THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case no: 831/2013

Reportable

In the matter between:

MINISTER OF HOME AFFAIRS	**FIRST APPELLANT**
DIRECTOR-GENERAL: DEPARTMENT OF HOME AFFAIRS	**SECOND APPELLANT**
CHIEF DIRECTOR ASYLUM SEEKER MANAGEMENT	**THIRD APPELLANT**
STANDING COMMITTEE FOR REFUGEE AFFAIRS	**FOURTH APPELLANT**
MINISTER OF PUBLIC WORKS	**FIFTH APPELLANT**

and

SOMALI ASSOCIATION OF SOUTH AFRICA EASTERN CAPE (SASA EC)	**FIRST RESPONDENT**
PROJECT FOR CONFLICT RESOLUTION AND DEVELOPMENT	**SECOND RESPONDENT**

Neutral citation: *Minister of Home Affairs & others v Somali Association of South Africa & another* (831/13) [2015] ZASCA 35 (25 March 2015)

Bench: Ponnan, Shongwe and Majiedt JJA and Schoeman and Meyer AJJA

Heard: **16 February 2015**

Delivered: **25 March 2015**

Summary: Refugees Act 130 of 1998 – closure of refugee reception office – decision challenged for want of consultation with interested parties and rationality – remedy – authorities ignoring previous court orders.

ORDER

On appeal from: Eastern Cape High Court, Port Elizabeth (Eksteen J, sitting as court of first instance)

Save for setting aside paragraphs (2) and (3) of the order of the court below, and substituting them with the orders that follow, the appeal is dismissed with costs, to be paid by the first to third appellants jointly and severally, and to include the costs of two counsel. Paragraphs (2) and (3) are substituted with the following:

'(2.1) The first to third respondents are directed to restore by 1 July 2015 the refugee reception services to the Port Elizabeth Refugee Reception Centre such that new applicants for asylum will be able to make applications in terms of s 21 of the Refugees Act 130 of 1998 and, if they qualify, be issued with permits in terms of s 22 of the said Act.

(2.2) The second respondent, the Director General of the Department of Home Affairs, shall report in writing to the applicants not later than 15 April 2015 and, thereafter, on or before the 15th day of each succeeding month as to what steps have been taken and what progress has been made to ensure compliance with the aforesaid order.

(3) The parties are granted leave to apply upon the same papers, supplemented insofar as they consider that to be necessary, for further relief.'

JUDGMENT

Ponnan JA (Shongwe, Majiedt JJA and Schoeman and Meyer AJJA concurring):

[1] In his famous 'I am an African' speech then Deputy President Thabo Mbeki paid tribute to his ancestors along with migrants from Asia, Europe and the rest of Africa and thanked them for teaching him that 'we could both be at home and be foreign' and that 'freedom was the necessary condition for . . . human existence'. [1] And yet, as the South African Human Rights Commission observed:[2]

'If a society's respect for the basic humanity of its people can best be measured by its treatment of the most vulnerable in its midst, then the treatment of suspected illegal immigrants . . . offers a disturbing testament to the great distance South Africa must still travel to build a national culture of human rights.'

[2] Many migrants, especially refugees and asylum seekers (who represent a small but significant portion of those who, for whatever reason, are attracted to South Africa) experience grave difficulty in legalising their stay in this country. The condition of being a refugee connotes a 'special vulnerability as refugees by definition are persons in flight from the threat of serious human rights abuse'.[3] Hannah Arendt states that the 'fundamental deprivation of human rights is manifested first and above all in the deprivation of a place in the world (a political space) which makes opinions significant and actions effective'.[4] That especial vulnerability is recognised in our legislation governing the status of refugees – the Refugees Act 130 of 1998 (the Act). Its passage represented a significant break with a past characterised by measures

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[1] T Mbeki 'I am an African' address to the Constitutional Assembly on the occasion of the adoption of the new Constitution of the Republic of South Africa on 8 May 1996 at Cape Town.

[2] South African Human Rights Commission *Report into the arrest and detention of suspected undocumented migrants* (1999) at 5.

[3] *Union of Refugee Women & others v Director: Private Security Industry Regulatory Authority & others* 2007 (4) SA 395 (CC) para 29. See also J Hathaway (ed) *Reconceiving International Refugee Law* (1997) at 8; and L B Landau, K Ramjathan-Keogh and G Singh *Xenophobia in South Africa and problems related to it*, Forced Migration Working Paper Series 13 (2004) at 34, available at http://migration.wits.ac.za, accessed on 12 May 2015.

[4] H Arendt *The origins of totalitarianism* at 296.

designed to control the entry and presence of what were described as 'aliens' in this country and proclaims instead a more progressive commitment to refugee protection in accordance with international standards. According to s 3 of the Act, which draws on international instruments such as the 1951 United Nations Convention Relating to the Status of Refugees and the 1969 Organisation of African Unity Convention Governing Specific Aspects of Refugee Problems in Africa, a person qualifies as a refugee 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, or, not having a nationality and being outside the 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 his 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).'

