THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 589/11

YENE WOLDEMESKEL BULA	First Appellant
TEKETEL BAMBORE LAMORE	Second Appellant
MESELE ELILO KABETO	Third Appellant
TEREFE MUNDINO ANDISO	Fourth Appellant
QADRE ERESO ABE	Fifth Appellant
ALEMAYEHU ASHEBO ARUFU	Sixth Appellant
MITIKU MANTESE BASORE	Seventh Appellant
TEMESGEN KARESO MAGA	Eight Appellant
DANELI GENCHUBO WOLDE	Ninth Appellant
ADDISE DUTORO GAGURO	Tenth Appellant
DESTA YOHANNES SAWO	Eleventh Appellant
TESSEMA MESSELE HANICHA	Twelfth Appellant
BELAYENHE SERATO BULADE	Thirteenth Appellant
SHENO BUTE SHOBE	Fourteenth Appellant
MELESE AWONO ARIFICHO	Fifteenth Appellant
ELIAS EREKOBO ERAGO	Sixteenth Appellant
ALI ABDULRAMAN AHMED	Seventeenth Appellant
CHARENTE YOHANNES TUMATE	Eighteenth Appellant
ESHETU GEBREMEDHIN EROMO	Nineteenth Appellant
and	
MINISTER OF HOME AFFAIRS	First Respondent
DIRECTOR-GENERAL DEPARTMENT OF HOME AFFAIRS	Second Respondent
BOSOSA (PTY) LTD T/A PROSPECTS TRADING	Third Respondent

Neutral citation: *Bula & others v Minister of Home Affairs & others* (589/11) [2011] ZASCA 209 (29 November 2011)

CORAM: Navsa, Cloete, Maya, Bosielo and Leach JJA

HEARD: 9 November 2011

DELIVERED: 29 November 2011

SUMMARY: **Applications for asylum – structure and purpose of Refugees Act 130 of 1998 – South Africa's obligations under international law – Refugee Reception Officer obliged to accept an application for asylum – for Refugee Status Determination Officer not court to decide whether applicant entitled to asylum – including whether application is unfounded – meaning of 'encountered' in Regulation 2(2) – once intention to apply for asylum is indicated asylum seeker entitled to protective provisions – manner in which proceedings in high court conducted criticised – unwarranted statements by judicial officer – warning against preconceived ideas – militating against rule of law and proper administration of justice.**

ORDER

On appeal from: South Gauteng High Court (Johannesburg) (Cassim AJ sitting as court of first instance):

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the high court is set aside and replaced with the following:

'A Subject to the Applicants approaching a Refugee Reception Office as contemplated in paragraph D below, the First and Second Respondents are interdicted from deporting the Applicants unless and until their status under the Refugees Act, 130 of 1998, has been lawfully and finally determined.

B It is declared that the detention of the Applicants is unlawful.

C The Respondents are directed to release the Applicants forthwith.

D It is declared that, in terms of Regulation 2(2) of the Refugee Regulations, the Applicants are entitled to remain lawfully in the Republic of South Africa for a period of 14 days, in order to allow them to approach a Refugee Reception Office.

E. The First and the Second Respondents are directed, upon submission by the Applicants of their asylum applications, to accept the Applicants' asylum applications and to issue them with temporary asylum seeker permits in accordance with section 22 of the Refugees Act, pending finalisation of their claim, including the exhaustion of their rights of review or appeal in terms of Chapter 4 of the Refugees Act and the Promotion of Administrative Justice Act 3 of 2000.

F. The First and Second Respondents are jointly and severally directed to pay the costs of the Applicants.'

JUDGMENT

NAVSA JA (CLOETE, MAYA, BOSIELO and LEACH JJA concurring)

[1] On 9 November 2011 this appeal was heard and upheld and the order set out above was made. When handing down the judgment it was indicated that the reasons would follow. The background to the appeal and the reasons for making the order are set out hereafter.

[2] This appeal is about the principle of legality. It involves the interpretation and application of provisions of the Refugees Act 130 of 1998 (the RA) and of regulations issued thereunder. The appeal is directed against a judgment of the South Gauteng High Court, Johannesburg (Cassim AJ), in terms of which it dismissed an application by 19 Ethiopian nationals, the appellants, for an order: (a) reviewing and setting aside an order of the Magistrates' Court to extend warrants of detention and (b) interdicting the Minister of Home Affairs and the Director-General of the Department of Home Affairs (the DG) from deporting them until their status under the RA, was lawfully and finally determined. The appellants had also sought an order that they be afforded an opportunity to approach a refugee reception centre and that the Minister and the DG be directed to accept their applications for asylum and to issue them with a temporary asylum seeker permit, in accordance with s 22 of the RA. They were granted none of the relief sought. Because there was no prospect of recovery of costs no order was made in that regard. The appeal was before us with the leave of the court below.

[3] There are aspects of the manner in which proceedings were conducted in the court below that must be addressed in the interest of the proper administration of justice. That exercise will involve, inter alia, scrutinising numerous statements made by the court below during those proceedings. But first it is necessary to set out in broad outline the case made by the appellants

and the Minister and the DG's response to it.

[4] If the 19 appellants are to be believed, they fled Ethiopia in about May 2010 to escape political persecution and in fear of their lives, and walked for a year through Kenya, Tanzania and Mozambique before arriving in South Africa. According to the appellants, they crossed the South African/Mozambique border without being stopped by any immigration officials. In the founding affidavit by the first appellant, he states that he and the other appellants were all supporters of the opposition political party in Ethiopia, the Oromo Liberation Front and as such they were pursued, threatened and in some cases severely injured by the police and members of the ruling Ethiopian Peoples' Democratic Front. The first appellant stated that because of the confidential nature of claims for asylum he was not providing any details of the appellants' claims.[1] In their affidavits each of the remaining appellants confirmed the allegations made by the first appellant.

