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

Case No.: 3759/2011
Date Heard: 9 February 2012
Date Delivered: 16-02-2012

In the matter between:

SOMALI ASSOCIATION FOR SOUTH AFRICA EASTERN CAPE (SASA) EC	First Applicant
PROJECT FOR CONFLICT RESOLUTION AND DEVELOPMENT (PCRD)	Second Applicant

And

MINISTER OF HOME AFFAIRS	First Respondent
DIRECTOR GENERAL: DEPARTMENT OF HOME AFFAIRS	Second Respondent
CHIEF DIRECTOR: ASYLUM SEEKER MANAGEMENT	Third Respondent
STANDING COMMITTEE FOR REFUGEE AFFAIRS	Fourth Respondent
MINISTER OF PUBLIC WORKS	Fifth Respondent

JUDGMENT

PICKERING J:

This application, launched by the Somali Association of South Africa, Eastern Cape, (first applicant) and the Project for Conflict Resolution and Development (second applicant), arises out of an alleged decision of the Minister of Home Affairs (first respondent), Director-General: Department of Home Affairs (second respondent) and the Chief Director of the Asylum Management Directorate (third respondent) to close the Port Elizabeth Refugee Reception Office without opening a suitable alternative Refugee Reception Office ("Reception Office") within the area of the Nelson Mandela Bay Municipality.

The application was brought in two parts. In relation to Part A an order was granted by consent by Beshe J on 13 December 2011 in the following terms:

"*1.1 The First to Third Respondents are directed to ensure that, by*

Wednesday 14 December 2011, they provide at the interim annex refugee office, the full services of a refugee reception office to all holders of permits issued in terms of sections 22 and 24 of the Refugees Act 130 of 1998;

2. The First to Third Respondents are further directed not to impose fines or other sanctions in terms of section 37 of the Refugees Act 130 of 1998 for the non-renewal of permits which expired during the period 30 November 2011 to 14 December 2011;

1.3 The First to Third Respondents are further directed to publicise in a local newspaper as well as by way of notice immediately posted at the previous Port Elizabeth Refugee Reception Office of the address of the interim annex refugee office;

2. It is recorded that the parties are agreed that Part B of this application is urgent."

In Part B of the application the applicants seek the following final relief:

"1. The decision of the First to Third Respondents to close the Port Elizabeth Refugee Reception Office without having in place an alternative Refugee Reception Office within the Nelson Mandela Bay Municipality is declared to be unlawful and is reviewed and set aside.

2. The First to Third Respondents are directed to ensure that:

2.1 A Refugee Reception Office remains open and fully functional within the Nelson Mandela Bay Municipality, either at the existing premises of the Port Elizabeth Refugee Reception Office or at some suitable alternative premises;

2.2 The Refugee Reception Office referred to in paragraph 2.1

provides all the services contemplated by the Refugees Act 130 of 1998, including providing services to existing asylum seekers and recognised refugees and accepting and adjudicating new applications for asylum in terms of section 21 and 22 of the Refugees Act 130 of 1998.

3. *The costs of Part B of this application are to be paid by any party opposing the relief sought in Part B."*

Reception Offices are established in terms of section 8 of the Refugees Act 130 of 1998 ("the Act"). Section 8(1) provides as follows:

"(1) The Director-General may establish as many Refugee Reception Offices in the Republic as he or she, after consultation with the Standing Committee, regards as necessary for the purposes of this Act.

(2) Each Refugee Reception Office must consist of at least one Refugee Reception Officer and one Refugee Status Determination Officer who must-

(a) be officers of the Department, designated by the Director-General for a term of office determined by the Director-General; and

(b) have such qualifications, experience and knowledge of refugee matters as makes them capable of performing their functions.

(3) The Director-General must, with the approval of the Standing Committee, ensure that each officer appointed under this section receives the additional training necessary to enable such officer to perform his or her functions properly."

The Standing Committee for Refugee Affairs is itself established in terms of section 9

of the Act. In terms of section 10 of the Act the chairperson and members of the Standing Committee are appointed with due regard to their experience, qualifications and expertise, as well as their ability to perform the functions of their office properly. The Standing Committee may, in terms of s 11(b) regulate and supervise the work of the Refugee Reception Offices and must, in terms of s 11(d) advise the Minister or Director-General on any matter referred to it by the Minister or Director-General.

