REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: 2025-046181

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE

SIGNATURE

In the matter between:

M[…] K[...] Applicant

and

MINISTER OF HOME AFFAIRS Respondent

Delivered: *This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date and for hand-down is deemed to be 11 April 2025.*

Summary: Urgent application seeking an interdict pending the final determination of a review application. On application of the *OUTA* principle, launching of a review application does not entitle an applicant for review to an interdict pending the outcome of the review application. A statutory function once performed is incapable of being suspended by a Court of law. Although the application was heard as one of urgency, the applicant is not entitled to a final relief of an interdict. The essential requirement of clear right has not been

demonstrated. None of the rights of the children of the applicant are affected as such no protectable rights of theirs require protection by a remedy of an interdict. Exercise of statutory function is incapable, absent *mala fide* exercise thereof, of being interdicted. Held: (1) The application is heard as one of urgency in terms of Rule 6(12) of the Uniform Rules of Court. Held: (2) The application is dismissed. Held: (3) There is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] The urgent Court of this Division is inundated with immigration cases. The majority of cases involves illegal foreigners seeking to extend their stay in the Republic for reasons that they had launched PAJA judicial reviews against their rejection of asylum visas. In most instances, like in the present application, the Minister of Home Affairs or the Department of Home Affairs choose not to oppose such applications. Inasmuch as this Court is appreciative and acknowledges capacity challenges in the office of the State Attorney, the proper administration of justice is handicapped by the absence of the Minister or the Department when these matters are heard in Court.

[2] More often than not applicants, to their own advantage, of course, fail to disclose all the relevant facts that will enable a Court to disseminate justice and exercise proper judicial authority as enjoined by section 165 of the Constitution. At the very least, this Court expects the Minister or the Department officials to depose to an explanatory affidavits, and most importantly avail the relevant documents. This proposed benevolence on the part of the relevant officials will go a long way towards a proper administration of justice and effective exercise

of judicial authority. To my mind, such is a gesture of accountability contemplated in section 195(1)(f) of the Constitution[1].

[3] The above said, this is an unopposed urgent application in terms of which, the applicant, Mr M[...] K[...] (Mr K[...]), firstly seeks audience on an urgent basis within the contemplation of Rule 6(12) of the Uniform Rules of this Court. Secondly, he seeks reliefs that (a) pending the finalisation of Part B, the Form 23 (*Notices by Immigration Officer to Person to Appear before Director General*) issued in terms of section 33(4)(c) of the Immigration Act, dated 31 March 2025 be suspended; (b) pending the finalisation of Part B, the respondents be ordered to issue and/or extend the asylum permit of the first applicant; (c) interdicting the respondents from initiating any process to detain and/or deport and/or order the first applicant to depart from the Republic of South Africa pending the final determination of Part B; and (d) payment of costs on attorney and client scale.

Brief factual exposition

[4] Mr K[...] is a foreign national of the Democratic Republic of Congo (DRC). He is a self-professed singer. When he was in the DRC, he used to sing songs which criticised the ruling People's Party for Reconstruction and Democracy (PPRD). He was an ordinary member of the Movement of the Liberation of Congo (MLC). He participated in the activities of MLC as a local singer at the events organised by the MLC.

[5] In one of the meetings held at a secret location in Kinshasa during 2008, the government security forces infiltrated such a meeting. The attending members were assaulted, arrested and brutally killed. Following this incident, Mr K[...] lived in fear and received threats of a political nature. Both his parents, brother and sister were killed and their dead bodies were displayed outside his

[1] Section 195(1)(f) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles- (f) *Public administration must be accountable.*

homestead. Owing to the above situation, he fled DRC through a truck that was travelling to South Africa through Zimbabwe and Zambia.

[6] He arrived in South Africa around June 2008. I interpose to mention that, Mr K[...] vaguely testified that in June 2008, he applied to be recognised as an asylum seeker. Perplexingly, the asylum seeker temporary visa attached to the founding papers of Mr K[...] was issued on 12 March 2024. The visa was to expire on 20 August 2024. One of the conditions were that Mr K[...] was booked for appeal hearing on 20 August 2024. With the benefit of the benevolence mentioned earlier, this Court would have been wised up to the correct facts to demystify or better still detangle this apparent cobweb.

[7] It must be so, as it is often the case with immigrants who enters South Africa not using the recognised port of entry, that from 2008 to March 2024, Mr K[...] was an undocumented illegal foreigner in South Africa. In South Africa, the self-confessed singer worked as motorbike driver doing deliveries. During 2016, Mr K[...] married one Ms Kunga Ngemba Delice, a Congolese national. Two minor children were born in South Africa and their births were registered in South Africa. The two minor children were mentioned as the second and third applicants (Ms N[...] M[...] C[...] K[...], born on 20 June 2018; and Mr K[...] M[...] B[...], born on 25 April 2021). I interpose to mention that given the ages of the minor children, they do not possess a legal standing to litigate in their own rights. Nowhere in the founding affidavit does Mr K[...] aver that he is, in his capacity as their parent and legal guardian, litigating on their behalf.