I may add that in addition to the various formal legal obligations, South Africa has also committed itself to uphold the Declaration adopted at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance held in Durban in 2001. The Conference recognised the urgent need to translate the objectives of the Durban Declaration into a practical and workable plan.[5]

[3] But not every person who flees his or her home in the circumstances referred to in s 3 of the Act will obtain asylum in this country. It is thus important to understand how asylum is sought and comes to be conferred in terms of our law. According to s 21 of the Act, every person who wishes to obtain asylum must apply in person to a Refugee Reception Officer (the Officer) at any Refugee Reception Office (RRO). To

[5] The following points of the Declaration are especially relevant to vulnerable migrants and the eradication of xenophobia: principle 53: 'We underline the urgency of addressing the root causes of displacement and of finding durable solutions for refugees and displaced persons, in particular voluntary return in safety and dignity to the countries and local integration, when and where appropriate and feasible'; and, principle 54: 'We affirm our commitment to respect and implement humanitarian obligations relating to the protection of refugees, asylum-seekers, returnees and internally displaced persons, and note in this regard the importance of international solidarity, burden sharing and international cooperation to share responsibility for the protection of refugees, reaffirming that the 1951 Convention relating to the Status of Refugees and its 1967 Protocol remain the foundation of the international refugee regime and recognizing the importance of their full application by States parties'.

that end, the Officer must ensure that the application form is properly completed and where necessary assist the applicant in that regard. The Officer may conduct such enquiry as is deemed necessary in order to verify the information furnished by the applicant and, thereafter submit the application together with such information as may have been obtained to a Refugee Status Determination Officer (RSDO). Pending the outcome of that application the Officer must, in terms of s 22 of the Act, issue such applicant with an asylum seeker permit allowing him or her to sojourn in the Republic temporarily. Until the issuance of a s 22 permit (also described as an asylum seeker permit), such person is considered an illegal foreigner and subject to apprehension, detention and deportation in terms of the Immigration Act 13 of 2002. Importantly, in terms of the Immigration Act, no person may employ (s 38), or save for humanitarian assistance and aid, abet, assist, enable or in any manner help an illegal foreigner (s 42). An asylum seeker permit is thus essential to enable an asylum seeker to live, work and function in South Africa prior to the determination of his or her status.

[4] After having made an application for asylum, an asylum seeker will usually be obliged to report in person from time to time to an RRO, inter alia, to: (a) review his or her asylum seeker permit; (b) be interviewed by the RSDO (s 24(1) and (2)); (c) be informed of the outcome of the application for refugee status (s 24(4)); (d) if necessary, lodge an appeal against a rejection of the application to the Refugee Appeal Board (RAB) (s 26(1)); (e) attend a hearing of the RAB (s 26(3)); and (f) collect the decision of the RAB. Once a person satisfies the relevant authorities that he or she qualifies for refugee status, asylum will be granted and he or she is deemed a refugee for the purposes of the Act. Even then, such person's refugee status must be renewed every two years. For that to happen he or she would be obliged to call in person on an RRO. The asylum application process is invariably a protracted one. Timely access to an RRO is thus critical not just for asylum seekers to legalise their stay in this country, but also for the effective protection of their rights. In terms of s 27 of the Act, a refugee has a range of rights, including full legal protection, the right to remain in the Republic and the entitlement to: (a) apply for an immigration permit, an identity document and a travel document; and (b) the same basic health services and primary education which

inhabitants of the Republic receive from time to time. In practice, however, there are usually significant obstacles in the path of asylum seekers and refugees.[6]

[5] As at the beginning of 2011 there were six RROs in the country, namely Johannesburg, Pretoria, Cape Town, Durban, Musina and Port Elizabeth. Since then three of those six – Johannesburg, Port Elizabeth and Cape Town – have been closed either completely or to new applications by the Department of Home Affairs (DHA). Litigation challenging the lawfulness of each of those decisions followed. The Johannesburg High Court (per Legodi J) declared the decision not to re-establish an RRO in Johannesburg following upon the closure of the one located at Crown Mines to be 'procedurally unfair and invalid' and remitted the matter to the Director-General of the DHA (the DG) for 'his or her reconsideration on the suitability or otherwise of establishing such an office in Johannesburg'.

[6] On 16 February 2012 and at the instance of the Somali Association of South Africa Eastern Cape and the Project for Conflict Resolution and Development (the respondents) the Grahamstown High Court (per Pickering J) reviewed and set aside the decision to close the Port Elizabeth RRO (PE RRO) to new applications 'without having in place an alternative RRO within the Nelson Mandela Bay Municipality'. Pickering J directed, inter alia, the Minister of Home Affairs (the Minister), the DG and the Chief Director: Asylum Seeker Management (the Chief Director) (collectively referred as the relevant authorities) to open and maintain a fully functional RRO 'to provide services to asylum seekers and refugees including new applicants for asylum in the Nelson Mandela Bay Municipality'. The learned judge found the decision to be unlawful by reason of the failure on the part of the DG to consult with the Standing

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[6] A report by the Wits Forced Migration Studies Programme with Lawyers for Human Rights states:
'Our research into practices at the Johannesburg RRO confirms longstanding accusations of administrative incapacity, discrimination, exploitation, and violence. Long queues, unprotected from the weather, [are but the first indignity awaiting asylum seekers] . . . extended stays in unsanitary conditions, exploitation from private security guards, and extortion by networks involving translators, guards, and Home Affairs officials. Those who gain access to the RRO—often upon payment—face administrative delays, staff that are overworked or under-motivated, and further exploitation from translators and officials. For these reasons, acquiring status as either an asylum seeker or refugee typically requires stamina, determination, and cash. Those unable to meet these requirements—including the elderly, infirm, poor, and other vulnerable groups—are effectively denied the protections to which they are legally entitled.' See L B Landau *Migration trend, management, & governance challenges: Testimony prepared for the ad hoc Committee on Democracy & Good Political Governance* (2005) at 9-10. See also *Kiliko & others v Minister of Home Affairs & others* 2006 (4) SA 114 (C).

