



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

- (1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

SIGNATURE

DATE: 2 September 2026

Case No. 2026-163100

In the matter between:

SOLLY ERED

Applicant

and

MINISTER OF HOME AFFAIRS

First Respondent

DIRECTOR-GENERAL: HOME AFFAIRS

Second Respondent

Summary

The effect of the decision of the Constitutional Court in *Scalabrini Centre of Cape Town v Minister of Home Affairs* [2026] ZACC 30 (7 July 2026) is that putative asylum seekers may no longer be detained once they have indicated their wish to apply for refugee status.

JUDGMENT

WILSON J:

- 1 On 14 July 2026, I ordered the immediate release of the applicant, Mr. Ered, an asylum seeker, from the Lindela Repatriation Centre. My order departed

from the usual approach to matters of this nature (on which see *Shamore v Minister of Home Affairs* [2024] ZAGPJHC 414 (2 May 2024) (“*Shamore*”). This is because, a week before I gave my order, the Constitutional Court’s decision in *Scalabrini Centre of Cape Town v Minister of Home Affairs* [2026] ZACC 30 (7 July 2026) had fundamentally altered the law applicable to the detention of asylum seekers in South Africa. In light of this, it is in the interests of justice that I give my reasons for ordering Mr. Ered’s immediate release. These are my reasons.

The applicant

- 2 Mr. Ered arrived in South Africa in 2021. He fled from Ethiopia, having been subject to what he contends was persecution and threats of death arising from his political beliefs. Mr. Ered says that he tried to apply for asylum but was turned away from the Refugee Reception Offices he attended.
- 3 On 20 March 2026, Mr. Ered was arrested at Windsorton in the Northern Cape. Despite, he says, indicating to his arresting officers that he wanted to apply for asylum, Mr. Ered was prosecuted under section 49 (1) (a) of the Immigration Act 13 of 2002, which states that “[a]nyone who enters or remains in, or departs from the Republic in contravention of this Act, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding two years”. As an undocumented foreigner, Mr. Ered was technically in contravention of this provision, but the reason for this, he says, was that he was never given an opportunity to apply for an asylum seeker permit, despite having made reasonable efforts to present himself to a Refugee Reception Office.

- 4 Mr. Ered was convicted of contravening section 49 (1) (a) and sentenced to three months' imprisonment. Once he had served his sentence, he was detained again under section 34 (1) of the Immigration Act pending deportation. Section 34 (1) of the Act states that "[w]ithout the need for a warrant, an immigration officer may arrest an illegal foreigner or cause him or her to be arrested, and shall, irrespective of whether such foreigner is arrested, deport him or her or cause him or her to be deported and may, pending his or her deportation, detain him or her or cause him or her to be detained in a manner and at a place determined by the Director-General". Mr. Ered was transferred to the Lindela Repatriation Centre.
- 5 On 14 July 2026, Mr. Ered placed an application for release on my urgent roll. He alleged that, as a prospective asylum seeker, he had the right to be released merely upon indicating his intention to apply for asylum. Whether that submission is well-founded requires a short excursus of the way the law applicable to asylum seeker detention has developed. In providing that excursus, I borrow heavily from what is said in paragraphs 7 to 10 of my decision in *Shamore*.

The lawfulness of asylum seeker detention

- 6 Until fairly recently, the rule was that South Africa does not place asylum seekers in detention. If an asylum seeker was arrested for being unlawfully in the country, they had only to indicate that they wished to apply for asylum, having not yet been given an opportunity to do so. At that point they had to be released immediately, and afforded the opportunity to apply for asylum under the Refugees Act 130 of 1998. The theory underlying this rule was that arrest

and detention as an illegal foreigner under the Immigration Act could not survive an asylum seeker's intimation that they wished to apply for asylum, since the entitlement to asylum must be dealt with under the Refugees Act, which does not authorise the detention of those seeking refugee status. This was the nett effect of a series of Supreme Court of Appeal and Constitutional Court decisions culminating in *Ruta v Minister of Home Affairs* 2019 (2) SA 329 (CC) ("*Ruta*"). (See also *Abraham v Minister of Home Affairs* 2023 (5) SA 178 (GJ) ("*Abraham*"), especially paragraphs 36.1 to 36.3).