[8] On or about 16 August 2023, Mr K[...] received correspondence from the Department of Home Affairs to report to the Pretoria Refugee Reception Centre (PRRC) to meet with the Refugee Status Determination Officer (RSDO) in order to finalize outstanding administrative matters of his claim to be a refugee. At that meeting an interview on other matters related to his application for asylum may have been included.

[9] In his founding papers, Mr K[...] is economical with regard to the events of the meeting of 16 November 2023 with the RSDO. It is unclear as to what obtained

with regard to his mentioned application for asylum and the administrative issues relating to his claim of being a refugee. Tersely, he averred that all what happened is the handing over of a notice of appeal and an instruction to commission an affidavit at the police station, which he duly complied with. I interpose to mention that an explanatory affidavit by Ms Bridgette Mantutule Morudi, the RSDO, would have illuminated facts to assist this Court.

[10] An appeal was indeed launched, to which decision, this Court is none the wiser. An appeal hearing sat on 27 August 2024. Vaguely, Mr K[...] testifies about a first hearing where he was offered the services of an interpreter. He laments that at the appeal hearing, he was not afforded the services of an interpreter as a French speaking person. The impugned decision of the appeal body records that Mr K[...] waived the right to an interpreter. Nonetheless, on 16 October 2024, a member of the Refugee Appeals Authority of South Africa (RAASA), the erudite Ms Z B[...], handed down a detailed outcome. The conclusion reached by Ms B[...] was that (a) the appeal of M[...] K[...] is dismissed. Refugee protection is accordingly denied; (b) the Registrar of RAASA is instructed to finalise the matter by serving the decision on Appellant and the Department.

[11] Resultantly, on 31 March 2025, the Immigration Officer exercised a statutory power bestowed on him by section 33(4)(c) of the Immigration Act by issuing a notice to Mr K[...] calling upon him to appear before the Director General of the Department of Home Affairs (DoH). The reason for the appearance was for him to bring along his passport and bus or flight ticket within 14 days.

[12] On or about 3 April 2025, Mr K[...] launched the present application in two parts. The part B, which is not presently before this Court is, a review of the decision of the RSDO, the date of which is unknown and the decision taken by Ms B[...] on 16 October 2024. I pause to mention that service of the application upon the Minister has been effected by electronic mail contrary to Rule 4(9) of the Uniform Rules of this Court. In terms of section 2(2) of the State Liability Act[2],

[2] Act 20 of 1957

service to the Minister must be effected on the State Attorney. Service was improper. This may explain the non-appearance. Since Mr K[...] sought to be indulged within the contemplation of Rule 6(12), the present application was heard nevertheless.

Evaluation

[13] Minor children do not have a legal standing to litigate on their own behalf. Mr K[...] made no averment that he is instituting the present application on behalf of the minor children. No relief has been sought in the notice of motion in favour of the minor children. There is no evidence that the impugned Form 23 has named the minor children. There is no allegation that the minor children are facing possible deportation. Nevertheless, there is no evidence that the minor children were part of the asylum seeker's application. Section 21B(2A) of the Refugees Act provides that any child of an asylum seeker born in the Republic has the same status as accorded to an asylum seeker. Ultimately the status of Mr K[...] is that of an illegal foreigner. Therefore, in terms of the applicable law, the minor children acquired the status of being illegal foreigners. In terms of section 32(2) of the Immigration Act, any illegal foreigner shall be deported. In his founding affidavit, Mr K[...], other than reciting case authorities and applicable international charters, makes no case as to which of the minor children's rights are being harmed or threatened with harm. During oral submissions, counsel for Mr K[...] attempted to make a case to the effect that once Mr K[...] is deported, the children will be separated from their parent and such a separation does not serve the best interest of the minor children, contrary to section 28 of the Constitution. This is a submission made in hollow. There is simply no such case made, properly so, in the papers before Court. The pending review application does not seek to vindicate any of the minor children's rights. There is no evidence that they were part of the meeting where the rights of Mr K[...] were allegedly trampled upon.

[14] Owing to the fact that Mr K[...] was afforded 14 days to appear before the Director General, this Court was satisfied that an urgent relief is necessary and Mr K[...] may not be afforded a substantial redress in due course, if the

Immigration Officer acted unlawfully or with *mala fide,* by issuing the so-called Form 23.