Committee for Refugee Affairs (SCRA) established in terms of Section 9 of the Act. Pickering J accordingly declined to decide the other grounds of review sought to be advanced by the respondents. On 14 May 2012 the learned judge refused leave to the relevant authorities to appeal and directed, in terms of rule 49(11) of the Uniform Rules, that pending the outcome of any further appeal, his order that a fully functional RRO be opened and maintained, not be suspended. On 28 August 2012 the petition by the relevant authorities seeking leave to appeal to this court was dismissed. That notwithstanding and despite the order of Pickering J, the PE RRO has remained closed to new applicants.

[7] On 29 June 2012 the Cape Town RRO (the CT RRO) was closed to new applicants for asylum. On 25 July 2012 the Cape High Court (per Davis J) granted an interim order, inter alia, directing the relevant authorities to ensure that a RRO remains open and fully functional within the Cape Town Metropolitan Municipality at which new applicants for asylum can make applications and be issued with section 22 permits. And like Pickering J, he too ordered that, notwithstanding any further application for leave to appeal and appeal, and pending the outcome of any such appeal, his order shall not be suspended. In due course the review application succeeded before Rogers J who declared the decision to close the CT RRO to new applicants for asylum unlawful, and directed the relevant authorities to ensure that an RRO is open and fully functional within the Cape Town Metropolitan Municipality. This Court dismissed an appeal by the relevant authorities against the order reviewing and setting aside the decision to close the CT RRO. It declined, however, to endorse the conclusion by the high court compelling them to reopen the CT RRO (*Minister of Home Affairs and others v Scalabrini Centre and others* 2013 (6) SA 421 (SCA) paras 73-79).

[8] According to s 8 of the Act, the DG may establish as many RROs in the Republic as he or she, after consultation with SCRA, regards as necessary for the purposes of the Act. It thus followed, as was accepted by the relevant authorities before Pickering J, that the DG would likewise have been under an obligation to consult with SCRA when deciding to close those offices. Indeed, in seeking leave to appeal from Pickering J, the relevant authorities did not contest the finding that the decision to close the PE RRO was unlawful. Rather, it was only the order directing that a fully functional RRO be opened and maintained that was sought to be assailed.

[9] During June 2012 and following upon the judgment of Pickering J, the respondents' attorneys, Lawyers for Human Rights (LHR), addressed two letters to the State Attorney regarding the evident failure on the part of the relevant authorities to comply with the order of the learned judge. The response those letters elicited was 'we still await instructions from client in response to your concerns'. On 31 August 2012 LHR once again wrote to various officials in the DHA, as also the State Attorney:

'1. We are attaching the Order of Court handed down by the Supreme Court of Appeal on Tuesday 28 August 2012 dismissing leave to appeal the judgment of Pickering, J. of the Eastern Cape High Court regarding the closure of the Port Elizabeth Refugee Reception Office. A copy of the SCA order of court is attached hereto as Annexure "A". . . .

2. We trust that the Department of Home Affairs will now take immediate steps to comply with the order of Pickering J. Kindly inform us of the steps which the Department has taken and will take to implement the order of the High Court.'

When that letter failed to elicit a response LHR once again wrote on 6 September 2012:

'2. The Department has not responded with what steps it intends to take to comply with the judgment of Pickering J of the Eastern Cape High Court regarding the Port Elizabeth Refugee Reception Office (PE RRO).

3. We require a response from you by no later than the end of business on Friday 7 September 2012 failing which we will have no option but to assume that you have no intention of complying with the order of court and are therefore in contempt of that order.

4. Our clients reserve the right to approach the High Court for appropriate relief, including an appropriate order as to the costs of that application.'

That letter as well failed to elicit a response. Instead, on 16 September 2012 the Provincial Manager: Eastern Cape DHA, Mr Mabulu, notified 'various stakeholders' by e-mail:

'As you are aware, the failure on our part, as the Department, to consult with the Standing Committee for Refugees ("SCRA"), in respect of the compelling circumstances to close the PE RRO, inadvertently, invited an adverse Court ruling against our irrevocable decision.

For this reason, the Director-General, Mr. Mkhuseli Apleni, then, undertook to meet with SCRA, on 30 May 2012, at which the various challenges, relating to the nuisance caused to the surrounding Business community, and leading to the Eviction Orders, and the refusal of the Landlord to renew the Lease Agreement were discussed. All of this was discussed, it must be noted, within the context of the many Court challenges against further operations of the PE RRO in the area, under question.

SCRA, having satisfied oneself with the casual factors of the compelling closure, then, consented. For this reason, kindly, be informed that the PE RRO is closed, and, all, the arrangements that were made to assist Asylum Seekers, and recognised Refugees shall remain in place, until the finalization of, all, outstanding adjudications.'

[10] LHR sought, in the light of that email, to press the relevant authorities to comply with the order of Pickering J and accordingly wrote on 17 September 2012:

'2. It appears clear from the e-mail that the Department is intent on persisting with its refusal to reopen the Port Elizabeth Refugee Reception Office to new applicants, despite this being required by the order of the Eastern Cape High Court. It therefore appears that the Minister, the Director-General, and the Chief Director: Asylum Management are in contempt of court.'

Finally, on 21 September 2012 the DG, Mr Mkuseli Apleni, responded:

'I am responding on behalf of all the departmental addressees.

As you know, the judgment of the Court in this matter was based on the fact that the provisions of section 8(1) of the Refugees Act 130 of 1998 were not complied with when the decision to close the Port Elizabeth Refugee Reception Office ("PERRO") was taken.

That error has now been rectified. I have, *inter alia*, consulted with the Standing Committee for Refugee Affairs in terms of the said section 8(1) and taken a new decision to close the PERRO.

In the circumstances, the court order of 16 February 2012 has been overtaken by events. As you know, outstanding applications for asylum are still being attended to.

The Minister, the Department, officials of the Department and I are therefore not in contempt of court.

