IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, PORT ELIZABETH

CASE NOS: 2774 / 2015
410 / 2018
578 / 2018
Dates heard: 8, 10 & 11 May 2018
Date delivered: 22 May 2018

In the matter between

TAGESE HILAFO TEKALIGN	Applicant
And	
MINISTER OF HOME AFFAIRS	First Respondent
REFUGEE APPEAL BOARD	Second Respondent
CHAIRPERSON: REFUGEE APPEAL BOARD	Third Respondent
REFUGEE STATUS DETERMINATION OFFICER	Fourth Respondent

AND 2 SIMILAR CASES

JUDGMENT

GOOSEN, J.

[1] In recent years a large number of applications have been launched in this Division by refugees challenging the refusal of their applications for refugee status. There was a period when numerous such applications would be enrolled for hearing in motion court every week. More recently we have witnessed an increase in the number of matters being enrolled for hearing. Some of these are enrolled as 'uncontested opposed' matters i.e. matters in which the respondents have filed a notice of opposition but have not taken any steps to file answering affidavits. The majority however are enrolled on the unopposed roll. A feature of these cases is that they invariably are cases which were initiated three or four years ago. The administrative decisions which are sought to be challenged, more often than not, were taken in the period between 2011 and 2014.

[2] The progress of these matters on the roll is anything but smooth. Orders as sought in the notices of motion are seldom granted without prior postponements sought by the applicants in order to enable the application papers to be supplemented. The case files indicate that the applications are regularly removed from the roll shortly before or on the day of the hearing only to reappear on the roll thereafter, presumably after the papers have been supplemented in some form. The lengthy delays associated with the applications; the absence of explanation; the poor quality of the papers and the slavish use of standard text affidavits has caused several judges to express their disquiet at this pattern of litigation. The impression has been that the litigation is driven by the pursuit of costs orders rather than the vindication of the rights of vulnerable refugees who have been poorly treated by the Department of Home Affairs.

[3] On 8 May 2018, I presided in motion court. There were several matters before me in which relief, in one form or another, was sought against the first respondent and the Department. When preparing the roll I discovered that in the three matters which form the subject of this judgment (to be referred to herein as the Tekalign, Makese, and Mbuku matters), the fact specific averments made to establish the applicants' entitlement to refugee status were identical. Indeed the founding affidavit contained not only the identical narrative, it repeated precisely the same grammatical and other errors. Given that the applicants were represented by two firms of attorneys and had apparently fled from different countries[1] at different times, I considered that the founding affidavits could not possibly reflect the true experiences of the applicants. It struck me that the persons responsible for the drafting of the affidavits must have known that this was so and that they were, accordingly, party to an attempt to mislead the court.

[4] I requested the Registrar to draw the files in all matters against the Department which had appeared on the motion court roll in the preceding two months and in which the two firms of attorneys had been involved. I was provided with approximately 25 files. On reading these files I discovered 5 cases involving one of the firms – JCM Attorneys – in which identical founding affidavits had been used. In one of those matters an order had been granted, including a costs order.

[1] In Tekalign the applicant's country of origin is Ethiopia. In the Makese and Mbuku matters the country of origin is the Democratic Republic of the Congo.

[5] When the matters were called I informed counsel who appeared of what I had discovered. I stood the matters down to enable them to take instructions. When the matters were called again, I directed that the respective attorneys should file an affidavit to explain how this had occurred. The attorneys were directed to state whether their firm had brought any other applications on the same factual averments, and to identify those that had been finalised and those that were pending. I then stood the matters down to the opposed motion court roll to enable the affidavits to be filed. Mr Sizwe Maci filed an affidavit. Mr Moorhouse, who was briefed by JCM Attorneys in the Makese and Mbuku matters, requested further time. I therefore again stood the matters down to Friday 11 May. On Friday morning the affidavit of JCM Attorneys had still not been filed. I heard submissions by Mr Beyleveld SC, who had been briefed in the Tekalign matter by Maci Incorporated, and Mr Moorhouse. I then reserved judgment in the matters. The affidavit on behalf of JCM Attorneys was delivered after the hearing.

[6] Before dealing with the explanatory affidavits it is necessary to set out the content of the founding affidavit concerned and thereafter deal with certain features of the applications before me. The affidavits filed by the applicants are, as I have already stated, identical in all respects. The key portion of the affidavit (in the Tekalign matter) is reproduced verbatim hereunder.

