



CONSTITUTIONAL COURT OF SOUTH AFRICA

Ashebo v Minister of Home Affairs and Others

CCT 250/22

Date of hearing: 16 February 2023

Date of Judgment: 12 June 2023

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Monday, 12 June 2023 at 10h00, the Constitutional Court handed-down judgment in an urgent application for direct leave to appeal against an order of the High Court of South Africa, Gauteng Local Division, Pretoria (High Court) which struck the matter off the roll with costs for lack of urgency on 9 September 2022.

The applicant, Mr Beneyam Deselegn Ashebo (Mr Ashebo) is a foreign national from Ethiopia. He was arrested in Pretoria for unlawfully entering and residing in South Africa, in contravention of the Immigration Act 13 of 2002 (Immigration Act), and was charged in terms of section 49 thereof. Upon his arrest, Mr Ashebo explained to the arresting officers that he had long been seeking asylum, with no success as a result of Covid-19 restrictions, and that he entered South Africa illegally from Zimbabwe on 11 June 2021 owing to a fear of persecution in his country.

In an attempt to enforce his right to apply for asylum, Mr Ashebo lodged an urgent application in the High Court in which he sought an order amongst others, interdicting the respondents from deporting him until his status under the Refugees Act 130 of 1998 (Refugees Act), alternatively under the Refugees Amendment Act 11 of 2017 (Refugees Amendment Act), has been lawfully and finally determined. The first respondent is the Minister of Home Affairs. The second respondent is the Director-General, Department of Home Affairs. The third to fifth respondents are the National Director of Public Prosecutions, Minister of Justice and Correctional Services, and the Head of Kgosi Mampuru Correctional II Services, Pretoria, respectively. Taking part in the proceedings are the first and second respondents (respondents). Mr AShebo's urgent application in the High Court was struck off the roll for lack of urgency. Following which, he approached the Constitutional Court seeking the same relief.

Before the Constitutional Court, Mr Ashebo submitted that the application engaged the Court's jurisdiction as in terms of section 167(7) of the Constitution, a constitutional matter is that which includes the interpretation, protection and enforcement of the Constitution. In furtherance of this submission, he contended that the matter concerned his right to freedom and security of the person entrenched in section 12(1) of the Constitution. He submitted further that the matter also raised an arguable point of law of general public importance. This is so, he contended, because the question on which the matter hinges transcends his interests as there are thousands of asylum seekers who are in a

similar situation who will benefit from the certainty on the question of release from detention when an asylum seeker has shown an intention to apply for asylum. He contended that it is therefore warranted for the Court to sit as the court of first and last instance, particularly in light of his circumstances as he has a deportation threat hanging over his head, which could result in his persecution in Ethiopia should he be deported.

On the merits, Mr Ashebo contended that the application has reasonable prospects of success and that once he expressed an intention to apply for asylum, the legislation that ought to govern his case is not the Immigration Act but the Refugees Act, Refugees Amendment Act together with the new Refugees Regulations, in particular, section 21 read with regulation 8(a). He submitted further that in terms of the requirements in the two provisions, an application for asylum must be made in person, which he cannot do as he is currently unlawfully detained. Mr Ashebo argues that he was arrested and charged under the Immigration Act which no longer finds application in this case as he has expressed his intention to apply for asylum. He states that he has made out a sufficient case to indicate that he is a genuine candidate for refugee status in terms of article 31 of the 1951 United Nations Convention relating to the Status of Refugees and that his continued unlawful detention constitutes a penalty in terms of the said article and the principle of non-refoulement.

The respondents filed a notice to abide. Subsequently, directions were issued by the Court requesting written submissions from the parties, if any. Despite the notice to abide, the respondents' submissions in response to the Court's directions counter the application. The respondents insisted that the matter is not urgent. They argued for its re-enrolment on the ordinary High Court roll and submitted that it was incorrect and disingenuous for Mr Ashebo to contend that there would be a delay in hearing the matter under ordinary court procedures, as there have been many immigration and asylum cases which have been considered timeously by the Courts. They contended that Mr Ashebo could only be released from detention after he has applied for an asylum seeker permit in terms of section 22 of the Refugees Act and it is granted by Home Affairs. They submitted further that to do otherwise would render the Immigration Act an empty vessel in relation to foreigners who enter the country illegally and, after a long stay in the country, make assertions that they seek to make an application for asylum. In these circumstances, the respondents sought for the application to be dismissed.

In a unanimous judgment penned by Maya DCJ, the Constitutional Court held that it had the requisite jurisdiction to entertain the matter, and that it was urgent. The Court found that the matter raised two crucial issues to grapple with. The first concerned the time afforded to an illegal foreigner to apply for an asylum seeker permit in terms of the Refugees Act after entering the country. The second was whether an illegal foreigner is entitled to be released from detention after expressing an intention to seek asylum while awaiting deportation until such time that his or her application has been finalised. Of the two, the Court found that it was the second issue in our jurisprudence that remained without an answer.

The Court held that an illegal foreigner is entitled to an opportunity to be interviewed by an immigration officer to ascertain whether there are valid reasons why he is not in possession of an asylum transit visa. And prior to being permitted to apply for asylum, the illegal foreigner must show good cause for the illegal entry and stay in the country, as contemplated in the relevant legislative framework. The Court held further that, once good cause is shown and an application for asylum is lodged, the entitlements and protections provided in sections 22 and 21(4) of the Refugees Act – being issued with an asylum seeker permit that will allow him or her to remain in the country, without delay, and being shielded from proceedings in respect of his or her unlawful entry into and presence in the country until the application is finally determined – will be available to him/her.

The Constitutional Court further held that in this case, once Mr Ashebo has an asylum seeker visa issued in terms of section 22, he would be entitled to remain in this country temporarily, and his continued detention, to the extent that it rests solely on section 34 of the Immigration Act, would become unlawful, because he would no longer be an "illegal foreigner" for purposes of the Immigration Act. Moreover, it held that merely expressing an intention to seek asylum does not entitle an illegal foreigner, Mr Ashebo in this case, to release from detention.

The Court held further that Mr Ashebo's detention – to the extent that it rested on section 34 – may have become unlawful at some point, once a reasonable period elapsed with no effort made on the respondents' part to bring him before a RSDO for the process envisaged in section 21(1B) of the Refugees Amendment Act, read with regulation 8(3). But precisely when that would have been is difficult to discern in light of the new amendments to the relevant legislative regime, especially the repeal of the old regulation 2(2). The Court noted that, to the extent that Mr Ashebo's detention was authorised pursuant to section 49(1) of the Immigration Act read with the Criminal Procedure Act, the immigration officials' failure to facilitate his asylum application would not render his detention unlawful. In this light, the Court held that, a just and equitable remedy in terms of section 172(1)(b) of the Constitution would be to compel the respondents to facilitate Mr Ashebo's application for asylum, failing which, to release him from detention unless he may lawfully be detained under the Criminal Procedure Act 51 of 1977. The Court ordered the respondents, particularly the first, second, fourth, and fifth to assist Mr Ashebo with his application in order to give effect to his intention to apply for asylum and to further refrain from deporting him until his asylum application is finalised.