[5] According to the appellants, at the end of their travels they arrived in Johannesburg on 16 June 2011, encountering a Somali national with whom they could communicate in Amharic.[2] They were hungry and were offered food by the Somalian who took them to a house in Mayfair and gave them a meal. Whilst there, a fight broke out between two Somalians causing the police to arrive. The police asked the appellants, through an interpreter, for documentation to prove that they were lawfully resident in South Africa. When this could not be produced they were arrested as 'illegal foreigners'.

[6] After being detained at the Johannesburg police station from 16 June 2011 until 24 June 2011 the appellants were transferred to Lindela, a holding facility and repatriation centre controlled by the Department of Home Affairs. On 27 July 2011, approximately a month after their arrival at Lindela and following on a meeting with their attorneys, Lawyers for Human Rights, a

1 Section 21(5) of the RA provides:
'The confidentiality of asylum applications and the information contained therein must be ensured at all times.'

2 A Semitic language that is the official language of Ethiopia.

letter on their behalf was sent to the Department of Home Affairs in which they demanded that all deportation proceedings against them be halted and that they be released immediately and afforded the opportunity to apply for asylum. There was no written response to the letter. That the letter was sent and not responded to is undisputed. The contents of the letter bear repeating:

'1. We write on behalf of, and with instructions from 19 Ethiopian asylum seekers detained at Lindela since 24 June 2011. A list of the names of our clients is annexed hereto as "A" (our clients). (Please note that our clients' names are spelt incorrectly on their Lindela cards).

2. Our clients instruct us that they arrived in South Africa in June 2011, having fled Ethiopia in fear for their lives and due to political persecution.

3. We do not set out herein the details of our clients' asylum claims, due to the confidential nature thereof and in accordance with section 21 (5) of the Refugees Act 130 of 1998 ("*the Refugees Act*"), which preserves the confidential nature of our client's claim.

4. Our clients instruct us that following arrival in South Africa, and after meeting a Somali national, they made their way to a house in Mayfair, which was occupied by Somali nationals who undertook to assist them.

5. Our clients instruct us further that they were arrested by the police at this house on 16 June 2011, prior to having an opportunity to apply for asylum.

6. Our clients instruct us that they were detained at the Johannesburg Central Police station from 16 June 2011 until 24 June 2011 when they were transferred to Lindela.

7. As asylum seekers, our clients cannot be deported and their detention for purposes of deportation is thus unlawful. Deporting our clients would be a violation of the principle of *non-refoulement* as well as a contravention of the Refugees Act 130 of 1998 and South Africa's obligations under international law.

8. We are therefore instructed to demand, as we hereby do, that:

    1. All deportation proceedings against our clients be immediately halted;
    2. Our clients be immediately released and afforded the opportunity of applying for asylum.

9. Should our clients not be released as outlined above by no later than Friday 29 July 2011, they will take further steps as they may be advised including approaching an appropriate Court for urgent relief.

10. We trust this will not be necessary and await your response.

11. All of our clients' rights are reserved.'

[7] Fearing imminent deportation the appellants, as stated above, approached the South Gauteng High Court for orders in the terms set out in para 2. In their founding affidavit in the court below the appellants disclosed that they had recently become aware that, on 27 June 2011, an unauthorised

application had been made to that court on their behalf, for an order that they be released from detention and that the Minister and the DG allow them to apply for asylum seeker permits. The appellants denied that they had signed the affidavits on which the prior application had been based. According to the appellants, they had not heard nor met either the advocate or the attorney who had purportedly represented them during the hearing of that application. On 30 June 2011 that application was dismissed by Hattingh AJ.

[8] In the court below, in addition to the orders described in para 2, the appellants had also sought, to the extent necessary, a rescission of the order made by Hattingh AJ.

[9] In opposing the application in the court below, the Minister and the DG adopted the attitude that no justifiable basis had been provided for the setting aside of the order made by Hattingh AJ and contended that the appellants were now attempting 'a second bite of the cherry'. The Minister and the DG took the view that the court below, by virtue of Hattingh AJ's consideration of the merits of the prior application, was *functus officio*. The Minister and the DG submitted that since the application was based on the same but amplified grounds the proper course for the appellants to have followed was to lodge an appeal against the judgment of Hattingh AJ.

[10] Furthermore, the Minister and the DG challenged the *locus standi* of the second to nineteenth appellants on the basis that an application for asylum is individual in nature and that each applicant had to set out facts in relation to his or her asylum claim, which in the present case, so it was contended, was not done by the second to nineteenth appellants. The Minister and the DG pointed out that none of them had set out facts relating specifically to them, relying merely on the general allegations of political persecution in their country of origin made by the first appellant.

[11] The Minister and the DG justified the arrest of the appellants on the basis of the provisions of s 9(4) of the Immigration Act 13 of 2002 (the IA)

read with s 1 thereof. Section 9(4) provides that:

'A foreigner who is not the holder of a permanent residence permit may only enter the Republic as contemplated in this section if (a) his or her passport is valid for not less than 30 days after the expiry of the intended stay; and (b) issued with a valid temporary residence permit, as set out in this Act.'

[12] I interpose to state that the validity of the arrest was unchallenged by the appellants. It is what transpired thereafter that was in issue.

[13] The Minister and the DG admitted that the appellants had been transferred to Lindela, pending deportation. The Minister and the DG were adamant that the appellants had been notified of the decision to deport them. In their opposing affidavit they asserted that the appellants' right to appeal the decision had been explained and incorporated in a 'notification of deportation'. The Minister and the DG produced such a document which they alleged contained the signatures of the appellants. According to the Minister and the DG an interpreter had been employed to ensure proper communication with the appellants. The Minister and the DG pointed out that at no stage during the period before the appellants saw their attorneys did they indicate an intention to apply for asylum.