> BACKGROUND
>
> 20. I was born in Ethiopia.
> 21. I arrived in the Republic of South Africa during, having gained entry into the Republic of South Africa through the Mozambique Boarder post.
> 22. Immediately after gaining entry into the Republic, I made my way to the Durban Refugee Reception Office to apply for asylum. I chose this office because I was informed by fellow countrymen whom I met once inside the Republic that this was the best office from which I could apply for asylum.
> 23. I am a supporter of the SEPDC in my country of origin as will be apparent from the record which will be furnished in these proceedings.
> 24. Prior to leaving Ethiopia, the police came to my House looking for supporters of the SEPDC, before they could get into home I managed to escape. I was a well-known supporter of the SEPDC amongst my peers at school and I knew it would be easy for the officers to get to me. I was also well known for distributing the SEPDC pamphlets within my community.
> 25. My father informed was assaulted by members of the ruling Ethiopian people's Revolutionary Democratic Front (hereinafter referred to as EPRDP) forcing him to inform them of my whereabouts. The said officers informed my father that if he did not disclose my whereabouts they would kill him.
> 26. They further informed my father that once they found me they would kill me and return my corpse to him for burial.

27. For the safety of my family and myself, my father advised me to flee Ethiopia immediately.
28. I then immediately left Ethiopia for Kenya, whilst in Kenya I was informed by other refugees from my country that the best place to seek asylum was South Africa.
29. After having hitched hiked over four countries, namely Kenya; Tanzania; Malawi and Mozambique I arrived in South Africa, and as applied for asylum at the Durban Refugee Reception Office shortly after my arrival in the Republic. Upon my application for asylum I was immediately issued with a section 22 permit which allowed me to sojourn in the Republic whilst y application for asylum was being determined.
30. About a few Months I was given an appointment with the RSDO whom spoke to me in English. I cannot communicate in English but only in Amharic. Even though an Amharic interpreter was provided, I was told not to trust him by other asylum applicant whom I met outside the Refugee Reception Centre. It was said that the said interpreter is an agent of the Ethiopian Government in South Africa and therefore did not relating the truth to the RSDO when interpreting on behalf of SEPDC supporters.
31. The RSDO took a decision rejecting my application for asylum; I am not in possession of the said decision at this stage.
32. I lodged an appeal against the decision of the RSDO with the Refugee Appeal Board (RAB). I am, not in possession of the said decision.
33. During the appeal I had repeated what I had informed the RSDO's at my initial interview. I cannot go back to my country as I face a real risk of persecution if I am returned.
34. I now seek to be granted a hearing in terms of Rule 53 so that a judge of this Honourable Court can determine my claim in terms of the Act.

[7] What follows this portion of the affidavit is a section dealing with the grounds of review. In the Makese and Mbuku matters the affidavits differ only in respect of the country of origin; the acronyms of the political parties or organisations concerned; and the countries traversed to get to South Africa. In every other respect the averments are identical.

[8] It is necessary to record here that when the explanatory affidavit on behalf of JCM Attorneys was delivered to me in chambers, Mr Moorhouse indicated that he had noted an error in the Makese founding affidavit where in paragraph 20 it stated that the applicant was born in Ethiopia. I did not recall that error and on checking the papers found that there was no error – it referred to the applicant as being born in the Democratic Republic of the Congo on 6 May 1970. Mr Moorhouse showed me the copy of the affidavit included in his brief. It stated that the applicant was born in Ethiopia on that date. The page was initialed by the applicant and another person in an entirely different place on the page. I will return to this hereunder.

[9] In addition to the identical averments there are several other features which the applications have in common. Firstly, the founding affidavit contains no averments which deal with the considerable delay between the final decision of the Refugee Appeal Board and the launch of the application to review and set aside that decision. In the Tekalign matter the decision was taken on 17 October 2013. On that date the applicant signed receipt of the decision. The application was commenced on 6 July 2015 well outside of the 180-day period provided for in s 7 (1) of the Promotion of Administrative Justice Act 3 of 2002 (hereinafter the PAJA). In the Makese matter the decision sought to be reviewed was taken on 24 May 2013. In the Mbuku matter it was taken on 28 July 2011. These applications were commenced on 9 February 2018 and 23 February 2018 respectively.

[10] The second common feature is the claim made by the applicants that they are unable to communicate effectively in English and that they were not provided with adequate or appropriate interpretation services. They all complain that the interpreter who assisted them was alleged to have been an agent for the government of their home country. The allegation of a lack of language proficiency is central to the attack on the merits of the decisions taken by the Refugee Status Determination Officer (RSDO). The contention is that the applicants were unable to present their cases for refugee status and that the failure to provide proper interpretation services vitiated their right to be heard. Notwithstanding this assertion, the allegation of an inability to convey the basis of the claim for asylum status is not repeated in relation to the Refugee Appeal Board (RAB). On the contrary the applicants assert that they conveyed to the RAB precisely what they conveyed to the RSDO. None of the applicants state that at the time of deposing to the founding affidavit they were able to communicate effectively in English. On the affidavits therefore it must be accepted that they were not so able to communicate. Yet none of the applications include an affidavit deposed to by a proficient interpreter who is able to swear that the instructions that were taken were properly interpreted and that the content of the affidavit – written in English – was explained in translation.