Trusting that the above explanation deals with your enquiry and concerns.'

[11] The disclosure that a new decision had been taken, prompted the respondents, to once again approach the Eastern Cape High Court. Their application succeeded before Eksteen J, who, on 20 June 2013, issued the following order:

'1. The second respondent's decision, taken on 30 May 2012, to close the Port Elizabeth Refugee Reception Office to new applicants for asylum is declared unlawful and is set aside.

2. The first to third respondents are directed to ensure that by 1 October 2013 a Refugee Reception Office is open and fully functional within the Nelson Mandela Metropolitan Municipality at which new applicants for asylum can make applications for asylum in terms of section 21 of the Refugees Act 130 of 1998 and be issued with permits in terms of section 22 of the said Act.

3. During the week commencing Monday 24 June 2013, and again during the week commencing Monday 22 July 2013, the second respondent or his duly appointed representative shall furnish a written report to the applicants' attorneys summarising the steps taken by the Department of Home Affairs up to the date of the report to give effect to para (2) of this order; giving the second respondent's assessment as to whether he expects there to be compliance with the said para (2) by 1 October 2013; and, if the second respondent's assessment is that there will not be compliance by that date, giving the second respondent's best estimate of the date by which there will be compliance.'

Eksteen J granted leave to the relevant authorities to appeal to this Court against his judgment and order. SCRA and the Minister of Public Works were also cited as the fourth and fifth respondents respectively but no relief was sought against them. They accordingly took no part in the proceedings either in the court below or in this Court.

[12] According to the DG, Mr Mkhuseli Apleni:

'4.3 In the Department's view, the most operationally strategic and convenient places to locate RROs are points of entry utilised by those entering the country. Port Elizabeth is not such a point of entry. The records held at the PERRO clearly indicate that those applying for asylum in Port Elizabeth hail from China, Pakistan, Bangladesh, Somalia, Ethiopia, and so forth. None of these applicants use Port Elizabeth as a port of entry.

. . .

97.6 This strategy underlies the decision to establish RROs as close as possible to ports of entry, whilst still giving applicants for asylum unrestricted rights of travel and residence in any part of the country. We came to the conclusion that establishing RROs nearer ports of entry would go a long way to achieving these objectives.'

Mr Apleni added:

'96.3 I admit that the exercise of the power afforded in section 8(1) of the Refugees Act is constrained by the principle of legality. I have submitted in various parts of this affidavit that consequent on the court order of 16 February 2012, I remedied the failure to act in accordance with the terms of section 8(1) of the Refugees Act. I have now taken a new, rational and lawful decision as required in law, to close the PERRO.'

Significantly, although there are several similar references in the rather detailed affidavit deposed to by him, nowhere does he state precisely when the new decision was taken.

[13] In a confirmatory affidavit, Mr Karl Sloth-Nielsen, the chairperson of SCRA, stated:

'18. Having discussed these matters and related matters as is apparent from the Minutes of that meeting, we agreed with the Director-General's reasoning. We advised that we would not take issue with the decision he sought to take in that regard. It was only once our discussions were concluded that the Director-General took a fresh decision to close the PE RRO. I left that meeting knowing what the new decision was . . .'

And yet, somewhat surprisingly given the earlier correspondence from LHR urging compliance with the order of Pickering J, the first intimation that a new decision had in fact been taken was when Mr Apleni wrote to LHR some four months later on 21 September 2012. In an affidavit filed with this court in support of the application for leave to appeal against the judgment of Pickering J, Mr Apleni stated:

'For completeness' sake and in the interests of openness, I wish to disclose that I have since consulted with the Standing Committee, who have approved of the closure of, *inter alia*, the Port Elizabeth Refugee Reception Office.'

Mr Apleni deposed to that affidavit on 4 June 2012. If indeed, as Mr Sloth-Nielsen suggests, a new decision had been taken at the meeting with SCRA on 30 May 2012, Mr Apleni's pointed failure to disclose that to this Court was the very antithesis of his professed assertions of 'completeness' and 'openness'. For, that a new decision had been taken would, in my view, have rendered academic the application for leave to appeal to this Court. That could hardly have been lost on Mr Apleni. In my view he was obliged to disclose to this Court that he had already taken a new decision and disingenuously failed to do so. We were however urged by counsel for the relevant authorities to approach the matter on the basis that the new decision, the subject of this appeal, was taken on 30 May 2012.

[14] The respondents accepted that in the light of this Court's judgment in *Scalabrini* we would be bound to find that the DG's decision constitutes executive action. And it also came to be accepted on behalf of the relevant authorities that the assessment of the number and location of RROs for the purposes of processing applications by asylum seekers and refugees is constrained by the principle of legality. The broad thrust of the respondents' case is that the decision of the DG fell short of constitutional legality for want of: (a) consultation with interested parties; and, (b) rationality. Each of those contentions will be considered in turn.

[15] If Mr Apleni's new decision was indeed taken on 30 May 2012, as urged upon us, then there was (as counsel for the relevant authorities accepted) no consultation with interested parties prior to that decision being taken. The closest that one comes to any reference to a consultation is the following in Mr Apleni's affidavit:

'99.4 Similarly, once the consultation with the SCRA had taken place, the Department thought it appropriate to convene a meeting with interested parties and explain how applications for asylum would be dealt with in the future. This meeting was held on 26 July 2012 as a courtesy to those members of the public who wished to receive an update on matters affecting the PERRO. . .'