[15] Turning to the merits of the present application, regard being had to the reliefs sought by Mr K[...], the questions to be addressed in this judgment are (a) is this Court empowered to suspend the issued Form 23 notice; (b) is this Court empowered to order the Minister to extend the asylum permit; and (c) is Mr K[...] entitled to a final relief interdicting and restraining any process to detain, deport or order the departure of Mr K[...] pending the final determination of part B of this application.

Suspension of the issued Form 23 notice

[16] During oral submissions, this Court raised a concern with counsel for Mr K[...], regarding the powers of this Court to suspend a notice issued in the exercise of statutory power. In support of a submission that a Court is so empowered, counsel placed reliance on the decision of the learned Acting Justice Andrews in the matter of *Sattar and others v Minister of Home Affairs and another (Sattar)*[3].

[17] By issuing Form 23, the Immigration Officer exercises powers approbated to him by section 33(4)(c) of the Immigration Act[4]. The section reads:

> "(4) An immigration officer may, for the purposes of this Act –
>
> (a) …
>
> (b) …
>
> (c) By notice in writing call upon any person to appear before the Director-General and to give evidence or to answer questions relevant to the subject matter of the investigation:
>
> Provided that any such notices shall specify the time when and the place where the person to whom it is directed shall appear, be signed by an immigration officer, be served by an immigration officer or a sheriff by delivering a copy thereof to the person concerned…, and

[3] Marked reportable Case No 144037/2024 handed down on 09 January 2025 (WC)
[4] Act 13 of 2002 as amended.

shall specify the reason why the thing is to be produced or the evidence is to be given."

[18] Without deciding, whether the issued Form 23 amounts to an administrative action or not, any exercise of statutory power is subject to judicial review either in terms of PAJA or legality review. An administrative action remains valid until set aside by a Court with competent jurisdiction[5]. Before me, the applicant is not seeking a judicial review of the Form 23. Accordingly, in my view, this Court is not authorised to suspend an exercise of statutory power. The power is already exercised and the only manner in which the already exercised power may vacate is by way of a review. *Sattar* is not authority for the proposition that a Court is authorised to suspend the Form 23 notice. The suspension ordered in *Sattar* was part of a structural interdict. The basis for the structural interdict was clearly spelled out by the learned Andrews AJ as follows:

> "[54] … Having found that the nature of these proceedings is deemed inherently urgent, a review of the respective Form 23 notices in the fullness of time will still render the Applicants vulnerable to arrest and deportation without them having been afforded an opportunity to apply for asylum. The Applicants contended that without a court order directing the DHA to provide them with an opportunity to apply for asylum and have those applications decided on its merits, the Applicants remain without a remedy. There is very real fear of the Applicants facing imminent arrest and deportation if regard is had to the manner in which the Form 23 is framed."

[19] As an indication that the suspension is part of structural interdict designed by the learned Acting Justice, the suspension was conditioned on the applicants in there presenting themselves to the nearest RRO, in order to be interviewed and to show *good cause,* as steps towards applying for asylum. In the present matter, Mr K[...], seemingly, went through the process of applying for asylum. In

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[5] *MEC for Health, Province of Eastern Cape NO and Another v Kirkland Investments (Pty) Ltd t/a Eye & Laser Institute* 2014 (3) SA 219 (SCA) and *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 22 (SCA).

terms of section 24(5)(b) of the Refugees Act[6], an asylum seeker whose application for asylum has been rejected in terms of subsection (3)(c) must be dealt with in terms of the Immigration Act, unless he or she lodges an appeal in terms of section 24B(1).

[20] Unlike the applicants in *Sattar*, Mr K[...] became a subject of the Immigration Act effective 16 October 2024, since his appeal was rejected in terms section 24B(2) of the Immigration Act. Undoubtedly, the rejections turned him into an illegal foreigner.

[21] Accordingly, absent a judicial review, this Court is not empowered to suspend the Form 23. Thus, a prayer seeking such a relief stands to fail.

A power to order extension of the asylum permit

[22] The issue of asylum visa is regulated by chapter 2 of the Refugee Act. In terms of section 22(1) of the Refugee Act, an asylum seeker, whose application in terms of section 21(1) has not been adjudicated, is entitled to be issued with an asylum seeker visa, allowing the applicant asylum seeker, to sojourn in the Republic temporarily, subject to such conditions as may be imposed. On 12 March 2024, Mr K[...] was accorded the entitlements contemplated in section 22 and was issued with a temporary visa. As at present, the application of Mr K[...] has been adjudicated upon. Where section 22 refers to an applicant, it refers to an applicant contemplated in section 21(1)(b) of the Refugee Act.

