevant convention or international agreement to which the Republic is or becomes a party.

[23] An international principle of cardinal importance when dealing with refugees is that of non-refoulement.[24] The Convention Relating to the Status of Refugees provides:

'Article 33 prohibition of expulsion or return ("refoulement")

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

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.'

This principle is specifically embraced in s 2 of the Act:

[24] This means non-return. The introduction to the Text of the 1951 Convention Relating to the Status of Refugees Text of the 1967 Protocol Relating to the Status of Refugees is to the following effect:
'The Convention is both a status and rights-based instrument and is underpinned by a number of fundamental principles, most notably non-discrimination, non-penalization and non-refoulement.' http://www.unhcr.org/protection/basic/3b66c2aa10/convention-protocol-relating-status-refugees.html?query=Protocol%20relating%20to%20the%20status%20of%20refugees,%201967 at 5, accessed on 13 March 2017.

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

*(a)* he or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or

*(b)* his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or the whole of that country.'

[24] It is significant that the effect of not having a valid permit is that the provisions of the Immigration Act[25] concerning illegal foreigners come into effect. Section 23 of the Immigration Act provides that an asylum transit visa, valid for five days, may be issued at a port of entry to a person claiming asylum. If the holder does not apply for asylum under the Act within that period, she or he becomes an illegal foreigner under the Immigration Act. And s 32 of that Act provides:

'(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.'

The clear meaning is that, unless an asylum seeker has a permit, he or she is obliged to leave South Africa and is subject to deportation. If the RRO is not empowered to extend permits after the internal remedies have been exhausted, the asylum seekers will be subject to deportation if their permits lapse before the judicial review applications are finalised. In most cases, this is all but inevitable.

[25] The provisions of the Act are designed to determine whether an asylum seeker is such a person.[26] While this decision is being finalised, the Act provides

[25] Immigration Act 13 of 2002.
[26] Section 3.

temporary refuge by way of a permit. The right to just administrative action contained in s 33 of the Constitution gives persons a right to review administrative action under the Promotion of Administrative Justice Act (PAJA).[27] An adverse decision of an application for asylum amounts to administrative action. If an application for judicial review succeeds, the asylum seekers could be accorded refugee status. It stands to reason, then, that until it is finally determined whether an asylum seeker 'may be subjected to persecution' on one of the mentioned grounds or 'his or her life, physical safety or freedom would be threatened', s 2 of the Act would militate against the return of the asylum seeker. If the asylum seeker was returned, and if it was later determined in the judicial review that the asylum seeker had met the requirements for refugee status, s 2 of the Act, and the principle of non-refoulement, would have been transgressed. The rights under PAJA would also have been rendered nugatory.

[26] This approach is supported by the United Nations High Commissioner for Refugees Handbook[28] (UNHCR) which includes two requirements which make the approach to be taken while there is still a prospect that an asylum seeker may prove that he or she is entitled to refugee status explicit:

'(vi) If the applicant is not recognised, he should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing system.

(vii) The applicant should be permitted to remain in the country pending a decision on his initial request by the competent authority referred to in paragraph (iii) above, unless it has been established by that authority that his request is clearly abusive. He should also be permitted to remain in the country while an appeal to a higher administrative authority or to the courts is pending.'

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[27] Promotion of Administrative Justice Act 3 of 2000.

[28] UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* HCR/IP/4/Eng/REV.1 (revised, 2011) para 192 available at http://www.unhcr.org/4d93528a9.pdf accessed on 24 March 2017.

The rights accorded under PAJA must be seen as part of the 'prevailing system' for persons to have a decision formally reconsidered as provided for in the Handbook. This approach is also supported by a directive of the European Court of Human Rights:

'Given the irreversible nature of the harm that might occur if the alleged risk of torture or ill-treatment materialised and the importance which the Court attaches to Article 3, the notion of an effective remedy under Article 13 requires (i) independent and rigorous scrutiny of a claim that there exist substantial grounds for believing that there was a real risk of treatment contrary to Article 3 in the event of the applicant's expulsion to the country of destination, and (ii) the provision of an effective possibility of suspending the enforcement of measures whose effects are potentially irreversible'.[29]

[27] Section 39(2) of the Constitution[30] is a bedrock principle of interpretation requiring courts to interpret statutes so as to 'promote the spirit, purport and objects of the Bill of Rights'.[31] This has been expanded on in various ways: 'The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values';[32] a court must 'prefer a generous construction over a merely textual or legalistic one in order to afford to claimants the fullest possible protection of the constitutional guarantees';[33] and, again in *Bato Star*, 'first, the interpretation that is placed upon a statute must, where possible, be one that would advance at least an identifiable value enshrined in the Bill of Rights; and, second, the statute must be reasonably capable of such interpretation.'[34]