It is not in dispute that Refugee Reception Offices form a critical part of the administrative machinery under the Refugees Act and the Refugee Regulations. In terms of s 21(1) an application by a person for asylum must be made in person at any Refugee Reception Office. Section 22 provides that the Refugee Reception Officer must, pending the outcome of an application in terms of section 21(1), issue to the applicant an asylum seeker permit allowing the applicant to sojourn in the Republic temporarily subject to certain conditions.

Where a person is recognised as a refugee, his refugee status must be renewed every two years, in terms of regulation 15. In order to effect such renewal the refugee must present him or herself at the Refugee Reception Office. Until an asylum seeker permit has been issued to him he is and remains an illegal foreigner. See Kiliko and Others v The Minister of Home Affairs and Others 2006 (4) SA 114 (C) at para [27]; Arse v The Minister of Home Affairs and Others 2010 (7) BCLR 640 (SCA) at para [22].

The importance of Refugee Reception Offices in the scheme of the Act cannot therefore be underestimated.

It is common cause that, pursuant to the statutory obligation to establish Refugee Reception Offices in South Africa, five such offices were established in Pretoria, Durban, Cape Town, Johannesburg and Port Elizabeth respectively.

The Port Elizabeth Refugee Reception Office, which was established in 2000, was located at 5 Sidon Street, North End. It is common cause that the Port Elizabeth Office served a very large number of individuals. During the period May 2010 to March 2011 for instance, it provided assistance to approximately 22 000 persons.

The large number of persons visiting the office gave rise, however, to complaints from business persons and residents working or living in proximity thereto. This led in turn to the launching of an application in the High Court, Port Elizabeth by certain business owners for an order that the Minister of Home Affairs and the landlord of the premises occupied by the Reception Office, take steps to abate the nuisance created by persons visiting the office. An order to this effect was duly granted by Jones J on 2 November 2009 (see Stuart James Graham NO and Others v The Minister of Home Affairs and Others, Eastern Cape High Court, Port Elizabeth, case no. 2016/2008).

Despite this, the problems continued and, during June 2011, six months prior to the expiry by effluxion of time of the lease agreement in November 2011, the landlord advised the Department of Home Affairs that he would not agree to a renewal thereof.

According to Mr Apleni, the second respondent herein, the process of securing suitable alternative premises for the Reception Office promised to be a protracted, and difficult, if not impossible, task. According to applicants, however, various stakeholders were advised as early as June 2011 by Mr Lucas, the Manager of the Port Elizabeth Reception Office, that three potential sites for the relocation of the Office in Port Elizabeth had been identified.

Be that as it may, the second respondent, on 7 October 2011, addressed a letter to, *inter alia*, the various Refugee Reception Offices, the Refugee Appeal Board and the Standing Committee for Refugee Affairs, officially notifying them that the Port Elizabeth Refugee Reception Office would be "*permanently closed as from 30 November 2011*". This letter (Annexure MJM10) continues as follows:

> *"The Department came to this decision after ongoing dissatisfaction expressed by local business community. Further consideration was also the fact that Port Elizabeth is not located strategically to assist people who want to apply for asylum. As a result, the registration of new intakes for asylum (new applications) will be discontinued with effect from Friday 21 October 2011. Existing applications will be transferred to a nearby*

office to assist applicants in finalising their asylum claims."

It is common cause that in an attempt to resolve the situation, a meeting was arranged on 20 October 2011 with Ms Lusu, the Acting Provincial Manager for the Department of Home Affairs in the Eastern Cape, and a number of stakeholders, including the two applicants. At this meeting Ms Lusu informed those present that the Office was indeed scheduled to close permanently on 30 November 2011 and that no new asylum applications would be processed with effect from 21 October 2011. It was at this meeting that the applicants were provided with a copy of the letter by the second respondent dated 7 October 2011 (Annexure MJM10). Ms Lusu, however, undertook to discuss the concerns raised by the applicants with second respondent the following day. On the same day, 20 October 2011, a notice was posted on the gate outside the reception office stating:-

> *"Due to the closure of this office no newcomers will be assisted after 21 October 2011. Kindly report to your nearest office. We apologise for any inconvenience."*

On 21 October 2011 Ms Lusu informed the applicants that the decision to close the Office permanently and to cease providing services to new applicants for asylum was "*cast in stone*" and would take effect that day.