[11] The probability that three persons each seeking to be granted asylum status on the basis of political persecution in their home country would experience precisely the same incidence of persecution is so remote that it can be discounted entirely. The circumstances in which a person is compelled to flee his or her home country and seek asylum in another country is a fact-specific aspect of applications of this

nature. This is not to say that there is not scope for patterns of political persecution and for individual asylum seekers to share similar experiences. But the state of events which trigger the flight to exile is unlikely to be precisely the same or to follow the same sequence and to be based on precisely the same conditions. This is particularly so when the asylum seekers hail from different countries separated geographically by huge distances and by different periods in time. Yet in each of the cases before me the applicants swore under oath that the content of the affidavit, and therefore the narrative described, was true and correct.

[12] It is with this in mind that I turn to the explanations offered by the attorneys engaged in these matters.

[13] The affidavit filed by Mr Sizwe Maci of Maci Incorporated provides a brief background to alleged defects in procedure encountered in many asylum seeker applications processed by the Department of Home Affairs. These defects are what form the basis of the applications brought on behalf of many refugees. Mr Maci states that in regard to the Tekalign matter the applicant approached his firm in 2015. At that time he employed three candidate attorneys and a typist who were responsible for the preparation of the review applications. According to Mr Maci these individuals were, for reasons not germane to the present proceedings, relieved of their duties and are presently all employed by JCM Attorneys.

[14] Mr Maci stated that the founding affidavit in the Tekalign matter was drafted by Mr Gara, one of the candidate attorneys employed by Maci Incorporated. Mr Maci states that he did not oversee the drafting of the affidavit, which he concedes he ought to have done. He admits that he signed the notice of motion. According to him, no orders have been sought in review applications prepared by these individuals. This is because of ongoing settlement discussions relating to the many applications which have been commenced. He explained that in relation to the Tekalign matter he instructed counsel to move for a postponement so that the papers could be supplemented in certain respects.

[15] In response to the court's request to identify any other matters in which the same founding affidavit has been utilised Mr Maci supplied the name and case numbers of eight matters.[2] The names and

[2] Mr Maci filed two affidavits. He identified four matters in the limited time available before filing the first affidavit and a further four matters by the time the case was to be heard.

case numbers are set out in the table below. I was advised that these matters are pending and have not as yet been enrolled for hearing.

[16] Mr John Mlombo, who is the sole director of JCM Attorneys, states in his explanatory affidavit that he was a former director of the firm Maci Incorporated. He left that firm in 2012 to start his own practice, styled JCM Attorneys. In July 2015, he recruited several employees from Maci Incorporated. Mlombo explains that he has five office managers who each deal with five different departments. He does not name the managers nor state whether they are admitted attorneys. One of the departments deals with immigration and refugee matters. According to him there are 'about two candidate attorneys' who work under the manager.

[17] I reproduce the explanation, such as it is, hereunder in the terms provided:

> 13. I wish to state that the Precedents used by Maci and JCM are similar precedents if not the same as my Manager in Immigration and Refugee Departments was responsible for drafting the applications at Maci before I recruited him.
> 14. With regard to the similarities in the facts of these matters; I have been made to believe that each application is brought after a consultation with the Applicant and in such the information contained in the affidavits as the basis of the applications would be coming from the client him/herself.
> 15. I was not aware that there are applications wherein the facts are similar and the applicants are not even related, as I have stated I am not involved in drafting and take this Honourable Court's sentiments very seriously and undertake to investigate the Court's concerns.

[18] There is no affidavit deposed to by the person responsible for drafting the applications issued by JCM Attorneys. Mr Mlombo provided a list of 8 similar matters in which orders were sought and obtained. He also provided a list of 32 matters which are pending. I requested the Registrar to furnish me with these files and any other files of matters involving the firm which may also involve the use of the same factual averments. It transpired that 54 matters were identified which, with the three matters before me, brought the total number of applications founded on identical affidavits to 57. The details of these matters are set out in the tables below.

[19] The first table indicates the cases in which orders have been granted.