[14] It is common cause that subsequent to the appellants' detention at Lindela the Department of Home Affairs requested the Ethiopian Embassy to issue emergency travel certificates to the appellants to facilitate their deportation. The Embassy refused to do so, on the basis that the appellants were unwilling to return.

[15] According to the deponent to the affidavit in support of the Minister and the DG's case, Mr Joseph Swartland, who is an Assistant Director in the Department stationed at the Lindela holding facility, he personally had advised the appellants on 8 July 2011 that there was a need for him to apply for an extension of their detention on the basis of their Embassy's refusal to co-operate. Mr Swartland alleged that most of the appellants remained silent whilst some had insisted on seeing a member of their Embassy. It appears

that such a meeting was not facilitated by officials of the Department.

[16] On 14 July 2011, the Department applied for the extension of the appellants' detention. On 19 July 2011 the Magistrates' Court granted an order extending the detention of the appellants for 90 days.

[17] On the merits of the appellants' claim for asylum the Minister and the DG denied that the appellants qualified as asylum seekers. They denied that the appellants had made applications for asylum and contended that a person may only be recognised as a refugee after a proper application in terms of the provisions of the RA.

[18] The Minister and the DG contended that the appellants' failure to provide details concerning the nature of their political persecution in Ethiopia should be held against them. Significantly, Mr Swartland, in the answering affidavit, stated that he did not know how, why and when the appellants had left Ethiopia. He also questioned the appellants' failure to seek protection in any of the countries through which they travelled en route to South Africa.

[19] The following extract from Mr Swartland's affidavit is significant:

'62.3 I am advised that whether or not the Applicants qualify to apply for asylum is a decision or an administrative act which should be exercised by the Respondents. I am advised that a court may interfere with administrative actions only if they are not exercised reasonably or they are not exercised at all. This practice is consistent with our constitutional jurisprudence.

62/4 The Applicants seek an order which will amount to the Court resuming the functions of the Executive. More over, there is no suggestion that the Applicants approached or intimidated an intention to apply for asylum prior to their application being dismissed in Court.'

[20] Mr Swartland postulated that there was no legal obligation on the part of the Department's officials at Lindela to transport any person detained, pending deportation, to a refugee reception office, to enable an application for asylum to be made, if that person had failed to do so himself or herself. Mr Swartland contended that the appellants were required to exhaust the

internal remedies provided for in s 8 of the IA,[3] before an approach to court and that only exceptional circumstances justified prior judicial review.

[21] In the replying affidavit the appellants reiterated and emphasised that the court was not being asked to adjudicate the merits of their claim for asylum. It was being asked to order that they be provided an opportunity to apply for refugee status. They also denied having met Mr Swartland. They pointed out that Regulation 28(4)(a) of the regulations promulgated under the IA,[4] requires an immigration officer to serve a notification of intention to extend the period of detention on the person concerned personally in a form substantially corresponding to that which is prescribed.[5] No such notice had in fact been served on the appellants. They all denied having been afforded an opportunity to make representations against their continued detention.

[22] Faced with all the allegations referred to in the preceding paragraphs, the court below followed a disturbingly peculiar procedure before deciding the matter. The court below considered it imperative to determine at the outset whether the application before Hattingh AJ had been authorised by the appellant. That in itself is not objectionable. It is the manner in which that exercise was embarked on that is a cause for concern and it is dealt with in the paragraphs that follow.

[23] The court below summoned the attorney and advocate who had purportedly represented the appellants in the prior proceedings before Hattingh AJ to court. The record of proceedings in the court below indicates that the judge enquired of the attorney whether he had acted on the authority of the appellants. The attorney's response was that he had never heard of the matter before. He denied any knowledge of the prior application. According to the attorney he knew the advocate who was on record as the appellants' representative before Hattingh AJ as he had briefed him in two matters on other occasions. The attorney stated that he had not briefed anyone on the

3 Sections 8(1) and 8(4) of the IA provide for internal review and appeal procedures in respect of decisions made in terms of the IA.
4 Reg R 616, *GG* 27725, 27 June 2005.
5 The relevant sub-regulation was couched in peremptory terms.

appellants' behalf in the matter and said that he did not even know them, to which the judge responded as follows:

'So, I am going to stop [the advocate] from doing this, he is pretending that he is getting instructions from you. Who else could have given him instructions from your office?'

[24] In response to the last question in the preceding paragraph the attorney said there was no one else in his office that could have done so. A little later the attorney stated that the signature on the court documents before Hattingh AJ was not his. The attorney went on to state that he had not been practicing in the preceding months. This meant that he could not possibly have been involved in the application before Hattingh AJ.

[25] Even though the attorney had not been sworn in as a witness, the court below afforded the Minister's representative as well as counsel for the appellants an opportunity to question him. In this regard the court said the following:

'I mean, I do not want to make a finding in implicating your company's name without giving you an opportunity to be heard and I am not taking evidence under oath, I just want to give you an opportunity to be right. Yes.'

[26] After the attorney had been questioned the advocate who purportedly had represented the appellants before Hattingh AJ was called. He was also questioned by the court below without having been sworn in and before he said anything the judge said the following:

'[I] made certain statements concerning you, before I had the opportunity to read the papers and I also relied on what was told to me from the bar, to the extent of your absence I might have offended your – for integrity I want to in open court apologise. I have now had the opportunity to read the papers and I see that you are the author of the letter to the Lawyers for Human Rights, when you say, please help these people.'