It is the decision of the second respondent as encapsulated in the letter of 7 October 2011, to close the Reception Office, which is at issue in this application.

Applicants aver that the decision to close the Reception Office falls to be declared unlawful and to be reviewed and set aside on any or all of the following procedural and substantive grounds, namely:

(a) the decision was taken without consultation with the Standing Committee for Refugee Affairs
(b) There was no proper public consultation or opportunity for representations afforded to those affected by the decision; and
(c) the decision was irrational, unreasonable and based on irrelevant

considerations.

Second respondent has answered these contentions at considerable length.

He reiterates the factors which informed his decision such as the fact that the lease of the premises was due to expire on 30 November 2011 and the difficulty of obtaining suitable alternative premises; the fact that the Reception Office had been the subject of litigation instituted by business owners in the nearby vicinity for abatement of the nuisance caused at the premises; the fact that the Department of Home Affairs was in the process of considering the desirability of relocating all the Refugee Reception Offices to ports of entry with regard to which a "*feasibility study*" was being conducted, albeit that no information was forthcoming as to when such feasibility study would be completed; and the fact that the Port Elizabeth Reception Office was not "strategically located" in as much as the majority of applicants processed by that office were people whose entry into the country were persons coming from the North of Africa, making Port Elizabeth and Cape Town the farthest points of service for them.

It is these reasons which applicants attack as being irrational and unreasonable as set out under ground (c) above.

In the view that I take of the matter it is not necessary to deal any further with these averments. In my view the basis upon which the decision is assailed as set out in ground (a) above, is decisive of the matter.

Mr Semenya, who with Ms Manaka appeared for the first to third respondents (there being no appearance for the remaining respondents), submitted that the decision to close the asylum services at the Port Elizabeth Reception Office to "*newcomers*" did not amount to the disestablishment of that Reception Office. In this regard he stressed the averments made by second respondent to the effect that the Reception Office had been closed to new asylum applicants only and that measures had been put in place to assist those persons with existing applications to "*process such applications to their finality from a different regional office*". Mr Semenya submitted that the second respondent was therefore correct in averring that the decision to stop

rendering services to the applicants did not amount to the disestablishment of a Refugee Reception Office especially in as much as the annex to the Regional Office was fully equipped and functional insofar as it was rendering services to existing asylum applications.

I cannot agree with these submissions. In my view second respondent's averment to the effect that the Reception Office has not been permanently disestablished is little short of disingenuous. In this regard the provisions of section 21 and 22 of the Act bear repeating.

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.*"

Section 22 provides:

> *"(1) The Refugee Reception Officer 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 … ."*

It is clear from these provisions that one of the core functions of a Refugee Reception Office is to provide the necessary administrative machinery to enable new applicants to apply for asylum. If that core function is removed and the Reception Office closed to newcomers then, whatever the remaining rump of the Office may be, it is clearly not a Refugee Reception Office in terms of the Act. In the circumstances there is no other conclusion to draw but that the Port Elizabeth Refugee Reception Office has been permanently closed and thereby disestablished.

Mr Budlender, who with Mr van Garderen appeared for the applicants, submitted that it was a necessary implication from the power afforded to second respondent in terms of section 8(1) of the Act to establish as many Refugee Reception Offices as

he, after consultation with the Standing Committee regarded as necessary, that any decision by the second respondent to close or "to disestablish" an existing Reception Office could also only be taken after consultation with the Standing Committee.

This submission is clearly correct and Mr. Semenya accepted that this was so.

As a result of the closure of the Port Elizabeth Reception Office there is now one less Refugee Reception Office in the Republic than was considered necessary at the time of its establishment in 2000. Clearly at that time the then Director-General, after consultation with the Standing Committee, considered that a Refugee Reception Office in Port Elizabeth was necessary and that it was strategically located.