CASE NO	NAME	DATE	JUDGE	ATT
3816/15	AGO	10-Oct-17	KAHLA AJ	JCM
1401/16	GEBREWOT	28-Nov-17	MAGEZA AJ	JCM
4392/15	HOSSAIN	28-Nov-17	MAGEZA AJ	JCM
0001/16	MASEBO	19-Dec-17	SMITH J	JCM
4022/15	TADESSE	30-Jan-18	MAGEZA AJ	JCM
4220/15	DIKASO	6-Feb-18	MSIZI AJ	JCM
4451/15	DEOUN	20-Mar-18	HARTLE J	JCM
3663/15	DAWIT	3-Apr-18	MAKAULA J	JCM

[20] The table above indicates that orders were sought and obtained in two of these matters on the same day. The instructing attorneys were JCM Attorneys and the same counsel appeared (although not the counsel who appeared in the present JCM matters). I do not know what transpired at the hearing of the applications. I intend no criticism of the judge concerned. I am nevertheless constrained to comment that it strikes me as alarming that orders can be sought and be granted on identical allegations made by two unrelated applicants. In my view, it would have been incumbent upon counsel appearing in the matters to draw the attention of the court to the fact that the papers were in all material respects identical. I do not know whether that was done. I intend therefore to refer this judgment to the Bar Council of the Eastern Cape Society of Advocates so that the matter may be investigated. Such investigation ought not to be confined to the single instance referred to above. The orders were granted within a relatively short period of time. The engagement of counsel in all these matters ought therefore to be considered by the Bar Council.

[21] There is a further issue – over and above the concern about the misleading effect of the averments which I address below - which arises from the fact that orders were granted in matters in which identical affidavits were utilised. This concerns the propriety of the conduct of the attorneys in raising fees for the work done by them.

[22] In each instance an order of costs was granted against the respondents. In the matter of Ago (Case no 3816/2015) an order was granted on 10 October 2017. The file indicates that a bill of costs was taxed and that the Taxing Master issued her allocatur on 7 December 2017.

[23] I reproduce hereunder a few of the relevant items from the Bill.

No	Date	Item	Fees
1	01-10-15	Attending to Consultation with client perusal of client's documentation and taking instructions	1052-00
2		Drafting of Founding Affidavit	2367-00
3		Telephonic to client to arrange appointment for commission of founding affidavit	263-00
4		[Consultation] with client to confirm correctness of Founding affidavit and explained commissioning to procedure	263-00
14	[03/03/16]	Consultation with to prepare Supplementary to affidavit	526-00
15	19/06/16	Drafting of supplementary affidavit	2367-00
16		Attending to consultation to confirm correctness of affidavit and explaining commissioning procedure	263-00

[24] What emerges from this is that the attorneys have charged a substantial fee for the drafting of the founding affidavit. They have also charged a fee for a consultation to confirm the correctness of the averments contained in the affidavit prior to it being deposed to before the commissioner of oaths. In this instance they have also charged a substantial fee for the drafting of a supplementary affidavit. In the Ago matter it was necessary to seek an extension of the 180-day period provided for in s 7(1) of PAJA. The basis for the s 9 application was only set out in the supplementary affidavit which was filed more than eight months after the application was launched.

[25] In Sibiya v Director-General: Home Affairs & Others and 55 Related Cases [3] Wallis J (as he then was) dealt with a similar instance where large numbers of applications were brought on standard text affidavits. In that matter the standard text affidavit was only changed in minor and essentially irrelevant respects. Nevertheless the bills of costs which were typical of the charges raised in those matters indicated that the attorneys were charging fees for consultations and drafting of the founding affidavits in each instance. The learned judge concluded that the charges levied did not in fact reflect the work actually performed by the attorneys. The learned judge said the following,[4]

> I have considerable reservations whether any such consultation or process of taking instructions or drafting actually occurs beyond perhaps a clerk recording the name and some minor and routine personal particulars about the applicant in order to feed them into the computer program and print off the application papers.

[26] Wallis J went on to state,[5]

> I have drawn attention earlier in this judgment to the basis upon which the bills of costs are prepared in these cases and presented for taxation. For reasons already given, I have substantial reservations as to whether the bills of costs presented for taxation by these attorneys are in fact an accurate reflection of the work that they perform or whether they are, like the application papers, prepared as a matter of rote in the knowledge that they will be agreed with the State Attorney. …..
>
> Not only am I concerned whether the bills of costs being presented in these cases accurately reflect the work done by the attorneys but I am also concerned, bearing in mind the production-line manner in which the papers in these cases are produced, whether it is permissible or appropriate for the attorneys simply to charge in accordance with the tariff laid down in rule 70, or whether this constitutes a form of overreaching. I appreciate that it is not overreaching of their own client because they are not charging their clients fees. However, it seems to me equally inappropriate for an attorney to present a bill of costs for taxation to the opposing side where the fees claimed are exorbitant in relation to the amount of work actually done and the nature of that work. That is inconsistent with the bill being a party and party bill.