[27] Almost immediately thereafter the judge stated:

'And I also see that there is an averment in the papers that you phoned the deponent to the affidavit on behalf of the respondents when you were at the police station. I infer from that that when you were at the police station, you were there to consult with the people who were detained. So it cannot be suggested that you had no authority, whether you were properly mandated in terms of the Law Society Rules or the Bar Rules, I am not concerned about that.

I am concerned about the fraud on the court. So to that extent, I want to say to you that I want to apologise to you. I certainly will not make any adverse findings about you regarding whether you had authority to act for them or not by virtue of those two independent facts. But having said that, I must say to you the allegations are made that you had no authority. The attorney who says he instructed you came to court and says he did not instruct you. That is the position. Is there anything you want to say to the court?'

As can be seen from what appears early in the aforesaid passage it is the judge's view on whether or not the prior application had been authorised that is recorded rather than the view of the 'witness'.

[28] The advocate went on to state that he had seen the appellants at the police station, to which the court responded:

'So I do not understand how the Lawyers for Human Rights can come to me and say to me that you had no authority to act for them. This is clearly a second bite to the cherry.'

[29] When the advocate concerned stated that if the appellants were to be asked, he was certain that one of them would be able to identify him, the court below said the following:

'Well if I had known of that fact I would not have called for oral evidence.'

[30] When counsel for the appellants sought to intervene, the judge stated:

'I will allow this, please do not interrupt. This is an officer of the court. I am not prepared to take [the applicants'] word against an officer of the court.'

[31] The court below then repeatedly stated that if the appellants had a complaint against the advocate and attorney they should pursue it through another forum. He went on to state that the Law Society and the Bar Council could be approached in this regard.

[32] Questioned by counsel for the appellants, the advocate concerned said the following:

'You see, when I received the file, I was at the stage when entering the court, because the day, the previous evening when [the attorney] related the matter to me, he instructed me, he said to me, in the morning – because I had matters in Kempton Park, I had a matter in Kempton Park, so I said, I will just go quickly argue this matter for you, you know an urgent application, because I have been giving urgent applications. So I just did that. But now, when

he gave me the file, I just took the file and went through the affidavit to confirm what I know and then that was all I argued. I never noticed any difference in the signature of affidavits, I never did that. The only thing after I got the . . .[indistinct] from the Lawyers for Human Rights, I realised that, even the commissioning was done in Johannesburg with the guys out there, that is why I had a problem and then I immediately reported the matter to the Law Society. That was where I realised that – even my colleague phoned for the respondents here did not notice that, you see.'

These statements are far from clear and totally unhelpful.

[33] As noted above these were motion proceedings. That notwithstanding, after the judge had questioned the advocate, he invited any of the parties to call such witnesses as they thought fit. It did not appear that he was at that stage restricting such contemplated evidence solely to the question whether the proceedings before Hattingh JA had been properly authorised.

[34] Counsel for the appellants was willing to lead evidence on 'some of the concerns the court had about the veracity of their account of how they had entered South Africa, but submitted that it was irrelevant to the issues that fell to be decided.

[35] After an exchange between the court and counsel for the appellants, the first appellant was sworn in and proceeded to testify. He had hardly begun testifying about how he had crossed the border and travelled to Johannesburg during the night when the judge interrupted and asked how he came to know about the existence of Johannesburg. His response was that everybody knew about Johannesburg. He went on to explain that he had asked passers-by for directions to Johannesburg, when the court interrupted once again, and incredibly, said the following:

'No man you cannot just, I am not a child. Tell him I am not a child. I do not want to believe him if he is telling me he walked at night from the border to Johannesburg by asking people, show me the direction of Johannesburg. This is not fairytales please, tell him this is not fairytales, he must speak honest with me. If he wants me to help him, he must be honest with me. I will look for a way to help him, but I cannot help a person who wants refugee in this country, who is not prepared to be frank and honest with the authorities and certainly if he is not frank with the court, I am not going to help him.'

[36] After the first appellant testified that it had taken him one week to walk from the border to Johannesburg the judge directed the following at counsel for the appellants:

'The version has got to be probable Ms de Vos, the versions has got to be probable. I mean if I end up at the Heathrow Airport and I tell an English officer that I came by way of sea and I landed on the shores of the UK and I walked to London, they will not believe me. There is no difference ─ the standard should be [no] different in South Africa.'

[37] The first appellant was subjected to fairly extensive cross-examination by counsel for the Minister and the DG, without any significant negative effect. During the cross-examination the judge interrupted numerous times. The following four passages are some examples of the nature and tenor of the judicial intervention:

'I can ensure you, I looked very hard to try and assist people here, if they came here and they say listen never mind what happened, I want to come clean now, this is how I came here, somebody promised me this, this, this, this and if they come clean, I would not have that problem to look hard in the law and find the basis to assist them, whether I can ultimately or not, is another matter. But at least I will then dig deep into the jurisprudence.

. . .

Anyway it does not matter what Lawyers for Human Rights says, I am committed to this country, I do not want this country to be ungovernable, I like people from all over the world to come here, but they must work within the structures. If my client comes to me and says to me, look, this is a problem I find myself, then I tell my client, there is right ways of doing it and there is wrong ways of doing it. They found a Judge, they are not going to be unsympathetic to you, because you come from Africa, you want to better your life, let us see how we can do it, but I am not going to go on the version. If you take on review, the Constitutional Court can say what they want about me, but I am not going to take a version. That is for baby class stuff. You cannot seriously [contend] that in a court of law that I must accept that they came in the middle of the night and walked from the border to Johannesburg. Try to give that explanation in any Western country, you will be put on a flight that same afternoon and deport you, well what is different from us? Why do we being deeming ourselves, why are our standards any lower, because we are in Africa? It cannot be right Ms Manaka [counsel for the Ministers and the DG].