But that meeting, even if it could pass as a 'consultation'[7] in the true sense of that word, hardly assists the relevant authorities because it occurred after 30 May 2012. There was, however, a further string to counsel's bow. It was this: fresh consultations were unnecessary inasmuch as Mr Apleni had already consulted with interested parties prior to him taking his first decision to close the PE RRO. On the assumption that such a proposition is a tenable one (the correctness of which appears to me to be doubtful but which I need not here decide) I do not believe that it is supported by the facts. Mr Michael Collin Bendle, a director of the second respondent, the Project for Conflict Resolution and Development, stated:

'72. In June 2011, a meeting of stakeholders was called by employees of the second respondent working at the PE RRO, which meeting I attended. We were informed that the lease of the PE RRO premises was set to expire on 30 November 2011 and that the Department was in the process of finding alternative office space. The attendees at the meeting were advised of three potential sites to which the PE RRO may be moved. We were invited to visit the sites and see if they were suitable for a refugee reception office.

73. No mention was made at the time that there would be a permanent closure of refugee services in Port Elizabeth. In addition, no mention was made of the Department's intention to cease services for new applicants for asylum at the new office.

74. We were invited to a meeting on 17 October 2011 but the meeting was cancelled by a Mr. Baxter who works at the refugee reception office. We were not told what the meeting would be about, but only that it would be rescheduled for another day.

75. There was no further communication from the respondents until 20 October 2011 when a notice was posted on the gate outside the PE RRO which stated that services for new

[7] In *R v Secretary of State for Social Services, Ex Parte Association of Metropolitan Authorities* 1986 1 WLR (QB) at 4F-H it was put thus: 'But in any context the essence of consultation is the communication of a genuine invitation to give advice and a genuine receipt of that advice. . . .'

applicants would cease the following day on 21 October 2011. A copy of this notice is attached hereto as Annexure MB26.'

The response from Mr Apleni was:

'100.1 When the meeting referred to in the paragraphs under reply was called, no decision had at that stage been taken to close the PERRO in respect of the lodgement of new applications for asylum.

100.2 The steps that were taken were at the initiative of the officials at the PERRO.

100.3 It is correct that what was communicated to the officials of the PERRO was the impression that I was labouring under, that is that the continuance of services to applicants for asylum whose applications had already been lodged did not constitute a dis-establishment of the PERRO. This Court took a different view of the decision and I have accepted its interpretation that the effect of the decision was to discontinue a material portion of the services rendered by the PERRO, thereby effectively dis-establishing the office.

100.4 The meeting that was cancelled by Mr. Baxter was reconvened on 20 October 2011.

101. The allegations made in the paragraph under reply are admitted.

[16] Mr Bendle further stated:

'77. In an attempt to resolve the immediate situation, a meeting was arranged on 20 October 2011 with Ms Sonto Lusu, the acting provincial manager for the Department of Home Affairs in the Eastern Cape with a number of stakeholders, including the applicants. At this meeting, Ms Lusu informed us for the first time that the PE RRO was scheduled to close permanently on 30 November 2011, and that no new asylum applications would be processed with effect from 21 October 2011.

78. We were also provided with a copy of the directive from the second respondent, the Director-General of Home Affairs Mr Mkuseli Apleni, dated 7 October 2011, confirming the permanent closure of the PE RRO. A copy of this letter is attached hereto as Annexure MB27.

79. In the meeting we raised our concerns about the closure of the office, particularly under such notice, and sought an extension of the closure dates in order to engage with the Department about the decision.

80. Ms Lusu was adamant that the dates would stand but nevertheless undertook to discuss it with the Director-General whom she indicated she was scheduled to meet in Cape Town the following day. She also gave an undertaking to revert to stakeholders by 12h00 the following day.

81. On 21 October 2011, attorneys at the Nelson Mandela Metropolitan University ("NMMU") Refugee Rights Centre received telephonic confirmation from Ms Lusu that the decision as contained in the letter from the Director-General was "cast in stone" and that the

Department would not change the decision. Later that day, a letter of demand was sent by our attorneys, Lawyers for Human Rights ("LHR"), to the respondents in which our concerns were clearly described and the unlawful nature of the closure was put to the respondents. A copy of that letter is attached as Annexure MB28.

82. LHR received two requests for indulgences from the head of legal services, Mr S Mogotsi, to allow the first and second respondents time to respond to the letter of demand, which requests were granted. However, no such response was ever received.

83. We continued to try to engage with the Department but to no avail. On 9 November 2011, when it became clear that the first and second respondents had no intention of responding to the letter of demand, a further letter was sent to them by LHR confirming our intentions to approach a court to adjudicate this matter. This letter is attached hereto as Annexure MB29.

84. On 16 November 2011, the NMMU Refugee Rights Centre attended a stakeholders meeting in Grahamstown where Mr Lucas, the Centre Manager, informed the attendees that the PE RRO was closing permanently.'

Mr Apleni's response was:

'103. I admit the allegations made in the paragraphs under reply.'

He added:

'97.14 With regard to the first decision to close the PERRO, I ensured that the Department consulted with stakeholders at the meeting of 20 October 2011. After considering the inputs made, I weighed those against the factors that I have explained underpinned the rationale for the decision to close. I elected to go ahead with the closure of the PERRO.

That appears to be the high water mark of the relevant authorities' case. But by that stage the decision to close had already been taken. That is confirmed by the directive issued by Mr Apleni on 7 October 2011 headed 'Closure of the Port Elizabeth Refugee Reception Office', which reads:

'You are hereby officially notified that the Port Elizabeth Refugee Reception Office will be permanently closed as from 30 November 2011.'

It must follow that here as well to the extent that Mr Apleni can point at all to any consultation, such consultation occurred after the decision had already been taken.

