

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO:2024-002723

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: NO // [REDACTED]
(3) REVISED: NO [REDACTED]

Date: 12 February 2024 E van der Schyf

In the matter between:

DESALEGN ABERA ASHAGO

· APPLICANT

and

THE MINISTER OF HOME AFFAIRS

FIRST RESPONDENT

DIRECTOR GENERAL,
DEPARTMENT OF HOME AFFAIRS

SECOND RESPONDENT

NATIONAL DIRECTOR OF PUBLIC PROSECUTION

THIRD RESPONDENT

THE MINISTER OF JUSTICE AND CORRECTIONAL
SERVICES

FOURTH RESPONDENT

HEAD OF THE LEEUHOF CORRECTIONAL
SERVICE CENTRE, VEREENIGING

FIFTH RESPONDENT

JUDGMENT

Van der Schyff J

Introduction

- [1] The applicant, Mr. Ashago, first approached the urgent court for relief on 23 January 2024. In the founding affidavit to his urgent application, he stated that he is an Ethiopian national being detained at the Leeuhof Correctional Centre under case number D514/2023 for charges of being illegally in the country. He sought an order, amongst others, preventing the respondents from detaining, prosecuting, and deporting him pending the final determination of his status as a refugee under the Refugees Act 130 of 1997 as amended, declaring his detention unlawful, releasing him from detention, and declaring that he is entitled to remain lawfully in the country until the final determination of his status in terms of the Refugees Act.
- [2] For reasons that will become apparent later, it is necessary to provide a brief outline of the relevant facts provided in that application. Mr. Ashago provided details regarding the circumstances in Ethiopia that caused him to flee the country and explained his futile attempts to apply for an asylum seeker permit until he eventually submitted an online application. In response to the online application, he received a notice on 31 October 2023 to report to the Desmond Tutu Refugee Reception Office on 29 November 2023. He was, however, arrested on 10 November 2023 and charged with contravening section 49(1) of the Immigration Act 13 of 2002. He was subsequently not allowed to attend the scheduled appointment.
- [3] The Third Respondent, the National Director of Public Prosecution (NDPP), filed an answering affidavit. The NDPP submitted that the application was not urgent as the applicant could be afforded substantial redress at a bail hearing set down for 25 January 2024. The NDPP described the asylum-seeking application as fraudulent based on the DHA reference number used by Mr. Ashago when he submitted his online asylum-seeking application belonging to another person. A charge sheet

attached to the answering affidavit reflected that Mr. 'Abera',¹ the applicant, is charged with contravening section 49(1)(a) of the Immigration Act as amended in that he unlawfully and intentionally entered and remained in the Republic without a valid passport or permit or asylum documents as required.

[4] On 26 January 2024, Strydom J granted an order in the following terms:

2. Subject to the Applicant approaching the Refugee Office as contemplated in Paragraph 5 below, the First, Second, Third, Fourth, and Fifth Respondents are interdicted from detaining, prosecuting, and deporting the Applicant unless and until his status under the Refugee Act, 130 of 1998 alternatively under Refugee Act 130 of 1998 as amended by the Refugee Amendment Act 11 of 2017, has been lawfully and finally determined.
3. it is declared that the detention of the Applicant is unlawful.
4. The Respondents are directed to release the Applicant from detention forthwith.
5. It is declared that, in terms of Section 2 of the Refugee Act, the Applicant is entitled to remain lawfully in the Republic of South Africa until his application is finally determined in terms of the Refugees Act.
6. The Applicant is directed to submit and make his asylum application within 14 days from his release from detention.
7. the First and Second Respondents are directed, upon submission by the Applicant of his asylum application, to accept the Applicant's asylum application and to issue him with a temporary asylum seeker permit in accordance with Section 22 of the Refugee Act within 14 (Fourteen) days, pending finalisation of his claim, including the exhaustion of his right of review or appeal in terms of Chapter 3 of the Refugee's Act and the Promotion of Administrative Justice Act 3 of 2000, provided that the applicant applies for review or appeal in terms of the time periods as afforded to him in terms of Chapter 3 of the Refugee's Act and the Promotion of Administrative Justice Act.'

¹ The applicant's full names are Desalegn Abera Ashago. His identity is not in issue although the charge sheet refers only to his first and middle names.

- [5] The applicant now approaches the urgent court for an order:
- i. directing the respondents to comply with the order granted by Strydom J on 26 January 2024 (the Strydom-order),
 - ii. declaring the third, fourth and fifth respondents to be in contempt of the Strydom-order,
 - iii. a *rule nisi* calling on the respondents or Magistrates Singh and Abduldragman, or prosecutors Makea, Allison Choopdat, or any person who obstructs, interferes, violates, disobeys or disregards the execution of the Strydom order to show cause why they should not be incarcerated or fined for contempt of court, and
 - iv. punitive costs.
- [6] The respondents oppose the application.