It is disquieting that the second respondent did not see fit to consult with the Standing Committee before taking the decision to close the Reception Office. As set out above, the chairperson and members of the Standing Committee are appointed in terms of section 10 of the Act with due regard to their experience, qualifications and expertise. They must, in terms of section 11(d) advise the second respondent on any matter he may refer to it. As was submitted by Mr Budlender, with reference to *Premier, Western Cape v The President of the Republic of South Africa and Another* 1999 (3) SA 657 (CC) at para [85], fn 94; and *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147 (CC) at para [63], although the second respondent is not bound to follow the views or advice of the Standing Committee he is obliged to consider their views seriously and in good faith before taking a decision. The Legislature required the second respondent to consult with the Standing Committee as to how many Reception Offices were necessary in the Republic and where they were to be situated. Equally, second respondent is required to consult with the Standing Committee should he be contemplating the closure of one of the Reception Offices with all the negative and prejudicial consequences to vulnerable asylum seekers which would ensue therefrom. As to the particularly vulnerable position of asylum seekers see: Union of Refugee Women v Director: Private Security Industry Regulatory Authority and Others 2007 (CC) SA 395 (CC) at 406G – 407E.

Mr Semenya submitted further, however, that in the event of it being found that the

second respondent was obliged to have consulted with the Standing Committee, such failure to consult has not adversely affected the rights of asylum seekers whose claims await finalisation because an alternative Office has been provided to deal with and finalise those claims. There is accordingly no prejudice to them. He submits therefore that the impugned decision does not constitute administrative action and is not therefore subject to review under the Promotion of Administrative Justice Act 3 of 2000.

It is not necessary to determine whether or not the decision did constitute administrative action because it is abundantly clear that in exercising his powers the second respondent is constrained by the principle of legality.

In *President of the Republic of South Africa and Others v The South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) the following was stated at p. 148:

> "*It does not follow, of course, that, because the President's conduct in exercising the power conferred upon him by s 84(2)(f) does not constitute administrative action, there are no constraints upon it. The constraints upon the President when exercising powers under s 84(2) are clear: …. the exercise of the powers must not infringe any provision of the Bill of Rights; the exercise of the powers is also clearly constrained by the principle of legality and, as is implicit in the Constitution, the President must act in good faith and must not misconstrue the powers. These are significant constraints upon the exercise of the President's power. They arise from provisions of the Constitution other than the administrative justice clause."*

In all the circumstances I am satisfied that the decision taken by the second respondent to close the Port Elizabeth Refugee Reception Office without having first consulted with the Standing Committee for Refugee Affairs is unlawful and falls to be set aside.

Mr. Budlender, with reference to S v Jordaan 2006 (6) SA 642 (CC) urged me to deal also with grounds (b) and (c) as set out above. In my view, however, where the

closure of the Reception Office was so patently unlawful on ground (a) above it is neither necessary nor desirable that I should do so.

Counsel submitted that in the event of the application succeeding I should remit the matter to the second respondent for redetermination. In my view, however, such an order would not be appropriate. It is for the second respondent to decide whether or not he wishes to take the matter further, bearing in mind, if he does so, what has been stated in this judgment.

Finally, lest there be any misunderstanding on the part of the respondents as to the effect of the order declaring the closure to be unlawful I intend to add a further order thereto in terms of which they will be ordered to re-open the Reception Office forthwith.

The following order is made:

1. The decision of the First to Third Respondents to close the Port Elizabeth Refugee Reception Office without having in place an alternative Refugee Reception Office within the Nelson Mandela Bay Municipality is declared to be unlawful and is reviewed and set aside.

2. The first to third respondents are directed forthwith to open and maintain a fully functional Refugee Reception Office to provide services to asylum-seekers and refugees, including new applicants for asylum, in the Nelson Mandela Bay Municipality.

3. The first to third respondents are jointly and severally directed to pay the applicants' costs, including the costs of two counsel.

_____

J.D. PICKERING
JUDGE OF THE HIGH COURT

Appearing on behalf of Applicant: Adv. S. Budlender and Adv. J. Van Garderen
Instructed by: Lawyers for Human Rights, Johannesburg Law Clinic
c/o Refugee Rights Centre, Nelson Mandela Metropolitan University
Mr. Linto Harmse

Appearing on behalf of Respondents: Adv. A. Semenya S.C. and Adv. N. Manaka
Instructed by: State Attorneys Offices, Port Elizabeth.