. . .

But now your version, I never came to seek asylum, I wanted to be illegally in this country, that is what he is saying to me and to say that he does not know English, when he knows the English alphabet, I am not prepared to accept that. There is truthfulness and there is falseness, a legal system that cannot pursue the true facts, can never survive.

. . .
You must first get the proper facts and then you decide under the law whether you can assist a person or not. I mean, we are obviously sympathetic to their plight, I would rather help them than wealthy gangsters that come from Eastern Europe and some of them become leading members of our society. I would rather help people who applied, but they must come here and they must be properly advised to come and talk the truth.'

[38] During the first appellant's cross-examination the judge, through the interpreter, put it to Mr Bula that in his view somebody had transported the appellants from the border to Johannesburg. When that was denied, the judge responded as follows:

'That sounds more probable to me, it sounds more real and if somebody transported him, on the fact that they transported him from the border to Johannesburg does not make it illegal, somebody who transports you, does not make it illegal.'

[39] Counsel representing the Minister and the DG then sought the leave of the court to put it to the first appellant that he had been assisted by a syndicate involved in human trafficking. The court below responded as follows:

'I will allow it Ma'am, because that is the only way they could have come into this country and I will allow that and we must get to the bottom of this, we must stop syndicates and we must allow people to come in lawfully and apply for refugee. It is a deserving case then he must apply.'

[40] At this stage counsel representing the appellants objected on the grounds that no such basis had been laid in the affidavits filed on behalf of the Minster and the DG. The judge reacted in the following manner:

'You see, it is human trafficking, you see Mayfair is known where there is a lot of foreign African communities and one must look at probabilities and one must deal with these things here, because otherwise . . . [intervenes].'

The first appellant denied that he had been transported to Johannesburg by a syndicate or by anyone else.

[41] What is set out in the preceding paragraphs on the manner in which proceedings were conducted will be commented on later in this judgment. In the paragraphs that follow I set out the conclusions arrived at by the court

below.

[42] In its judgment the court below considered whether there was any basis on which the order of Hattingh AJ dismissing the prior application could be set aside. He stated that it was not necessary to decide the propriety of the conduct of the attorney and advocate concerned as that was a matter for their regulatory bodies. He went on to state that he could not determine the dispute on this issue on the material before him, but then, rather strangely, went on to record that that was not the end of the debate. He thought it necessary to consider whether 'others' may have instructed the attorney or the advocate concerned and proceeded to determine that dispute.

[43] The court below, in deciding whether the application before Hattingh AJ had been properly authorised by the appellants, thought it important that the founding affidavit in that application had been signed before a Commissioner of Oaths and that the first appellant had been referred to by his proper name. The court below considered the arrest of the appellants, the warrants of detention in relation to them and the notifications of deportation issued to each. It weighed those facts against what it regarded to be the appellants' improbable version of events. It reached the following conclusion:

'On the probabilities, these applicants were part of a syndicate bringing foreigners unlawfully into this country. This is illegal and cannot be countenanced. This explains the recruitment of lawyers to make the first application.'

[44] Immediately after the quoted passage the court below stated that it was not prepared to find that the advocate involved before Hattingh AJ had no authority. In para 34 of its judgment the court below said the following:

'I think the new sets of lawyers are unduly critical of the conduct of [the advocate]. He put a case on short notice as best as he could to assist the applicants. They have a bad case and this is not the fault of counsel. What other motive would [the advocate] have had? Those sympathetic to the plight of the applicants or more probably those who arranged their entry into the country recruited lawyers to assist the applicants.'

[45] The court below went on to hold that the first application had been properly authorised and that a case had not been made for setting aside the

order made by Hattingh AJ. It did, however, take into account that the case involved the liberty of individuals and was willing to consider the application 'afresh'.

[46] In deciding the merits of the application the court below accepted a submission by counsel representing the appellants, namely, that an applicant for asylum was not restricted to applying for asylum only at border posts. It nonetheless concluded that if, on the probabilities, the appellants were found to be party to a scheme to illegally import them into the country, they should not be afforded an opportunity to apply for asylum because such application could not be said to be bona fide.

[47] In the view of the court below the appellants had never really sought to apply for asylum. It held that their alleged intention to apply for asylum was an afterthought, designed to defeat the decision to deport them. The view of the court below concerning the entry of foreigners into the country, as was evident from the interventions referred to above, is repeated in para 62 of his judgment:

'I cannot accept that 19 applicants, without any connecting factor in this country, can be set free to roam the streets of our country as would be the effect of this court releasing the applicants. That will be tantamount to irresponsible and reckless conduct on the part of the authorities and this court. Assuming one or more of them were then to commit a crime, the victim will then seek to hold the State liable for releasing a detainee without any connecting factor and who subsequently engages in wrongful conduct. No organisation or body of responsible people such as for instance the Ethiopian community now settled in Johannesburg were prepared to accept any responsibility for the conduct of these individuals upon their release. I make this observation because when I considered Part B of the application, there was in attendance two representatives of the Ethiopian community who showed some interest in the matter.'

[48] In evaluating the evidence by the first appellant, the judge held that the appellants' version of how they travelled to South Africa was far-fetched. In its judgment, the court below repeated its scepticism of the description by the appellants of how they travelled from Ethiopia to South Africa. He held that their version was 'selective, unhelpful and not frank'.