Urgency

- [7] When the proceedings commenced, I indicated to the parties that my *prima facie* view was that the application was sufficiently urgent to be considered in the urgent court. My view was based thereon that the applicant is currently in detention, which he claims is unlawful. His right to freedom of movement is at stake. Both parties agreed that it is in the interest of justice to consider the merits of the application.

The parties' respective cases

(i) The applicant

- [8] It is averred on behalf of the applicant that his attorney of record visited the Leeuhof Correctional Service Centre on 29 January 2024 to serve the Strydom-order on the Head of the facility personally. An employee of the facility, Mr. Massyn, refused to acknowledge receipt of the court order. By then, an official from the High Court, Mr. Setati Sathekge, was already on his way to Leeuhof to serve the court order and

facilitate the applicant's release.² The deponent to the founding affidavit, Mr Manamela, the applicant's attorney of record, met up with Mr. Sathekge, who advised him that Mr. Massyn refused to release the applicant because the Strydom-order does not mention that the applicant is also charged with fraud. Even after it was explained to Mr. Massyn that the issue of a fraudulent reference was raised before Strydom J, he refused to release Mr. Ashago.

- [9] Mr. Manamela approached the control prosecutor at the Vereeniging Magistrate's Court on 31 January 2024 and advised her to comply with the court order. She informed him that she would not release Mr. Ashago and would oppose bail on 1 February 2024, when he would appear in court again. On 1 February 2024, the prosecutors objected to Mr. Ashago's immediate release, and the presiding officer, Ms. Abdulragman, transferred the matter to Ms. Singh. Ms. Singh ordered that the matter be postponed for a bail application. The applicant's legal representative approached the High Court for relief as it deemed the respondents to be in contempt of the Strydom-order.
- [10] The applicant is of the view that the respondents' attitude towards the court order is one of intentional disregard. The applicant and his legal representatives are of the view that because it was raised before Strydom J that Mr. Ashago allegedly provided or used a fraudulent reference when he submitted his online application, the issue of fraud has been considered by Strydom J. Mr. Ashago must be released from detention based on the Strydom-order.

(ii) *The respondents*

- [11] The respondents aver that they have complied with the Strydom-order and that the application is unfounded. They submit that the applicant's current detention is authorised in terms of the Criminal Procedure Act 51 of 1977 (the CPA) in that he is charged with the offence of Fraud.

² No confirmatory affidavit was attached. The respondents indicated in answer that they have no knowledge of this averment.

- [12] The charge sheet now attached to the answering affidavit contains a second count and reflects that Mr. 'Abera' is charged with the offence of Fraud in terms of ss 99, 103, 236, and 250 of the CPA.
- [13] The third respondent explains that Mr. Ashago was initially charged with the offence of contravening the Immigration Act. This charge has, however, been formally withdrawn after the outcome of the urgent application. After careful consideration of the docket, the third respondent held the view that there is *prima facie* evidence of the commissioning of the offence of Fraud. Mr. Ashago was charged with this offence, and is currently detained on the basis of this offence.
- [14] The respondents submit that Mr. Ashago's initial application was that he had to be released since he was an asylum seeker and had nothing to do with the charges he must currently meet. The Strydom-order was complied with when the charge of contravening section 49(1)(a) of the Immigration Act was unconditionally withdrawn. Mr. Ashago is not prosecuted or detained for being illegally in the country. The prosecution is empowered to charge anyone if there is evidence of fraud.
- [15] The respondents explain that when the applicant's representative presented the court Strydom-order to the official at the Leeuhof correctional facility, the order was not accompanied by warrant of release, or liberation warrant. They took issue with the fact that the applicant seeks a *rule nisi* affecting parties not cited as parties to the proceedings.

(iii) *The applicant's reply*

- [16] The applicant reiterated its view that he had to be released on authority of the Strydom-order and avers that paragraph 2 of the Strydom-order interdicted any further prosecution. It is submitted on behalf of Mr. Ashago that the 'alleged' charge of fraud is unlawful, in violation of the Strydom-order, and added in order to frustrate the Strydom-order. Since this charge emanates from 'the alleged submission of fraudulent documents,' the facts are not new and were served before Strydom J.