- 7 It is easy to see why this was the approach. Asylum seekers are not always able to apply for refugee status at the time they enter South Africa. It has to be assumed that any genuine asylum seeker is in fear for their safety, often without official documents from their country of origin, frequently in the process of fleeing persecution without being able to make arrangements for their arrival at their country of final destination, and hardly trusting of official authority of any sort.
- 8 For these reasons, an asylum seeker will often cross the border clandestinely. Once in South Africa, they are confronted with a severely limited number of refugee reception offices (five by my count), and they often face barriers of access to those offices of the nature Mr. Ered says he experienced in this case, and of the nature recorded at paragraph 1 of my decision in *Shamore*. The commitment not to detain those who wish to apply for asylum was a humane recognition of the fact that detention for the purposes of deportation, or in response to the contravention of immigration rules, should only follow

once it has been established that an application for asylum is genuinely without merit.

- 9 On 1 January 2020, however, section 21 (1B) of the Refugees Act came into force. That provision requires that an aspirant asylum seeker present in South Africa without a valid visa “must be interviewed by an immigration officer to ascertain whether valid reasons exist as to why the applicant is not in possession of such visa”. Section 21 (1B) must be read with subsections 4 (1) (h) and (i) of the Refugees Act which provide that a person does not qualify for refugee status if an immigration officer has reason to believe either that they “having entered the Republic, other than through a port of entry designated as such by the Minister in terms of section 9A of the Immigration Act, fails to satisfy a Refugee Status Determination Officer that there are compelling reasons for such entry” or that they have “failed to report to the Refugee Reception Office within five days of entry into the Republic as contemplated in section 21, in the absence of compelling reasons, which may include hospitalisation, institutionalisation or any other compelling reason”. Regulation 8 (3) of the Refugee Regulations provides that an aspirant asylum seeker who does not possess a valid visa must “prior to being permitted to apply for asylum show good cause for his or her illegal entry or stay in the Republic” (my emphasis).

- 10 The nett effect these provisions was that an asylum seeker was prevented from applying for refugee status if they entered South Africa other than at a port of entry, or failed to report to a Refugee Reception Office within five days

of entering the country, unless they could show good cause for having done either of these things.

- 11 The question that naturally arose from these amendments was whether putative asylum seekers who had been locked out of the refugee system under this new statutory framework were subject to detention as illegal foreigners, and whether, if they were, on what terms.
- 12 In *Ashebo v Minister of Home Affairs* 2023 (5) SA 382 (CC) (“*Ashebo*”) at paragraphs 46 to 60, the Constitutional Court answered that question. The court held that, absent a challenge to the constitutional validity of the amendments to the Refugees Act, an asylum seeker found in South Africa without a valid visa can be detained pending a good cause interview, even if they immediately indicate that they wish to apply for asylum. The court also held that the asylum seeker’s detention becomes unlawful if such an interview is not organised within a reasonable time, and if there is no other basis on which their detention can be justified. If a good cause interview is arranged, detention may continue until such time as the asylum seeker has shown good cause for being in South Africa without a valid visa. Once good cause is shown, the asylum seeker must be released, and permitted to apply for asylum.

The decision in *Scalabrini*

- 13 That position endured until 7 July 2026, when the Constitutional Court gave judgment in *Scalabrini*. In that judgment the Constitutional Court, having considered a challenge to the constitutional validity of the Refugees Act amendments, confirmed the order of the High Court in *Scalabrini Centre of*

Cape Town and Another v Minister of Home Affairs [2025] 3 All SA 827 (WCC), which declared constitutionally invalid sections 4 (1) (f), 4 (1) (h), 4 (1) (i) and 21 (1B) of the Refugees Act. The High Court had also struck down Regulation 8 (3), but that order did not require confirmation. The consequence of the decisions of the High Court and the Constitutional Court, which came into effect immediately upon delivery of the Constitutional Court's judgment, was that the "good cause" interview process lost its footing in law. In other words, the failure to show good cause or compelling reasons for illegal entry to or presence in South Africa could no longer operate as a barrier to the asylum application process. The *Scalabrini* decision also superseded paragraphs 46 to 60 of the Constitutional Court's earlier decision in *Ashebo*, since those paragraphs were no more than an interpretation of a statutory regime that no longer existed.