[49] The court below noted the submission on behalf of the appellants that they had not been notified in writing, in accordance with the peremptory provisions of Regulation 28(4)(a) of the regulations promulgated under the IA, that the immigration officer concerned intended to apply to court for an extension of their detention. The court below recorded that the Minister and the DG accepted that there had been no such written notification. It did, however, take into account in favour of the Minister and the DG, Swartland's assertions, in the opposing affidavit, that he had advised the appellants verbally that there would be a need to apply for the extension of their detention on the basis that the Embassy had refused to identify them and issue emergency travel documents to facilitate their deportation. According to Mr Swartland they had also been specifically asked whether they had representations to make to the court and some of them had said that they wished to see members of their Embassy.

[50] In the view of the court below there had been substantial compliance with the regulation requiring written notification. The court below went on to state the following:

'Thirdly, by elevating the requirement of regulation 28(4)(a) as inflexible would be tantamount to rendering the provisions of the Immigration Act requiring a foreigner to have permission to be in this country nugatory. The law should not be interpreted in a manner to give legitimacy to illegality. Fourthly, in weighing up the public interests as compared to the interests of the applicants, I take the view that form should not outweigh substance. The public interests warrant safeguards whereby individuals who are illegally in this country should not be permitted to be released without any safeguards. On the other hand of the spectrum, the applicants cannot have an expectation of converting their illegal entry and illegal abode in this country to being freed on a technicality which does not serve to fortify any fundamental or elementary right.'

[51] Misunderstanding where the onus resides in respect of justifying the appellants' continued detention[6] the court below stated that the appellants had no defence against their continued detention. It was adamant that it could not give a construction to the applicable legislation that would legitimise illegal

6 *Zealand v Minister of Justice and Constitutional Development* 2008 (4) SA 458 (CC) para 25. See also *Arse v Minister of Home Affairs* 2010 (7) BCLR 640 (SCA) para 5.

foreigners being permitted to be in this country. In the concluding part of its reasoning the court below said the following:

'Such a construction would be detrimental and destructive of the law which requires a foreigner to have legal status to be in this country.'

[52] I have set out the manner in which the court below conducted proceedings in some detail because it is a matter of grave concern when fundamental rules of litigation are so flagrantly flouted. The court below misconceived its function and misidentified the issues that called for decision.

[53] First, there had been no request for a referral to oral evidence. It is generally undesirable that a court *mero motu* orders a referral to oral evidence.[7] Having resorted to that which is undesirable, and without directions as to issues or procedure,[8] further peculiar procedures followed. The first two witnesses were not sworn in. In respect of the advocate alleged to have been involved in the application before Hattingh AJ, the judge in the court below said very early on, before hearing any of the appellants that he would take the advocate's word above the word of the appellants on whether or not the former had been properly authorised. This is judicial conduct that is fundamentally unacceptable. Procedural rules and the rules of evidence exist for a reason. It is to ensure that justice is done between litigants. Witnesses too should, in accordance with constitutional values, be treated fairly and with dignity.

[54] Right at the beginning of the first appellant's evidence-in-chief, the judge started making factual findings, indulged in pontification and was patronising. A judge is required to wait until all the relevant evidence has been adduced and after hearing submissions from legal representatives before making an assessment and reaching conclusions. The repeated interventions set out in some detail earlier in this judgment are also judicially unacceptable. Judges are impartial adjudicators. They do not enter the fray in the manner set out above.

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7 Farlam Fichardt Van Loggerenberg *Erasmus Superior Court Practice* B1-48B and the authorities therein cited.

8 Farlam *et al op cit* at B1-51.

[55] Statements by the court below concerning foreigners were far from tempered. They caused the court to be blinkered to the issues that called for decision. The statements have the potential for creating and heightening tensions between nationals and foreigners. If they are not prudent extra-judicially they must be all the more unacceptable in court.

[56] Furthermore, the conclusions of the court below concerning a syndicate involving human trafficking have no basis in any of the evidence, written or oral. It was wrong to allow cross-examination on an issue not raised in the opposing affidavits. The cross-examination and the conclusions of the court below were based on pure supposition. Judicial officers should guard against preconceived views. It is the very antithesis of the supremacy of the rule of law which is a founding constitutional value.

[57] The respondents correctly did not seek to support the findings of the court below in relation to the question whether the proceedings before Hattingh AJ were properly authorised. Given the nature of the 'evidence' by the attorney and the advocate concerned and the conduct of the judge in this regard and that the liberty of the appellants was at stake, the attitude of counsel for the respondents in this court is commendable. Counsel representing the Minister and the DG, quite correctly, right at the outset distanced themselves from the manner in which proceedings were conducted in the court below.

[58] I now intend to deal with the approach that ought to have been followed in the court below. At the outset it is necessary to understand the purposes served by the RA and to appreciate the manner in which it is structured. The preamble correctly states that the Act is designed to give effect within the Republic of South Africa to the relevant international instruments, principles and standards relating to refugees and to provide for the reception into South Africa of asylum seekers. The Act quite clearly regulates applications for and recognition of refugee status and provides for the rights and obligations flowing from that status.

[59] Most importantly, the provisions of s 2 of the RA read as follows:

'Notwithstanding any provisions 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.'

[60] Section 3 of the Act states that subject to Chapter 3, which provides procedures for applicants for asylum to follow, a person qualifies for refugee status, if that person—

'*(a)* owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or

(b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of this or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere; or

(c) is a dependant of a person contemplated in paragraph *(a)* or *(b)*.

[61] In *Abdi v Minister of Home Affairs* 2011 (3) SA 37 (SCA) para 22, this court noted that the provisions of the Act referred to in the preceding paragraph mirror those of the 1951 United Nations Convention on the Status of Refugees and the 1969 Organisation of African Unity Convention. In para 22 of *Abdi* this court went on to say that these provisions 'patently prohibit the prevention of access to the Republic of any person who has been forced to flee the country of his or her birth because of any of the circumstances identified in s 2 of the Act'.