[17] In the event, counsel for the relevant authorities was driven to contend that the DG (Mr Apleni) was not obliged to consult with interested parties. In that regard, not entirely consistent with what had elsewhere been stated by him, Mr Apleni asserted:

'99.1 I deny that there was a legal obligation to consult with affected parties or their known representatives prior to taking the decision to close the PERRO to new applicants for asylum.

. . .

102.1 I have stated earlier in this affidavit that there was no obligation arising from section 8(1) of the Refugees Act for me to consult interested parties about the decision that I had taken.

102.2 I also pointed out that in any event those who had submitted applications for asylum before the decision was taken had no cause to complain as the decision taken did not affect those applications.

102.3 . . . I could hardly be expected to consult with unknown future new applicants regarding their access to the PERRO.'

I accept, as Nugent JA did (*Scalabrini* para 72), that a duty to consult will arise only in circumstances where it would be irrational to take a decision without such consultation, because of the special knowledge of the person or organisation to be consulted. The relevant authorities were aware that the respondents had close links to refugee communities and experience and expertise in dealing, not just with asylum seekers in Port Elizabeth, but also with the challenges that confronted them. That was acknowledged, implicitly at least, when they were invited to a stakeholders meeting during June 2011. But that meeting was a charade and positively misleading as to the intentions of the relevant authorities. What is worse, is that after having lulled the respondents into a false sense of security as to the continued operation of the PE RRO, it was suddenly sprung on them on 20 October 2011 that a decision had already been taken by Mr Apleni on 9 October 2011 to close the PE RRO to new applications with effect from 21 October 2011. That was, to borrow from Nugent JA (*Scalabrini* para 70), 'inconsistent with the responsiveness, participation and transparency that must govern public administration'. In *Scalabrini* (para 71), Nugent JA endorsed what Rogers J had to say, namely:

'In assessing the rationality of the process followed by the DG, it is important to remind oneself that consultation with the NGOs would not have been a new or alien process for the DG. He recognised them as stakeholders and apparently did in general consult with them on important developments. At the meeting of 7 May 2012 the [DHA] said that there would be further consultation with stakeholders if efforts to remain at the Maitland premises failed. This renders all the more inexplicable the DG's failure to do so.'

It must follow that Mr Apleni's failure to consult with the respondents when deciding whether to close the PE RRO was not founded on reason and was arbitrary and thus unlawful.

[18] That conclusion ought, ordinarily at any rate, to dispose of the matter. But it may nonetheless be desirable, particularly when regard is had to the remedy sought by the respondents in this matter (to which I turn in due course), for a view to be expressed on their other challenge (*S v Jordaan* 2002 (6) SA 642 (CC) para 21). It is well established that an incident of legality is rational decision-making. It is a requirement of the rule of law that the exercise of public power should not be arbitrary. It follows that decisions must be rationally related to the purpose for which the power was given. (See *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2002 (2) SA 674 (CC) para 85.) But, as Nugent JA pointed out (*Scalabrini* para 65): 'rationality can be a slippery path that might easily take one inadvertently into assessing whether the decision was one the court considers to be reasonable. . . . [R]ationality entails that the decision is founded upon reason – in contradistinction to one that is arbitrary – which is different to whether it was reasonably made.'

[19] According to Mr Apleni the DHA had decided to embark upon a new strategic direction namely to 'close some relatively marginal (in comparative terms) urban based RROs' such as the PE RRO and to establish 'a new refugee reception office at the Lebombo border post to replace the closed PE RRO', which would be 'used by refugees from all over South Africa that would apply for asylum at [that] Port of Entry'. The evidence thus reveals that: the PE RRO was considered to be closed and defunct by the DHA; the DHA proposed to have the new Lebombo RRO operational from 1 April 2012;[8] funds for the relocation to Lebombo would be obtained from the savings from the lease agreement for the PE office; the budget for the Lebombo RRO would be in line with the PE budget; the staff required for the Lebombo RRO 'would be aligned to the non-operational Port Elizabeth RRO'; and, the 'capital budget for the

[8] In an urgent internal memo dated 16 January 2012 the Chief Director: Asylum Seeker Management is recorded as having tasked the Chief Director: Property and Infrastructure Management with performing an urgent assessment of accommodation for the envisaged Lebombo RRO. The minutes of an Exco Meeting of the DHA held on 10 February 2012 record that the new '[RRO] in the Mpumalanga Province should be operational as from 1 April 2012. On 24 May 2012, the Chief Director: Property and Facility Management of the DHA, Mr Vukani Nxasana, emailed the Chief Architect of the Department of Public Works working on the Lebomba project, Ms Sushma Patel. The email reads:
'the main concern [of the Director-General of the DHA] is that Home Affairs has to demonstrate to the courts (PE and Cape Town) that reception centres will be opened soon. To that end, it would be appreciated if you could provide a high-level analysis of the two options . . . We will then have to present these to the DG and move forward.'

project would be secured from the R110 million special allocation for the 2012/2013 financial year'.

[20] By way of two separate applications, the respondents sought leave to place new evidence before this Court. In neither instance were the facts disputed or the applications opposed by the relevant authorities. I am satisfied that they are material and sufficiently weighty and that in respect of each, the threshold set for admission at this stage of the proceedings has been met (*Rail Commuters Action Group & others v Transnet Ltd t/a Metrorail & others* 2005 (2) SA 359 (CC) paras 40-43).

[21] In an affidavit in support of the first application, Mr Bendle stated:

'3. . . . The respondents seek to place before this Court evidence of the recent disclosure by the first appellant, the Minister of Home Affairs ("the Minister") in Parliament that there will not be a new Refugee Reception Office ("RRO") established at the border-post in Lebombo, Mpumalanga.