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[3] 2009 (5) SA 145 (KZP)
[4] At 168D-E
[5] At 179G-180B

[27] I share similar reservations in relation to the matters now under consideration. When it is considered, as will become clearer hereunder, that the founding affidavits are entirely in standard form including obvious and gross grammatical errors, it is difficult to conceive that any professional skill and expertise is applied at all to the production of these papers. When the deficiencies in the papers are highlighted at the hearing of the applications a supplementary affidavit is produced. In some instances it is produced pursuant to the filing of the record of proceedings in terms of Rule 53. In such cases, it appears, a further fee is raised in the bill of costs. I do not know whether the attorneys are charging their clients a fee for the work done. In the event that the attorneys are charging their clients fees, they may well be overreaching. In any event, I agree with Wallis J that the fees charged in the bill that I have considered, are inappropriate having regard to the work actually undertaken by the attorney.

[28] I shall for this, and other reasons explained hereunder, refer these concerns to the Cape Law Society to consider whether an investigation ought to be initiated.

[29] It is in my view equally necessary that the respondents, against whom at least eight costs orders have been made in the finalised matters, should be appraised of the potentially significant prejudice occasioned to the public-purse consequent upon the obtaining of orders upon identical founding affidavits. They should also be appraised of the concerns as to the propriety associated with presentation of bills of costs on the basis drawn in the Ago matter. I shall for this reason also direct that a copy of this judgment be forwarded to the State Attorney for presentation to the Minister.

[30] I should at this juncture also comment on the fact that these matters are not opposed. A litigant is of course not obliged to oppose. It may be that the respondents, as advised, consider that they have no answer to the applicants' case. In that event it might be expected that the respondents would indicate that the order be taken without opposition thus curtailing costs. We are here dealing with a Minister as the political head of a department who, in terms of the rules of court, acquires knowledge of the legal proceedings when the papers are served on the State Attorney. Immediately litigation is commenced the risk of an adverse cost order arises. It is therefore to be expected, particularly where public funds are at issue, that such risk is properly appraised. Since service of the papers in these matters is always

effected on the local State of Attorney, that office is duty bound to act with due regard to the substantial costs risks that necessarily accompany the litigation. It strikes me as inconceivable that the State Attorney could not be aware of the use of standard text and identical affidavits to support the relief sought, including the costs orders. It may very well be that the State Attorney has drawn this to the attention of the respondents. In that event the failure to act lies at the door of the respondents. It seems to me however, that this issue requires investigation and to this end the Minister ought to be personally appraised of the situation.

[31] I turn now to the matters which are presently said to be pending before this court. The table below reflects the cases involving Maci Incorporated.

CASE NO	NAME	COUNTRY	RECEPTION OFFICE	RAB / RSDO DECISION	NOTICE OF MOTION	FOUNDING AFFIDAVIT	STATUS
1272/15	ALELO	ETH	DURBAN	14-May-14	2-Apr-15	30-Mar-15	Pending
1823/15	KENORE	ETH	DURBAN		12-May-15	11-May-15	Withdrawn 27 Feb 2017
2034/15	GENORO	ETH	PORT ELIZABETH	8-Apr-10	28-May-15	26-May-15	Pending
2288/15	NADEGE	CAM	PORT ELIZABETH	24-Jul-12	15-Jun-15	11-Jun-15	Pending
2364/15	BAFA	ETH	PORT ELIZABETH	9-Sep-11	19-Jun-15	18-Jun-15	Pending
2658/15	FORESIDO	ETH	DURBAN	27-Jun-13	9-Jul-15	6-Jul-15	Pending
2764/15	ABEBE	ETH	PORT ELIZABETH		16-Jul-15	15-Jul-15	Withdrawn 26 Oct 2015
2855/15	MASUD	BANG	PORT ELIZABETH	30-Sep-11	21-Jul-15	21-Jul-15	Pending
3020/15	LELAGO	ETH	DURBAN	22-May-15	3-Aug-15	29-Jul-15	Withdrawn 24 Oct 2016
3103/15	TAGESE	ETH	DURBAN	17-Mar-15	7-Aug-15	3-Aug-15	Pending
3269/15	TAGESE	ETH	DURBAN	17-Mar-15	21-Aug-15	3-Aug-15	Withdrawn 22 Sep 15

[32] What follows are the matters involving JCM Attorneys.