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[29] *Muminov v Russia* [2008] ECHR 1683 para 101.
[30] This reads: 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'
[31] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) para 72.
[32] *Investigating Directorate: Serious Economic Offences & others v Hyundai Motor Distributors (Pty) Ltd & others; In re: Hyundai Motor Distributors (Pty) Ltd & others v Smit NO & others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (2) SACR 349 (CC); 2000 (10) BCLR 1079 (CC) paras 21-26.
[33] *Department of Land Affairs & others v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (10) BCLR 1027 (CC); 2007 (6) SA 199 (CC) para53. See also *Cool Ideas 1186 CC v Hubbard & another* 2014 (4) SA 474 (CC) para 28.
[34] *Bato Star* footnote 31, para 72.

[28] I have concluded that s 22(3) is at least capable of the interpretation that the RRO is empowered to extend permits after the internal remedies have been exhausted. The rights to bodily integrity, just administrative action and access to courts are immediately identifiable values which would be advanced by this interpretation. These would be placed at risk if the asylum seekers are returned for no other reason than that the internal remedies have been exhausted in circumstances where judicial review proceedings have been launched.

[29] Counsel for the appellants submitted that this was not a necessary outcome. The asylum seekers are not left without a remedy if it is found that the RRO is not empowered to extend permits. The suggested remedy was to approach a court for an interdict staying their 'arrest, detention and deportation until the outcome of such review.' There is at least one significant problem with this submission. If the Minister has withdrawn a permit, she or he has a discretion to have the asylum seeker concerned arrested and detained. If a court interdicts the arrest and detention, this interferes with the discretion of the Minister where there may be a valid basis for this discretion to be exercised against the asylum seeker which has nothing to do with the application for judicial review. If, on the other hand, the RRO is empowered to extend permits after the exhaustion of the internal remedies, this leaves the discretion of the Minister under s 22(6) intact. In addition, this option may not be practicable where asylum seekers have only 30 days before deportation to bring an application and may not have access to legal representation to assist.

[30] All of these lead to the conclusion that s 22(3) empowers the RRO to extend permits after the internal remedies have been exhausted. However, even where the tools of text and context produce a stalemate, the Constitutional Court has held:

'The balance must be tilted by looking at which interpretation will best "promote the spirit, purport and objects of the Bill of Rights".'[35]

It was readily conceded by counsel for the appellants that if this position is reached in the present matter, the interpretation of s 22(3) which grants the RRO the power to extend permits beyond the exhaustion of the internal remedies, must be preferred.

[31] Taking into account the various interpretative tools applicable to this matter, it is my view that the high court correctly found that the RRO is empowered to extend permits after the internal remedies have been exhausted. I am accordingly satisfied that the appeal must be dismissed.

[32] I turn to the cross-appeal. Not content with a finding that the RRO has the power to extend permits beyond the exhaustion of the internal remedies, counsel for the asylum seekers submitted that the RRO is obliged to do so pending the outcome of an application for judicial review, and that the high court should have directed the RRO to do so. Counsel for the asylum seekers relied, in this regard, on two bases for this submission. The first is based on the contention that the asylum seekers have a substantive legitimate expectation that the permits will be extended. The second is that, if it is found that this is not the case, the high court should have substituted its own decision for that of the RRO and directed the extension of the permits.

[33] The legitimate expectation that their permits will be renewed amounts to a substantive legitimate expectation. In other words, it goes beyond any requirement that the asylum seekers are entitled to insist on procedural fairness before a decision is made. Procedural fairness was the basis on which the

[35] *Minister of Defence and Military Veterans v Thomas* [2015] ZACC 26; 2016 (1) SA 103 (CC); (2015) 36 ILJ 2751 (CC); 2015 (10) BCLR 1172 (CC) paras 38-39. See also *South African Transport Services* v *Olgar and Another* 1986 (2) SA 684 (A) for a pre-Constitution approach along similar lines.

doctrine of legitimate expectation was introduced into our law.[36] This Court has expressly left open the question whether a party can be granted substantive relief as a result of a legitimate expectation.[37] The Constitutional Court has so far endorsed this approach.[38]

[34] Counsel for the asylum seekers submitted, however, that this case cries out for the extension of the doctrine so as to grant substantive relief. In support, counsel called in aid *KwaZulu-Natal Joint Liaison Committee*. It was submitted that the Constitutional Court in fact applied this doctrine although it disavowed having done so. In that matter, it was accepted by the Department of Education, KwaZulu-Natal, that an undertaking to pay subsidies had been given with an intention to honour it. It was held that the undertaking was that the department 'intended to make payments in accordance with its statutory and constitutional obligations.' The subsidy was held to be part of the constitutional obligation of the state to provide education. Once the government promised a subsidy, the right of learners 'not to have their right to a basic education impaired . . . [was] implicated.' The notice in question envisaged that schools would prepare their budgets based on it. In all the circumstances, the notice 'constituted a publicly promulgated promise to pay.' Once the due date for payment elapsed, 'this created a legal obligation unilaterally enforceable at the instance' of the named schools. It was made clear that this was the basis for the relief and not that the notice gave rise to a substantive legitimate expectation of payment.[39]