4. The disclosure was made by the Minister in April 2014, in reply to an internal Parliamentary question. The question and reply were published online by the Parliamentary Monitoring Group, and came to the respondents' attention on 25 April 2014. . . It indicates that the following questions and reply were exchanged between Mr De Freitas of the Democratic Alliance and the Minister:

"Mr M S DE Freitas (DA) to ask the Minister of Home Affairs:

Whether her department will be establishing a refugee reception office at Lebombo in Mpumalanga; if so, (a) what is the cost for the (i) establishment and (ii) running of this office, (b) in each case, (i) what consultations have taken place and (ii) with whom, (c) what progress has been made to date and (d) when will the specified office (i) open and (ii) be functional?

. . .

Reply:

No."

9. The evidence of the fact that an RRO will not be established at Lebombo is fundamental to the merits of the review that is the subject of this appeal. The review concerns the decision of the second appellant, the Director-General of the Department of Home Affairs ("the Director-General"), to close the PE Refugee Reception Office ("PE RRO"). One of the principal justifications given by the Director-General for his decision to close the PE RRO was the establishment of a replacement RRO in Lebombo.

11. In light of the new evidence, the respondents contend that the Director-General's decision to close the PE RRO is reviewable and falls to be set aside for material mistake of fact and irrationality under the doctrine of legality.'

Mr Apleni's response was:

'11. I have been advised and verily believe, that Respondents' interpretation and use of the evidence sought to be introduced, is misconceived. As explained below, the parliamentary questions and answers thereto, must be understood within the context of parliamentary custom, protocol and language. Applying parliamentary custom, protocol and language and bearing in mind the time the question was posed, it was understood by the Minister, the Department and me, as meaning whether or not it was anticipated that the RRO in Lebombo would be opened during the forthcoming financial year.

12. Since it was not anticipated that the Lebombo RRO would be opened within the forthcoming financial year, the Minister correctly answered the question in the negative.

13. As set out below, this does not, however, mean that the Minister and the Department are not proceeding with their plans to establish an RRO at Lebombo at all. On the contrary, those plans are still progressing. Indeed, an appropriate site has now been identified and a tender for the provision of temporary structures at Lebombo, has already been awarded.

14. Consequently, the Respondents' contention that a new RRO will not be established in Lebombo soon or at all, is not correct.

. . .

16. The opening of an RRO in Lebombo was consequently, a relevant consideration when I decided not to re-open the PE RRO and it was therefore not an error on my part to take this factor into consideration.

. . .

17. The parliamentary questions were posed to the Minister in the National Assembly on 14 March 2014, for a written reply.

18. Before the Minister gave her reply, the questions were circulated amongst the relevant functionaries in the Department for their consideration, including myself.

19. I considered the questions and provided my input in relation to a draft response. I approved the response. . .

20. In determining the appropriate response, the Minister and relevant functionaries, including myself, took into account the fact that the questions were a parliamentary questions. In this regard, the relevant functionaries, having regard to parliamentary protocol and custom and the specific manner in which questions are asked and answered in the National Assembly, interpreted the primary question to be whether an RRO would be opening in Lebombo during the forthcoming financial year.

21. Consistent with the answer given by the Minister, the Lebombo RRO will not as a matter of fact be opening in the forthcoming financial year, since the Department has not been allocated the necessary funding from Treasury to construct the RRO.
22. The Department's targets are required to comply with the "SMART" principles advanced by the Auditor General: they must be Specific, Measurable, Attainable, Realistic and Time-bound. At the time the parliamentary question was asked, the establishment of the Lebombo RRO did not satisfy these requirements, particularly, in relation to the anticipated time-frame for the construction of the RRO.
23. Taking these factors into account, the Department and Minister determined that the Minister was not in a position to answer the primary question in the affirmative.
24. Indeed, a positive answer to the primary question would have implied that the Department would finalise matters such as the costing and timelines for the establishment of the Lebombo RRO, within the forthcoming financial year. Since these matters were not, however, finalised, the Minister was not therefore, in a position to provide these subsidiary answers.
25. The Minister consequently correctly answered in the negative. I appreciate that the negative answer is capable of being interpreted that the Department does not intend to open an RRO in Lebombo and that this option was *off the table* so to speak. This was, however, not the intention of the response. As set out above, the Minister intended to convey the position that the Lebombo RRO would not be opening during the forthcoming financial year.

[22] That such a response is adduced by a senior official - under oath no less - beggars belief. How the question asked of the Minister in Parliament could have been construed as Mr Apleni does, is logically incomprehensible. Syntactically, the primary question seeks to ascertain whether the DHA will be establishing an RRO at Lebombo. It is an enquiry directed at a future state of affairs. It, as well, in the subsidiary questions, seeks clarity as to consultations and progress that has already taken place namely, a past state of affairs. It is thus difficult to appreciate how the question could have been construed as meaning whether Lebombo 'would be opening during the forthcoming financial year'. The question plainly did not seek to ascertain whether the Lebombo RRO would be opening during the course of that financial year. How it could have been understood as such is thus lost on me. That those were parliamentary questions could hardly have altered the meaning of the question. If anything, it seems to me, that our constitutional model sets fairly exacting standards for Cabinet Ministers particularly in their interaction with Parliament. According to s 1

of the Constitution, the Republic of South Africa is 'one, sovereign, democratic state' founded, inter alia, on 'a multi-party system of democratic government, to ensure accountability, responsiveness and openness'. In *Coetzee v Government of the Republic of South Africa, Matiso and Others v Commanding Officer Port Elizabeth Prison and Others* 1995 (4) SA 631 (CC) at 637D, albeit with reference to the Interim Constitution, Sachs J observed:

'The values that must suffuse the whole process are derived from the concept of an open and democratic society based on freedom and equality . . . The notion of an open and democratic society is thus not merely aspirational or decorative, it is normative, furnishing the matrix of ideals within which we work, the source from which . . . [we derive] the principles and rules . . . [we apply], and the final measure . . . [we use] for testing the legitimacy of impugned norms and conduct.'