CASE NO	NAME	COUNTRY	RECEPTION OFFICE	RAB / RSDO DECISION	NOTICE OF MOTION	FOUNDING AFFIDAVIT	STATUS
3464/15	TEGEGN	ETH	DURBAN	1-Jul-15	9-Sep-15		24-Jul-18
3469/15	MISHAMO	ETH	DURBAN	30-Jun-15	9-Sep-15	6-Sep-15	24-Jul-18
3818/15	KEBULE	ETH	DURBAN	15-Jul-15	5-Oct-15	5-Oct-15	Pending
3926/15	TSEDEKE	ETH	PORT ELIZABETH	17-Aug-15	14-Oct-15	7-Oct-15	Struck off 24 Apr 2018
3928/15	WATRO	ETH	DURBAN		14-Oct-15	13-Sep-15	Pending
3929/15	HYEDAMO	ETH	PORT ELIZABETH	8-Aug-11	14-Oct-15	13-Sep-15	Pending
4453/15	MIAH	BANG	PORT ELIZABETH	26-Aug-15	26-Nov-15	19-Nov-15	5-Jun-18
4598/15	HAJESO	ETH	PORT ELIZABETH		2-Dec-15	1-Dec-15	Removed 13 Mar 2018
4752/2015	MUJAHID	PAK	PORT ELIZABETH	18-Aug-15	14-Dec-15	11-Dec-15	Pending
0037/16	SALUM	TANZ	PORT ELIZABETH	12-Mar-15	12-Jan-16	8-Jan-16	12-Jun-18
157/16	SHAMEBO	ETH	PORT ELIZABETH		22-Jan-16	21-Jan-16	24-Jul-17
437/16	BEDORE	ETH	DURBAN	19-May-15	15-Feb-16	11-Feb-16	3-Jul-18
0461/16	ABTE	ETH	PORT ELIZABETH		16-Feb-16	15-Feb-16	29-May
797/16	OBAGUNWA	NIG	PORT ELIZABETH	17-Feb-15	10-Mar-16	10-Mar-16	Removed 8 May 2018
1193/16	JOMOLE	ETH	PORT ELIZABETH	9-Jun-11	13-Apr-16	12-Apr-16	31-Jul-18
1961/16	HOSSAIN	BANG	PORT ELIZABETH		8-Jun-16	8-Jun-16	22-May-18
2068/16	ISLAM	BANG	PORT ELIZABETH		20-Jun-16	17-Jun-16	Pending
2150/16	SALIM	TANZ	PORT ELIZABETH	23-Mar-09	27-Jun-16	27-Jun-16	17-Jul-18
2569/16	MANEDO	ETH	DURBAN		26-Jul-16	26-Jul-16	Pending
2929/16	MURETHI	KEN	PORT ELIZABETH	20-Jan-10	22-Aug-16	22-Aug-16	Removed 3 April 2018
2985/16	HILBORE	ETH	DURBAN		25-Aug-16	24-Aug-16	Pending
3012/16	CHOWDHURY	BANG	DURBAN		29-Aug-16	26-Aug-16	24-Jul-18
3677/16	ADIKAIBE	NIG	PORT ELIZABETH		18-Oct-16	18-Oct-16	25-Sep-18

3878/16	CHAMELO	ETH	PORT ELIZABETH	12-Nov-12	1-Nov-16	1-Nov-16	15-May-18
4012/16	SERWAA	GHA	PORT ELIZABETH		10-Nov-16	9-Nov-16	Pending
4013/16	ABIYO	ETH	PORT ELIZABETH		10-Nov-16	9-Nov-16	25-Sep-18
214/17	SALKA	ETH	PORT ELIZABETH		26-Jan-17	24-Jan-17	14-Aug-18
2784/17	NEGENA	ETH	PORT ELIZABETH	2-Aug-17	16-Aug-17		23-Oct-18
4226/17	MARIKOS	ETH	PORT ELIZABETH		12-Dec-17	12-Dec-18	2-Oct-18
250/18	BASHAR	BANG	PORT ELIZABETH	12-Jul-16	31-Jan-18	23-Jan-18	Pending
0160/15	TIOBO						18-Sep-18
0549/16	TIRORE						5-Jun-18
3757/15	HAMBAMO	ETH		24-Feb-16			3-Jul-18
3758/15	ISLAM						24-Jul-18
3764/15	HAMADO	ETH	PORT ELIZABETH	6-Feb-14			25-Sep-18

[33] I have studied the case files in all of these matters. I am mindful that those matters which are pending are not before me for adjudication. I shall therefore confine my comments in relation to these matters to certain features which emerge from a perusal of the applications which bear directly upon those matters presently before me. Before doing so I wish to indicate that where there are gaps in the tables this indicates that the case files either do not contain the relevant documents or that the information is lacking in such documents as do occur in the case files. The column headed "Status" contains dates on which the cases are enrolled for hearing where that has occurred. I note in this regard that several cases have been set down on the unopposed motion roll months in advance. Why this is so is a mystery since, ordinarily, an unopposed matter can be enrolled for hearing on a few days' notice since there is no waiting time for unopposed applications.