[62] Section 8 of the RA empowers the DG to establish as many Refugee Reception Offices as necessary for the purposes of the RA. It is common

cause that such an office exists at the Mozambique/South Africa border but not at Lindela.

[63] Section 9 of the RA provides for a Standing Committee for Refugee Affairs (the SCRA), which has the power, inter alia, to formulate and implement procedures for the granting of asylum.

[64] Section 21 of the RA is of importance in the present case. Section 21(1) provides:

'An application for asylum must be made in person in accordance with the prescribed procedures to a Refugee Reception Officer at any Refugee Reception Office.'

[65] In terms of s 21(2) a Refugee Reception Officer (RRO) is obliged to accept an application for asylum and, if required, must assist an applicant to complete the necessary application forms. An RRO is required to submit any application received together with relevant information to a Refugee Status Determination Officer (RSDO) to be dealt with in terms of s 24, the relevant provisions of which will be set out and discussed in later paragraphs.

[66] In terms of s 22(1) of the RA, an RRO 'must, pending the outcome of an application in terms of section 21(1), issue to the applicant an asylum seeker permit in the prescribed form allowing the applicant to sojourn in the Republic temporarily, subject to any conditions, determined by the Standing Committee, which are not in conflict with the Constitution or international law and are endorsed by the Refugee Reception Officer on the permit'.

[67] Section 22(6) enables the Department of Home Affairs to withdraw an asylum seeker permit under certain conditions. Section 26 gives the power to an RSDO to determine whether the applicant for asylum is entitled thereto. Section 24(3) provides as follows:

'The Refugee Status Determination Officer must at the conclusion of the hearing ─

(a) grant asylum; or

(b) reject the application as manifestly unfounded, abusive or fraudulent; or

(c) reject the application as unfounded; or

(d) refer any question of law to the Standing Committee.'

[68] Significantly, in terms of s 25(1) of the RA, the Standing Committee is obliged to review any decision taken by an RSDO in terms of s 24(3)(b). This provision was clearly intended to ensure that deserving applicants are not wrongfully turned away. This in turn ensures that South Africa meets its international obligations.

[69] Section 27 sets out the protections and rights that are conferred by refugee status. Section 38 empowers the Minister to make regulations, inter alia, for any matter necessary or expedient in order that the objects of the Act may be achieved.

[70] An important regulation in this regard is Regulation 2 of the regulations under the RA which provides:

'2(1) An application for asylum in terms of section 21 of the Act:

(a) must be lodged by the applicant in person at a designated Refugee Reception Office without delay;

(b) must be in the form and contain substantially the information prescribed in Annexure 1 to these Regulations; and

(c) must be completed in duplicate.

(2) Any person who entered the Republic and is encountered in violation of the Aliens Control Act, who has not submitted an application pursuant to subregulation 2(1), but indicates an intention to apply for asylum shall be issued with an appropriate permit valid for 14 days within which they must approach a Refugee Reception Office to complete an asylum application.'

[71] In para 24 of *Abdi* this court noted that the provisions of the Act are in accordance with international law and practice as evidenced by decisions of the European Court of Human Rights.

[72] Regulation 2(2) ought to have been the starting point as the appellants clearly fell within its ambit. They had not lodged an application within the terms set out in Regulation 2(1)(a). The word 'encountered' in Regulation 2(2) must be given its ordinary meaning which is to meet or come across

unexpectedly.[9] The regulation does not require an individual to indicate an intention to apply for asylum immediately he or she is encountered, nor should it be interpreted as meaning that when the person does not do so there and then he or she is precluded from doing so thereafter. The purpose of subsection 2 is clearly to ensure that where a foreign national indicates an intention to apply for asylum, the regulatory framework of the RA kicks in, ultimately to ensure that genuine asylum seekers are not turned away. It is clear that the appellants, when they were detained at Lindela, communicated to the Department's officials and enforcement officers by the letter referred to earlier in this judgment that they intended to apply for asylum. Once the appellants, through their attorneys, indicated an intention to apply for asylum they became entitled to be treated in terms of Regulation 2(2) and to be issued with an appropriate permit valid for 14 days, within which they were obliged to approach a Refugee Reception Office to complete an asylum application. The contrary view expressed in *Shabangu v Minister of Home Affairs* (49231/10) [2010] ZAGPJHC 146 (10 December 2010) is incorrect. The order in that case had the effect of placing the persons released into an unregulated position, which could never have been the intention of the RA.

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

[74] In terms of s 22 of the RA an asylum seeker has the protection of the law pending the determination of his application for asylum. To that end he or she is entitled to an asylum seeker permit entitling a sojourn in South Africa. As can be seen from the provisions of s 24(3) set out in para 67 above it is for the RSDO and the RSDO alone to grant or reject an application for asylum. In

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9 In the *Concise Oxford English Dictionary* 10 ed (2002) the verb 'encounter' is defined as follows:
'unexpectedly meet or be faced with.'

terms of s 24(3)(c) the application could be rejected on the basis of being 'unfounded'.

[75] Before us the Minister and the DG relied on the following sentences in para 22 of the judgment of this court in *Abdi*:

'Refugees entitled to be recognised as such may more often than not arrive at a port of entry without the necessary documentation and be placed in an inadmissible facility. Such persons have a right to apply for refugee status, and it is unlawful to refuse them entry *if they are bona fide in seeking refuge*.' (My emphasis.)

It was contended on behalf of the Minister and the DG that particularly the last sentence meant that the question whether an application for asylum was *bona fide* should be addressed at the outset and can be interrogated by a court as was done by the court below. In this regard it was submitted that the court below was correct in its scepticism of the description by the appellants of their journey to Johannesburg. They contended that it should be held against the appellants that they had not used the first available opportunity to indicate their intention to apply for asylum and that there was thus a basis for concluding as the court below did that the application for asylum was an afterthought calculated to thwart deportation. On the aforesaid grounds they contend that it could rightly be said upfront that the application for asylum was not *bona fide* and that consequently the appellants were not entitled to the relief sought in the court below.