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[36] *Administrator, Transvaal & others v Traub & others* [1989] ZASCA 90; 1989 (4) SA 731 (A); [1989] 4 All SA 924 (A) at 758C-G.
[37] *Duncan v Minister of Environmental Affairs and Tourism & another* [2009] ZASCA 168; 2010 (6) SA 374 (SCA); [2010] 2 All SA 462 (SCA) para 13; *Meyer v Iscor Pension Fund* [2002] ZASCA 148; 2003 (2) SA 715 (SCA); [2003] 1 All SA 40 paras 27-28.
[38] *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal & others* [2013] ZACC 10; 2013 (4) SA 262 (CC); 2013 (6) BCLR 615 (CC) footnote 7 to para 31. See also *Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* [1998] ZACC 20; 1999 (2) SA 91; 1999 (2) BCLR 151 para 36; *Bel Porto School Governing Body and others v Premier, Western Cape, and another* [2002] ZACC 2; 2002 (3) SA 265; 2002 (9) BCLR 891 (CC) para 96.
[39] *KwaZulu-Natal Joint Liaison Committee* para 48-52.

[35] In the context of procedural relief, Heher J examined the nature of the expectation in *National Director of Public Prosecutions v Phillips & others*:[40]

'The requirements for legitimacy of the expectation, include the following:

(i) The representation underlying the expectation must be "clear, unambiguous and devoid of relevant qualification". . . .

(ii) The expectation must be reasonable . . . .

(iii) The representation must have been induced by the decision-maker.

(iv) The representation must be one which it was competent and lawful for the decision-maker to make without which the reliance cannot be legitimate . . . .'[41]

Counsel for the appellants submitted that there was no debate between the parties that the first three of these was met. I have considerable difficulty with this submission. In the founding affidavit, the asylum seekers averred that Mr Mathebula, the RRO at the time, 'undertook that the Respondents would renew the permits' if he received a letter from the State Attorney requesting that he do so on the basis that a judicial review application had been launched. In answer, the appellants said that 'although it may have been the practice in the past in respect of some of the [asylum seekers] it should never have been allowed'.

[36] I am of the view that the appellants' response falls short of an admission that an undertaking was given. This is buttressed by the fact that the letter of the State Attorney put up by the asylum seekers in support went no further than requesting the RRO to extend the permit concerned. No reference was made to an undertaking.

[37] In any event, it seems to me that, if such an undertaking was made, it could go no further than that Mr Mathebula would exercise his discretion in

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[40] *National Director of Public Prosecutions v Phillips & others* [2004] ZASCA 111; 2002 (4) SA 60 (W) para 28. These were endorsed by this Court in *South African Veterinary Council v Szymanski* 2003 (4) SA 42 (SCA) para 19.

[41] References omitted.

favour of extending permits in those circumstances. Whether it was a proper exercise of the discretion of the RRO to give a blanket undertaking without considering factors other than the fact that a judicial review was pending, is doubtful. It is readily conceivable that factors unrelated to the judicial review applications could militate against the extension of a permit. One such factor is criminal activity on the part of the asylum seeker, as was conceded in argument by counsel for the asylum seekers.

[38] Even if it can be said that a representation was made that a permit would be extended, the question arises whether that representation was clear, unambiguous and unqualified. Section 22(3) requires the RRO to make at least three decisions. Only one of these is to extend a permit. Permits must be extended 'from time to time' to a fixed date. This is the second decision. She or he must also decide whether or not to amend the conditions of the permit. This is the third. There is no evidence that any representation was clear as to the last two of these matters. The representation relied on cannot thus be said to have been clear, unambiguous and unqualified.

[39] As regards the fourth requirement, it cannot be the case that Mr Mathebula was competent to bind future RROs. I have already adverted to the fact that it is doubtful that he could lawfully make a blanket undertaking to extend which had the effect of abdicating the exercise of his discretion to consider each application on its merits. Each RRO is required to exercise her or his own discretion. To fail to do so could clearly be impugned on review.

[40] In my view, these factors preclude any finding that the asylum seekers proved that they had a legitimate expectation that the permits would be extended as contended for by them. In addition, any representation made fell far short of giving rise to a unilaterally enforceable legal obligation to extend the

permits on the basis of the approach in *KwaZulu-Natal Joint Liaison Committee*.