[34] It will be noted that a few applications have been withdrawn. In one instance Maci Incorporated filed a notice of withdrawal in October 2016. Despite this JCM attorneys filed a Notice of Substitution of Attorneys and a Notice of Set down on 3 March 2018. There is one matter (Tagese, case no 3103/15) which is a duplicate of the papers in case no 3269/15 – the difference being that a notice of motion dated 7 August 2015 was filed in the former and one dated 21 August 2015 in the latter. It may be that

this is an error. The state of the case files in the pending matters however, reflects a generally lackadaisical approach to the litigation and strengthens the view that the litigation is conducted with little regard to the rights and interests of the applicants, but rather with a greater concern for the costs orders that may eventuate.

[35] I turn now to considering the pending cases in general. The first striking feature is that the identical averments are deposed to by applicants who hail from 8 different countries, namely Ethiopia, Bangladesh, Nigeria, Kenya, Tanzania, Cameroon, Ghana and the Democratic Republic of the Congo. I have already remarked on the improbability that each of these applicants will have experienced precisely the same sequence of events. The fact that the identical averments are made destroys the veracity of the allegations made under oath by each of the applicants concerned.

[36] While the narrative is the same there are very subtle changes made to the text. In the present matters before me the narrative centres on the applicant's 'father' and the hearsay allegations of a risk to the applicant's life as conveyed to the 'father'. This father figure features in other cases too. In still others the central figure is an 'uncle', whose role in the narrative is precisely the same as the erstwhile 'father'.

[37] This subtle change does not signify a 'different' fact-specific experience. Instead it speaks to the role of the drafter of the affidavit. It indicates that the drafter, in addition to making the changes required for a particular applicant, has altered a pre-existing narrative as recorded in the template of the affidavit. That a template is being used is to be discerned from the repetition of identical grammatical errors. The 'altering' of the narrative, of course, can only occur consciously. The drafter, knowing that he or she is using a pre-existing narrative introduces a change of character by referring to an 'uncle'. Far from lending any credibility to the altered narrative, it indicates a deliberate and conscious introduction of a 'fact' which cannot possibly be true in every instance. This, in my view, points to a calculated attempt to mislead a court.

[38] A court which is faced with allegations made in an affidavit in a matter which is unopposed will generally accept those allegations as establishing the factual basis upon which to adjudicate the matter. However, where such allegations are untenable or far-fetched, a court is entitled to reject them. That is the case in this instance.

[39] The discovery of such pervasive use of a standard template by both firms of attorneys caused me to consider how it is possible that every one of the applicants concerned could depose to allegations which are manifestly false. Language proficiency and the absence of an interpreter may explain this. If that is so then the conduct of the attorneys involved is even more troubling. It is equally possible that the process of attestation of the affidavits is defective.

[40] With this latter consideration in mind I examined the certificates of the commissioners of oath engaged in the administration of the oaths in the present matters and in the pending matters.

[41] In the Maci Incorporated matters which are pending, 7 of the 11 founding affidavits are attested before the same commissioner. I use the term 'same commissioner' cautiously. The handwriting of the attestation appears the same. Only a portion is sufficiently legible to discern the details of the commissioner. That portion refers to 'Mount Road' and 'warrant officer' – nothing else can be discerned. The stamp that appears over or alongside the handwritten attestation differs: in only one matter is the date stamp that of "Integrated Justice System Court Centre, Station Commissioner, Mount Road, South African Police Service". In the other matters the stamp is either that of "The Clerk of Criminal Court, PE Magistrate's Office" or that of "Magistrate, Port Elizabeth Magistrate's Court".

[42] This same commissioner attestation appears – with the variations as between Magistrate and Clerk of the Court - in 10 of the 35 JCM Attorneys matters. It should be stated that 4 of the JCM files contain no founding affidavit. One founding affidavit is not attested and a further one is incomplete and excludes the last page where it might be expected the deponent has signed and taken the prescribed oath.

[43] The fact that a commissioner of oaths is regularly called upon to administer the oath on behalf of a firm of attorneys is not, in itself, worthy of comment. However, it is striking that the same person acts as a commissioner in a total of 20 of the 57 cases – i.e. In the Tekalign case, in two of the finalised cases and 17 of the pending cases. Furthermore the use of different date stamps which suggest that the same commissioner is either a police official or a clerk of the court or a magistrate raises suspicion about the authenticity of the attestation. In several other files the affidavits purport to have been commissioned by a clerk of the court or police officer where only an illegible signature appears together with a generic stamp. The full names, office, designation and address of the commissioner concerned

appears in only a few matters. The majority, *prima facie*, do not comply with the Regulations which regulate the administration of an oath. This is the case in the Makese and Mbuku matters before me.