[23] Therefore, section 22(1) does not have an applicant for a judicial review in mind. Such being the present legal position, where an application contemplated in section 21 has been adjudicated, an entitlement to a temporary asylum visa falls away. This view is underpinned by a proper read of section 22(4), which provides that the visa referred to in subsection (1) may, pending the decision on the application in terms of section 21, from time to time be extended for such period as may be required. As pointed out earlier, once an application is

[6] Act 130 of 1998 as amended.

rejected the asylum seeker loses any protections in terms of the Refugee Act. Section 21(4) provides that no proceedings may be instituted or continued against any person in respect of his or her unlawful entry into or presence in the republic if such a person has applied for asylum until decisions contemplated in section 24, 24A, or 24B have been made. This protection does not extend to a situation where a judicial review pends.

[24] Accordingly, once the Refugee Act protection evaporates, this Court is not empowered to afford a supposed asylum seeker any of the protections in the Refugee Act. In terms of section 1 of the Refugee Act, asylum means a refugee status in terms of the Act. An asylum seeker means a person who is seeking recognition as a refugee in the Republic. A refugee status is acquired by a person who fits the statutory provisions of section 3(a)-(c) of the Act. A decision has already been made that Mr K[...] does not fit the statutory requirements in section 3. Therefore, he is not an asylum or an asylum seeker anymore.

[25] Resultantly, an order compelling an extension of a temporary visa is not capable of being made by this Court. The temporary visa that was once issued to Mr K[...] has expired. Expiry refers to a point in time when something comes to an end or stops being valid. If that state is reached, extension becomes impossible. Extension generally refers to something that is added to make something longer, larger, or more extensive. Mr K[...] is bound to fail on this relief.

[26] Since the applicable law is that, having gone through the process designed by the Refugee Act, a person must be dealt with in terms of the Immigration Act, section 1 of the Act defines a foreigner to mean an individual who is not a citizen. The section further defines an illegal foreigner to mean a foreigner who is in the Republic in contravention of the Act. Undoubtedly, Mr K[...] is a Congolese and not a citizen of the Republic. He is in the Republic without any documentation permitting him to be in the Republic, as such an illegal foreigner. In terms of section 32(1) of the Immigration Act, an illegal foreigner shall depart unless authorised by the Director-General to remain in the Republic pending his or her application for a status.

Is Mr K[...] entitled to a final order of an interdict?

[27] An interdict is a special discretionary remedy aimed at protecting protectable rights. As a departure point, a review application is not a protectable right, to be insulated by an interdictory relief[7]. In order to obtain a final interdictory relief, an applicant must demonstrate a clear right. A right to launch a review is not a right to be preserved *pendente lite*. Mr K[...] seeks to protect a right to fair and lawful administrative action. As confirmed in *OUTA*, an interdict is meant to protect future conduct and not decisions already made. On his own version, his right to fair and lawful administrative action as guaranteed to everyone in section 33 of the Constitution, was trampled upon on 27 August 2024. Accordingly there is nothing to protect at this stage. The remedy of Mr K[...] is a review in terms of PAJA or legality and rationality principle[8]. The issue whether or not affording him a French speaking interpreter amounts to procedural unfairness would be decided in due course. This Court expresses its own doubts. The notice of appeal was completed by manuscript in English.

[28] Mr K[...] fears a deportation. Section 34 of the Immigration Act authorises deportation and detention of illegal foreigners. Should Mr K[...] be ultimately deported, the Minister would not be acting unlawfully thereby. As an illegal foreigner, Mr K[...] is not entitled to remain in the Republic. Section 32(2) of the Immigration Act is unequivocal. An illegal foreigner shall be deported. In *Gool v Minister of Justice and another*[9], it was confirmed that unless allegations of *mala fides* are made a Court does not readily interdict the exercise of statutory powers. The *Gool* decision received an imprimatur in *OUTA*.

[29] Having failed to demonstrate a clear right that is to be harmed, Mr K[...] is not entitled to a final interdictory relief.

Conclusions

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[7] See *National Treasury and others v OUTA* 2012 (6) BCLR 1148 (CC) at para 50.

[8] See *Ithala SOC Ltd v SARB and others* (010146/2022) [2022] ZAGPPHC 784 (14 October 2022) para 14.

[9] 1955 (2) SA 682 (CPD).

[30] In summary, this Court is satisfied that the present application deserved to be heard as one of urgency. This Court is not empowered to suspend the Form 23. This Court is not empowered to order the extension of a non-existent temporary asylum visa. Mr K[...] has failed to make a case for a final interdictory relief. Accordingly, the application must fail.

[31] On account of all the above reasons, I make the following order:

Order

1. The application is heard as one of urgency in terms of Rule 6(12) of the Uniform Rules of this Court. Non compliance with the Rules is hereby condoned.
2. The application is dismissed.
3. There is no order as to costs.

GN MOSHOANA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES:

For the Applicant:	Mr B Baliso
Instructed by:	Mapingire & Associates Inc, Pretoria
Date of the hearing:	08 April 2025
Date of judgment:	11 April 2025