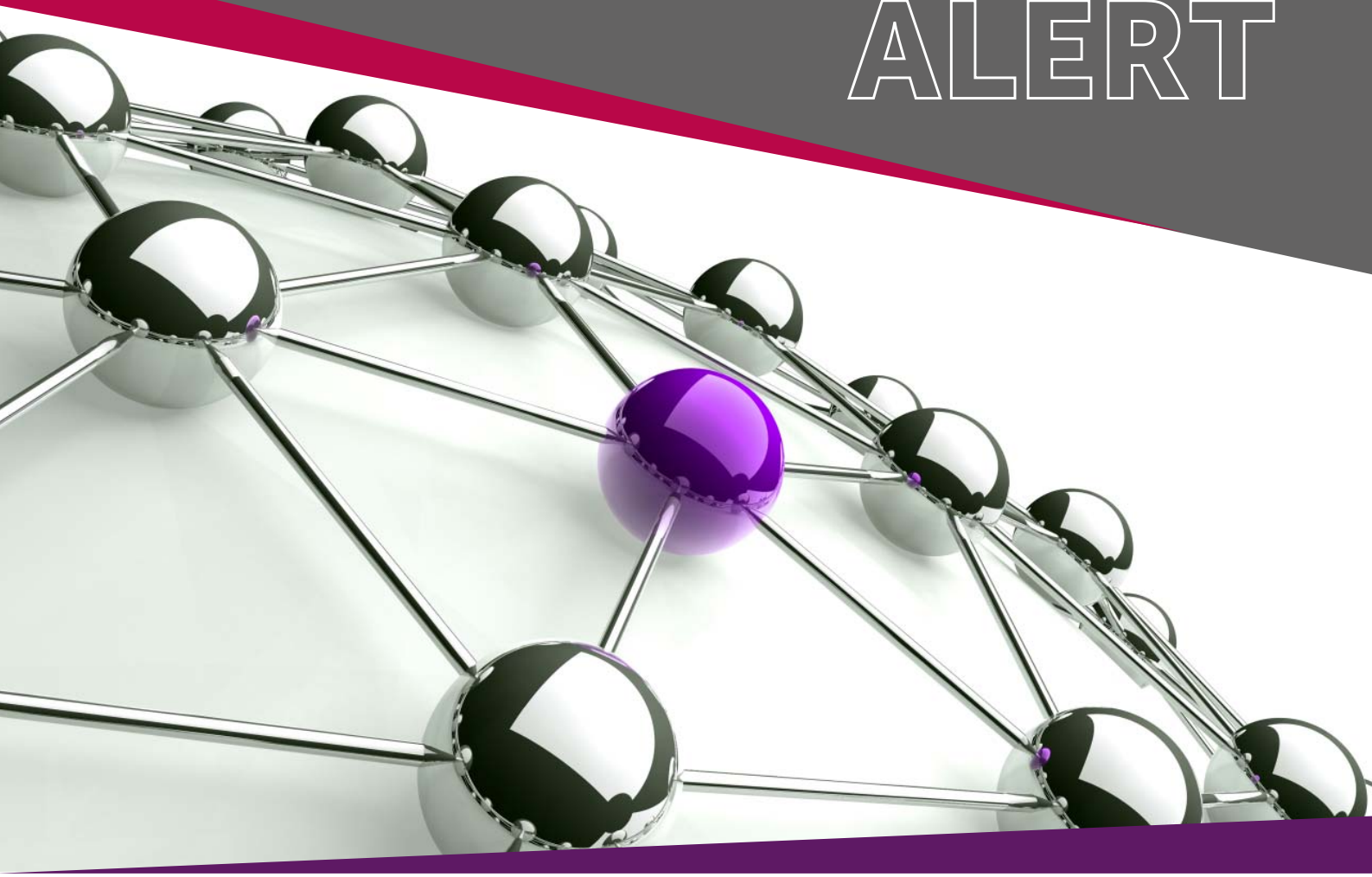
29 MAY 2017

DISPUTE RESOLUTION AND EMPLOYMENT ALERT



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ASYLUM SEEKERS AND URGENT APPLICATIONS AGAINST THE STATE

The applicants in *Olatude and 5 others v the Minister of Home Affairs and 2 others* (3701/2017) [2017] ZAGPJHC were asylum seekers who were at one stage holders of temporary asylum permits and had submitted applications to the Department of Home Affairs (DHA) for asylum status. The applicants alleged that, upon enquiring about the status of their applications at the relevant Refugee Reception Office (RRO), they were informed that their applications had been rejected. They were subsequently arrested without being furnished with reasons for their arrest nor were they afforded an opportunity to advance their version of events.