[76] I disagree with the suggested approach. After the passage in *Abdi* relied upon by the Minister and the DG the very next sentence reads as follows:

'The Department's officials have a duty to ensure that intending applicants for refugee status are given every reasonable opportunity to file an application with the relevant refugee reception office ─ unless the intending applicant is excluded in terms of s 4 of the Act.'

It was agreed by the parties that s 4 of the Act has no application to the present circumstances.

[77] As is abundantly clear the scheme of the Act is that it is for the RSDO to determine the merits of an application for asylum and not for a prior interrogation by a court. In the passage in *Abdi*, relied on by the Minister and

the DG, this court was stating the obvious. It does not follow that in the passage referred to this court intended to convey what is presently submitted on behalf of the Minister. On the contrary, the concluding sentence in para 22 of *Abdi* makes it clear that the Department's officials are obliged to ensure that once there is an indication of an intention to apply for asylum they assist the person concerned to lodge such an application at a Refugee Reception Office.

[78] Regulation 2(2) of the Refugee Regulations set out in para 70 above makes it even more clear that, once there is an indication by an individual that he or she intends to apply for asylum, that individual is entitled to be issued with an appropriate permit valid for 14 days within which there must be an approach to a Refugee Reception Office to complete an application for asylum. Read with s 22 of the RA it is clear that once such an intention is asserted the individual is entitled to be freed subject to the further provisions of the RA.

[79] The principle of legality, an incident of the rule of law, dictates that officialdom in all its guises must act in accordance with legal prescripts. In

Fedsure Life Assurance Ltd & others v Greater Johannesburg Transitional Metropolitan Council & others 1999 (1) SA 374 (CC) para 58 the Constitutional Court put it thus:

'It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution. Whether the principle of the rule of law has greater content than the principle of legality is not necessary for us to decide here. We need merely hold that fundamental to the interim Constitution is a principle of legality.'

In the present case that principle was breached in more ways than one.

[80] It follows ineluctably that once an intention to apply for asylum is evinced the protective provisions of the Act and the associated regulations come into play and the asylum seeker is entitled as of right to be set free

subject to the provisions of the Act.

[81] This court has a keen appreciation of the problems that must inevitably be visited on the Department in keeping track of numerous persons in the position of the appellants. As pointed out above, the RA is in keeping with international conventions and international best practice in relation to refugees. Section 21(2) obliges applicants for asylum to provide fingerprints and photographs to enable them to be monitored. The permit in terms of s 22(1) of the RA enabling a sojourn in South Africa may be issued subject to conditions determined by the Standing Committee, which are not in conflict with the Constitution or international law. It does not appear that such conditions have in fact been determined. Section 38(1)(e) of the RA enables the Minister to make regulations relating to 'the conditions of sojourn in the Republic of an asylum seeker, while his or her application is under consideration'. Such regulations appear not to have been made. It is for another arm of Government to prescribe the conditions under consideration. In this regard see the comments of this court in *Arse v Minister of Home Affairs* 2010 (7) BCLR 640 (SCA) para 23. It is not for the judicial arm to do so. The logistical logjam in the processing of applications for asylum of people detained at Lindela is in part due to the absence of an RSDO at Lindela. It is a problem that is easily resolved but it requires an act of will on the part of the Department.

[82] Although not strictly necessary to consider and decide in the present case, I am afraid that the factual conclusions sought to be drawn by counsel on behalf of the Minister and the DG, referred to in para 75 above, are in themselves unsustainable. The appellants explained how they came to be arrested. They described their difficulty in communicating with the authorities. They sought assistance from attorneys. The context is that they were in a foreign country without proper documentation and at the mercy of law enforcement authorities. Be that as it may, as demonstrated above, the legal-technical approach adopted by the court below and counsel for the Minister and the DG before us is fundamentally flawed.

[83] One further aspect calls for brief attention, namely, the conclusion by the court below that there was 'substantial compliance' with the requirement in Regulation 28(4) of the regulations under the IA that the notification of intention to apply for extension of detention be served on the detainee concerned. Once again the principle of legality is implicated. Section 28(4)(a) of the regulations under the IA reads as follows:

'(4) An immigration officer intending to apply for the extension of the detention period in terms of section 34(1)*(d)* of the Act shall–

(a) within 20 days following the arrest of the detainee, serve on that detainee a notification of his or her intention on a form substantially corresponding to Form 31 contained in Annexure A; . . .'

[84] The subregulation is couched in peremptory terms. It involves the liberty of an individual and must be strictly construed. In *Arse*, Malan JA in para 10, dealing with the fundamental rights to liberty, said the following:

'The importance of this right "can never be overstated". Section 12(1)(b) of the Constitution of the Republic of South Africa, 1996 guarantees the right to freedom, including the right not to be detained without trial. This right belongs to both citizens and foreigners. The safeguards and limitations contained in section 34(1) of the Immigration Act justify its limitation of the right to freedom and the right not to be detained without trial. Enactments interfering with elementary rights should be construed restrictively.'

There is no room for the 'substantial compliance' approach of the court below. The extended period of detention as ordered by the Magistrate has, in any event, already passed. On the construction of the applicable legislation set out above the appellants were entitled to the order made.

[85] It is for all the reasons set out above that the order referred to in the first paragraph was made.

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M S NAVSA
JUDGE OF APPEAL

APPEARANCES:

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For 3rd Respondent:	─

Instructed by
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Abides by the decision of the Court