Discussion

- [17] Much was made during argument by the applicant's counsel of the specific date when the fraud charge was instituted. The exact day when Mr. Ashago was charged with fraud is not evident from the papers. On the one hand, the applicant's replying affidavit reflects that the fraud charge was instituted and added to the charge sheet after the Strydom-order was granted. In argument, counsel for the applicant submitted that the charge sheet attached to the respondent's answering affidavit in the first urgent court application was incomplete in that the charge already existed but was, for unknown reasons, concealed.
- [18] The respondents don't refer to a specific date when the fraud charge was instituted, but state that representatives of the third respondent considered the docket after the Strydom-order was granted and realised that there is *prima facie* evidence that an offence of fraud was committed, as a result of which Mr. Ashago was charged with having committed fraud. Mr. Massyn, the representative of the fifth respondent, ostensibly already alluded to the charge of fraud when confronted by Mr. Sathekge on 29 January 2024. On 1 February 2024, it was formally confirmed during court proceedings that count 1, the count relating to section 49(1) of The Immigration Act, was withdrawn and that Mr. Ashago is prosecuted on charges of fraud.
- [19] Since it is common cause that no mention was made before Strydom J of Mr. Ashago being charged with fraud in terms of the CPA, the Strydom-order clearly dealt only with Mr. Ashago's detention for allegedly contravening section 49(1)(a) of the Immigration Act. Even if Mr. Ashago was charged with fraud by that time, as hinted to by counsel for the applicant, neither the applicant nor the respondents informed Strydom J of such a charge. It is not disputed that Strydom J was aware of the allegation that Mr. Ashago based his asylum-seeking application on fraudulent information. Counsel for the applicant submitted at the time that an allegation of fraud or the use of fraudulent documents is not a bar to be released from detention. There is, however, a distinction between the consequences that follow allegations of a fraudulent application when a person is charged in terms of section 49(1) of the

Immigration Act, and a person formally being charged with the offence of having committed fraud.

[20] The factual position is, however, that Mr. Ashago is currently detained for the alleged commissioning of fraud. He has been advised to apply for bail but chose not to do so. He is not prevented from launching a formal bail application.

[21] In *Lembore and Others v Minister of Home Affairs and Others*,³ a Full Court of this Division distinguished cases like *Ruta v Minister of Home Affairs*,⁴ where the courts were concerned with detention in terms of section 34 of the Immigration Act, from cases where people are detained for contravening section 49 of the Immigration Act.⁵ This distinction was, amongst others, premised thereon that section 34 does not create an offence but merely forms part of the procedures before the deportation of foreign nationals who have contravened the Immigration Act. Where a person is prosecuted for an offence, whether it be a statutory offence as created in section 49(1) of the Immigration Act, or a common law offence like fraud, such person can apply for bail, where he or she may 'intimate his desire to apply for asylum, which will entitle him to be assisted and interviewed to show good cause for entering and staying in South Africa illegally.' In *Lembore*, the Full Court relied on the Constitutional Court's judgment in *Ashebo v Minister of Home Affairs*.⁶

[22] If regard is had to the Strydom-order, I agree with the respondents that the sole purpose of the order was to release Mr. Ashago from being detained, deported and prosecuted because he is illegally in the country until his asylum-seeking application is finally determined. The order to release him from detention is inextricably linked to the offence the court was informed he was charged with, being the offence created in section 49(1) of the Immigration Act. The question as to whether the court was correct to grant the order in light that Mr. Ashago was formally charged for an offence

³ Judgment handed down on 8 February 2024, Gauteng Division (2023-097427, 2023-097292; 2023-097111; 2023-097076; 2023-100081; 2023-100526).

⁴ 2019 (2) SA 329 (CC).

⁵ The court explicitly overruled the Full Court's judgment in *Abraham and Others v Minister of Home Affairs and Another* 2023 (5) SA 178 (GJ).

⁶ 2023 (5) SA 382 (CC).

for which he could apply for bail in contrast to being detained in terms of s 34 of the Immigration Act where there is no option to apply for bail, is irrelevant at this stage, since it is not being appealed and this court, in any event, does not sit as a court of appeal.

[23] Once the charges in terms of section 49 of the Immigration Act were withdrawn, the basis for the Strydom-order dissipated. As a result, this court cannot direct the respondents to comply with Strydom-order.

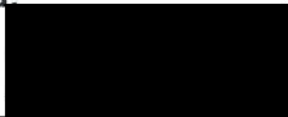
[24] Based on the facts before the court, it cannot be found that any of the respondents were in willful contempt of the order Strydom-order. Their view that Mr. Ashago's continued detention was inextricably linked to the charge of fraud, a view expressed already by Mr. Massyn on 29 January 2024, might be criticised but cannot be said to demonstrate a willful disregard for the court order. The question of whether the respondents are in contempt of court should not be confused with the onus on the respondents in civil cases based on unlawful detention, where the onus would be on the respondents to show that there was lawful authority for the detention. The position would have been different if the Strydom-order specifically referred to a charge of fraud. The Strydom-order cannot be interpreted as a blanket or all-encompassing guarantee from being prosecuted or detained until Mr. Ashago's status under the Refugees Act is determined.

[25] It follows that costs follow the event.

ORDER

In the result, the following order is granted:

- 1. Non-compliance with the Uniform Rules of Court is condoned and the application is heard as an urgent application;**
- 2. The late filing of the answering affidavit is condoned;**
- 3. The application is dismissed with costs.**


 E van der Schyff
 Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be emailed to the parties/their legal representatives as a courtesy gesture.

For the applicant:	Adv. SI Vobi
Instructed by:	Manamela MA Attorneys
For the respondents:	Adv. ES Dingiswayo
Instructed by:	State Attorney
Date of the hearing:	9 February 2024
Date of judgment:	12 February 2024