[41] The requirement of the exercise of the discretions granted to the RRO mentioned above leads to the next issue. Counsel for the asylum seekers submitted that there were two reasons why the high court should have directed the RRO to extend the permits. The first arises from the nature of the discretion accorded to the RRO by S 22(3). It was submitted that the word 'may' in s 22(3) does not mean that the RRO exercises a true discretion. In this regard, Wade and Forsyth[42] explain that:

'The hallmark of discretionary power is permissive language using words such as "may" or "it shall be lawful", as opposed to obligatory language such as "shall". But this simple distinction is not always a sure guide, for there have been many decisions in which permissive language has been construed as obligatory. This is not so much because one form of words is interpreted to mean its opposite, as because the power conferred is, in the circumstances prescribed by the Act, coupled with a duty to exercise it in a proper case.'

It was made clear, in *South African Police Service v Public Servants Association*,[43] that this approach is accepted by our courts:

'*Van Rooyen* indicates, therefore, that the word "may" may be construed in one of two ways: either to give a complete discretion to the commissioner to advertise or not, or simply to give authorisation to the commissioner to upgrade together with the duty to appoint the incumbent to the upgraded post without advertisement.'[44]

[42] In my view, however, the present use of the word 'may' in s 22(3) falls into the category of a true discretion rather than the conferring of a power coupled with a duty to use it in a certain way. As I have said, it may be that factors such as criminal activity on the part of an asylum seeker have been

[42] Wade and Forsyth *Administrative Law* 8 ed (2000) at 239.
[43] *South African Police Service v Public Servants Association* [2006] ZACC 18; 2007 (3) SA 521 (CC); [2007] 5 BLLR 383 (CC) para 16.
[44] The reference is to the dictum of Chaskalson CJ in *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening*) [2002] ZACC 8; 2002 (5) SA 246; 2002 (8) BCLR 810 paras 180-182.

established. In such circumstances, the RRO would not be obliged to extend the permit at all. The discretion whether to extend is accompanied by a discretion as to the date to which it is to be extended and the discretion whether to amend the conditions of the permit. All three are clearly beyond any power coupled with a duty.

[43] The second basis relied on for an order directing the RRO to extend the permits was that, if the empowering provision to extend was not accompanied by the duty to do so, the high court should have substituted its own discretion for that of the RRO. For similar reasons, it is my view that the high court was correct not to do so. The law is settled that this should be done only in exceptional circumstances.[45] The doctrine of separation of powers requires that courts, in exercising their constitutionally ordained powers, do not trespass on the territory of other organs of state where they are exercising their powers appropriately. This is known as judicial deference. In approaching the enquiry, certain factors must be considered:

'The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances.'[46]

[44] In the present matter, it is clear that the refusal of the RRO to extend the permits of the asylum seekers arose from a belief that she had no power to do so. There is no indication on the papers that she exhibited bias or incompetence.

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[45] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd & another* [2015] ZACC 22; 2015 (5) SA 245 (CC) paras 46-47.
[46] *Trencon Construction* paragraphs 46-47. References omitted.

In the light of the discretions involved and in the absence of any evidence of specific factors which might influence the manner in which those discretions should be exercised in the cases of individual asylum seekers, it cannot be said that the court is in as good a position as the RRO would be to do so. The outcome of each individual application to extend is also not a foregone conclusion at least as to duration and conditions. It is, of course, clear that an extension, subject to some conditions, will be the likely outcome unless there are other factors which warrant a refusal. I can think of no other factors which would have made a substitution order by the high court just and equitable in this matter. An important factor is that none of the asylum seekers' individual circumstances were outlined in the papers to enable the court a quo to form a proper view on the applications for extensions. The matter was a proper one for the high court to defer to the discretion granted to the RRO by s 22(3) and to remit the applications for extensions to her for consideration.

[45] As far as costs go, it was agreed that the principles set out in *Biowatch Trust v Registrar, Genetic Resources* apply.[47] In brief, these provide that a private party who litigates against the government to enforce a constitutional right and loses should not be ordered to pay costs. This is to prevent paralysis in legitimate cases in the face of a potentially crippling costs order. Where, however, the government litigates against a private party and loses, the costs should follow the result.[48] There is no reason to depart from these principles in the present instance.

The following order is made:

1 The appeal is dismissed with costs.

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[47] *Biowatch Trust v Registrar, Genetic Resources & others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

[48] See also *Affordable Medicines Trust and Others v Minister of Health and Others* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529) para 139.

2 The cross-appeal is dismissed.

T R Gorven

Acting Judge of Appeal

Appearances

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|---|---|
| For the Appellant: | MA Albertus SC (with him A Njeza) |
| | Instructed by: |
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| | State Attorney, Bloemfontein |
| For the Respondents: | M Bishop |
| | Instructed by: |
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| | Webbers Attorneys, Bloemfontein |