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ASYLUM SEEKERS AND URGENT APPLICATIONS AGAINST THE STATE

In hearing the urgent applications, a pertinent consideration for Judge Modiba was that the urgent courts are becoming increasingly inundated with applications of this kind.

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The court was generally unimpressed with the overall conduct of the applicants' cases in seeking the relief that they sought.

The applicants launched their urgent applications in the High Court contending that their respective arrests were unlawful.

In hearing the urgent applications, a pertinent consideration for Judge Modiba was that the urgent courts are becoming increasingly inundated with applications of this kind. The court identified an emerging practice where counsel attends court with a draft court order in hand which, in many instances, ends up forming the basis of an agreement between applicants and the DHA and is thereafter simply made an order of court. Judge Modiba pointed out the disadvantages of this practice:

> "the court is precluded from properly considering the matter and having the issues adequately ventilated. A consequence of this is that the courts cannot formulate guidelines for the future conduct of similar cases, which undermines the efficiency of the administration of justice".

The court held that in cases such as these, a reasonable amount of time must be given to the respondent organ(s) of state, who frequently deal with numerous similar applications (in the present case there were nine urgent applications brought against the DHA set down for hearing on the same date). The court held further that merely allocating the respondent organ(s) of state a period of two days within which to deliver answering papers (as the applicants did in the present case) is grossly unreasonable.

In considering the present applications, the court was generally unimpressed with the overall conduct of the applicants' cases in seeking the relief that they sought. In particular, the court took issue with the applicants' failure to exhaust applicable internal remedies in terms of the Refugees Act, No 130 of 1998 (RA). The RA provided the applicants with the following two internal remedies, namely:

(1) lodging an application for the review of the decision to reject the applications for asylum permits with the Standing Committee for Refugee Affairs; and

(2) submitting an appeal to the Refugees Appeal Board.

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ASYLUM SEEKERS AND URGENT APPLICATIONS AGAINST THE STATE

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The court expressed grave disappointment at the applicants' failure to provide sufficient detail in their court papers.

In the present case, the applicants had only made use of the first remedy referred to above by opting to bring an application for the judicial review of the rejection of their applications for asylum permits in terms of the Promotion of Administration of Justice Act, No 3 of 2000 directly to court and, in doing so, appeared to have ignored the second remedy available to them. The RA does not provide for such a course of action to be adopted, and the court criticised the applicants' failure to exhaust the internal remedies prior to approaching the court for relief in circumstances where there was still a remedy available to them. Accordingly, the court refused to condone the applicants' failure due to there being a lack of exceptional circumstances justifying a departure from the RA's provisions. The court therefore held that the arrest and detention of the applicants was lawful and dismissed their applications.

Furthermore, the court expressed grave disappointment at the applicants' failure to provide sufficient detail in their court papers. Important information such as date and port of entry into South Africa, mode of travel, date of application for asylum permit/s, date of visitation/s at the RRO (if at all), date of issue of permit/s, proper identification, and explanations for seemingly unlawful periods of presence in the country, were absent from the majority of their applications.

Accordingly, the court dismissed four of the six applications before it. In the remaining two applications, the court only granted the applicants minimal relief in the form of immediate release from detention at the Lindela Repatriation Centre. This was due to the fact that the DHA had failed to discharge the onus it bore to prove that the continued detention of the applicants for a period exceeding thirty days without the detention being confirmed by a court in terms of the Immigration Act, No 13 of 2002 was lawful and justifiable. A failure to discharge this onus automatically results in the applicants being entitled to their immediate release. Nevertheless, the court refused to grant an interdict prohibiting the DHA from arresting, deporting and/or detaining these two applicants, for the same reasons which underpinned the dismissal of the other applicants' cases.

In our view, this judgment provides a valuable lesson for practitioners and potential applicants for asylum permits when contemplating approaching the courts on an urgent basis. This is particularly because the courts are increasingly reiterating the requirement for applicants to exhaust all internal remedies first before approaching the courts for relief, especially when done so on an urgent basis. This requirement would apply not only to matters involving the state but can arguably be extended to all matters where applicable internal statutory remedies have already been legislated for.

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