- 14 The nett effect of all of this is that, until the Constitutional Court says otherwise, the principles spelt out in *Ruta*, and in the "quartet" of Supreme Court of Appeal decisions that *Ruta* endorsed (see *Ruta*, paragraph 16), continue to apply. Chief among those principles is that release from detention under the Immigration Act must follow immediately upon the detainee evincing an intention to apply for asylum, and asylum seeker detention is unlawful once an intention to apply for asylum has been expressed. In other words, the law has returned to the state it was in immediately before the provisions the Constitutional Court struck down in *Scalabrini* came into effect.
- 15 It followed from all of this that, at the time his application came before me, there was nothing to do but to release Mr. Ered immediately, since he had

intimated his intention to apply to asylum and was entitled to liberation on that basis.

The decision in *Mnamo*

- 16 While finalising this judgment, I had the benefit of the decision of this court in *Mnamo v Minister of Home Affairs* [2026] ZAGPJHC 948 (25 August 2026). In that matter, the court dealt with twenty applications for release from the Lindela Repatriation Centre brought by putative asylum seekers. The court declined to order their release, despite apparently recognising (a) that the applicants had all indicated that they wished to apply for asylum and had in fact attempted to take steps to do so (*Mnamo*, paragraph 2) and (b) that the “good cause” regime ushered in by the amendments to the Refugees Act struck down in *Scalabrini* could no longer be applied (*Mnamo*, paragraph 1).
- 17 In reaching this conclusion, the court relied upon paragraphs 59 and 60 of the decision in *Ashebo*. Those dicta, the court appears to have held, entitled it to refuse to release the applicants and to direct the Minister for Home Affairs “to transport the relevant immigration and refugee officials to Lindela Repatriation Cent[re] to conduct the necessary processes; [and] if unable to do so, [to] transport the applicants to the nearest Refugee Reception Office for processing” (*Mnamo*, paragraph 39.3). It is not clear to me whether the direction to convey the applicants to a Refugee Reception Office implies the applicants’ ultimate release, but the tenor of the *Mnamo* judgment appears to be that the applicants must remain in detention, albeit safe from deportation, at least until their asylum seeker permits have been issued.

- 18 I cannot support this approach. It is, in my view, without legal foundation. The reliance on *Ashebo* is misconceived, since *Ashebo* dealt only with detention pending a good cause interview, which, for the reasons I have given, is no longer part of the refugee application process. The *Mnamo* judgment's failure to apply the decision in *Ruta* is, in my respectful view, erroneous. On the facts set out in the *Mnamo* judgment, the applicants should have been released.
- 19 It appears that the decision in *Mnamo* was animated to some degree by what the court believed to be "the views of organizations such as Dudula and March and March" which the court identified with "the views of the impoverished and downtrodden members of the society" (*Mnamo*, paragraph 37). I do not think that the two can be treated as identical. I have my doubts about whether xenophobic organisations have much support among the poor and the vulnerable, most of whom may well strive to avoid the egregious mistake of blaming the poverty they endure on the presence of foreign nationals in South Africa.
- 20 That aside, the more fundamental point is that the duty of a court is not to channel the views it attributes to a judicially constructed vision of a virtuous majority, but to apply the law as it stands. As the Constitutional Court has said, public opinion may possibly be relevant to the interpretation of the Constitution, but it forms no part of the judicial function to make decisions based directly upon what the dominant views of the general public are thought to be (see *S v Makwanyane* 1995 (2) SACR 1 (CC) paragraphs 87 to 89). In other words, courts are duty bound to enforce the rights and freedoms set out

in the Constitution and the law, no matter what a particular court, or anyone else, might think of them.

21 It was for these reasons that I ordered Mr. Ered's immediate release.



S D J WILSON
Judge of the High Court

This judgment was prepared by Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 2 September 2026.

HEARD ON: 14 July 2026

DECIDED ON: 14 July 2026

REASONS: 2 September 2026

For the Applicant: PMT Madubanya
Instructed by Mohlala PP Attorneys Inc

For the Respondents: No appearance