[44] In the context of such a large number of affidavits containing manifestly false averments, the apparent deficiencies in the way that the affidavits are commissioned raises still further doubt that the oaths have been properly administered to the deponents in accordance with the regulations.

[45] I wish to return, in this context, to the bill of costs discussed above. It will be recalled that the bill includes an item for consultation to confirm the correctness of the founding affidavit. I am aware that this is only one bill of costs. However, given the fact that the founding affidavit in that matter contains precisely the same allegations which, in the light of the reproduction of those averments in 56 other cases, are false, it is to be seriously doubted that the attorneys can have consulted to confirm the correctness of the affidavit.

[46] I return also to the disclosure made by Mr Moorhouse of the affidavit contained in his brief in the Makese matter. It seems to be that the relevant page must have been replaced at some stage so that the court file contains one version and the attorney's file another. This is deeply troubling. It raises still further suspicion about the way this litigation has been conducted by the attorneys concerned.

[47] How does the existence of these 54 other cases, each founded upon identical allegations, impact upon the three matters presently before me? In my view the impact is to render the applications fatally defective. A court does not lightly disbelieve averments made under oath where there is no challenge to the allegations in opposing affidavits. Yet in this matter, as in the Sibiya matter referred to above, the extent of the use of the affidavit; the conscious 'alteration' of the narrative and its extensive use; the deficiencies in the commissioning of the affidavits; and the substantive deficiencies in the formulation of the applicants' entitlement to the relief sought, suggest that the affidavits cannot be regarded as trustworthy.

[48] It was argued in relation to the Tekalign matter that the fact-specific portions can be ignored since there is, on the papers, a basis to grant the relief. This it was said is to be found in the composition of the Refugee Appeal Board which appears to have sat with only one member. I disagree. To adopt this approach would be to ignore what is at face value, an abuse of the process and to countenance a deliberate attempt to mislead this court. The same applies in the Makese and Mbuku matters. In these

matters the commissioning of the affidavits does not comply with the regulations, so that there is not in fact a proper affidavit before the court. Furthermore the papers do not address the question of an extension of the 180-day period provide for in s 7(1) of PAJA. This is despite the fact that the applications, launched in 2018, seek to review decisions taken in 2011 and 2013 respectively. Counsel sought to remove these matters from the roll so that service could be effected upon the fourth respondent and, presumably to attempt to correct other substantive deficiencies. No purpose would be served by allowing applications tainted in the manner described above to be served upon the fourth respondent.

[49] The only appropriate order to be made in relation to the three applications before me is to dismiss them.

[50] In coming to this conclusion I am acutely aware that the applicants suffer the consequence of such dismissal of their claims. Responsibility for this however lies squarely upon the shoulders of the attorneys involved. The order made in respect of the three cases before me does not dispose of the pending applications. Their fate is to be determined by the court which hears the applications in due course. I have given consideration to whether it would be appropriate to set out certain directives, with the assent of the Judge President, to regulate the adjudication of the pending applications referred to above. On reflection it is unnecessary to do so.

[51] The circumstances in which the 57 applications have been prosecuted raises, as I have explained, very serious questions regarding the propriety of the conduct of the attorneys concerned. These are matters to be investigated by the Law Society. The conduct described however, may very well also encompass criminal conduct. For this reason I shall direct that a copy of the judgment be forwarded to the Director of Public Prosecutions to consider whether or not to initiate an investigation in this regard.

[52] In the result I make the following orders:

1. In case numbers 2774/15, 410/2018 & 598/2018 the applications are dismissed.

2. The registrar of this court is directed to send a copy of this judgment to:

2.1 The Cape Law Society and to draw their attention to paras [21] to [28];

2.2 The Eastern Cape Society of Advocates and to draw to their attention par [20]; and

2.3 The State Attorney and to draw attention to paras [29] & [30].

3. The registrar of this court is further directed to send a copy of this judgment to the Director of Public Prosecutions, Grahamstown.

G. G. GOOSEN
JUDGE OF THE HIGH COURT

Appearances:

For the applicant in case no 2744/15
Adv. A. Beyleveld SC, assisted by Ms. I Bands
Instructed by Maci Incorporated

For the applicants in case nos.410/2018 & 598/2018
Adv. A Moorhouse
Instructed by JCM Attorneys