[23] Questions addressed by opposition parties to the Executive and Organs of State (see s 239 of the Constitution) serve as an important mechanism at the disposal of Parliament for exercising oversight and holding the executive and organs of state to account (s 55 of the Constitution). And, in terms of s 92(2) of the Constitution, Cabinet Members are collectively, individually and directly accountable to Parliament for the exercise of their powers and the performance of their functions. Moreover, s 13 of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act 4 of 2004 makes a member, which by definition includes a Minister or Deputy Minister (s 1), guilty of contempt of Parliament if such member, inter alia, commits an act mentioned in section 17(1)*(e)*. Section 17(1)*(e)*, in turn, provides that '[a] person . . . [who] wilfully furnishes a House or committee with information, or makes a statement before it, which is false or misleading, commits an offence and is liable to a fine or to imprisonment for a period not exceeding two years or to both the fine and imprisonment.' Further, consistent with the National Assembly's constitutional responsibility to 'provide for mechanisms to ensure that all executive organs of State in the national sphere of government are accountable to it', the Rules of the National Assembly includes specific procedures for the questioning of Ministers, the Deputy President and the President (rules 109-111). There is, as well, the Executive Ethics

Code,[9] which not just re-affirms our commitment to the 'promotion of an open, democratic and accountable government' (s 2.2), but also provides that Members of the Executive may not 'wilfully mislead the legislature to which they are accountable' (s 2.3(a)). Tellingly, in England, Ministers who knowingly mislead Parliament are expected to offer their resignation to the Prime Minister[10] and such an offence might also be proceeded against as a contempt.

[24] As De Vos and Freedman explain: [11]

'Accountability is the hallmark of modern democratic governance and implies that members of the executive have to explain their actions to Parliament and its committees so that Parliament can play a role in checking the exercise of power by members of the executive.'

They add:

. . . accountability requires the establishment of institutional arrangements to effect democratic control over the executive as members of the executive, unlike the MPs, are not directly democratically elected.'

(See also *Democratic Alliance and Another v Masondo NO and Another* 2003 (2) SA 413 (CC) paras 42 and 43.) Against that backdrop it is difficult to understand why the fact that the questions were parliamentary questions somehow gave them a different hue. Nor can I fathom what 'parliamentary protocol and custom' Mr Apleni has in mind, or how parliamentary language could possibly have caused the response to change from the affirmative (as it ought to have been) to its exact opposite. That notwithstanding, I am willing to approach the matter, as Mr Apleni would have us, on the basis that the relevant authorities have every intention of proceeding with the establishment of the Lebombo RRO. For, it seems to me, that even approached thus, the decision to close the PE RRO still suffers a want of rationality.

[25] When the decision to close the PE RRO was taken, it was in the belief that the Lebombo RRO would be operational in April 2012. In that, the relevant authorities were overly optimistic. Mr Apleni now states (in his answering affidavit in response to the respondents application to adduce new evidence):

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[9] Regulation 6853 of 2000, which came into effect on 28 July 2000 in terms of s 2 of the Executive Members' Ethics Act 82 of 1998.

[10] *Halsbury's Laws of England* vol 78 (2010) para 1084; *Profumo's Case* (1963) 218 Commons Journals 246.

[11] P de Vos and W Freedman (eds) *South African Constitutional Law in Context* (2014) at 144.

‘34. The Department hopes to have the temporary structures in place and operational by February 2016. The erection of the temporary facilities will commence once the Department receives the necessary authorisation from Treasury and the relevant zoning procedures have been complied with. As set out in my letter to the Department of Home Affairs of 13 June 2014 (annexure MH3), I have requested the DPW to confirm the current zoning of the site as well as how soon can the Department take occupation. Once all of the aforesaid matters have been addressed, the erection of the temporary facilities will take approximately one month.’

If the Lebombo RRO is set up by February next year (and of that, given the history of the matter, there is at this stage no certainty) it would mean that Mr Apleni’s initial estimation was off by approximately four years. As the following excerpts from Mr Apleni’s affidavit reveal, the decision to close the PE RRO was ostensibly taken to assist asylum seekers:

‘97.5 The larger strategic issue for the Department was finding strategies for dealing with corruption within its own ranks, the safety of asylum seekers as they travelled inland from ports of entry, and the preservation of their dignity and sense of security in ensuring that they were able to renew their permits without having to fork out one cent in extortion money.

97.11 The inadequacy of staff in the busier RROs, the long queues that result in applications not being attended to on the day that an applicant presents him or herself at an RRO, the high number of files that the SCRA returns to the RSDO due to the incompleteness of the file or interview with the RSDO – all these are matters that have been regular items of discussion between the Deputy Minister, the members of SCRA and me.’

Implicit in that must be an acceptance that Mr Apleni believed that the establishment of the Lebombo RRO, which was inextricably linked to the closure of the PE RRO, would satisfy our obligations to asylum seekers as required by the Act and Constitution. That being so, it can hardly be imagined that the decision to close the PE RRO would have been taken by Mr Apleni when he did had he known then that Lebombo would only be operational at the earliest in February 2016. It must follow that the DG’s decision to close the PE RRO had been made in ignorance of the true facts material to that decision (see *Pepcor Retirement Fund & another v Financial Services Board & another* 2003 (6) SA 38 (SCA) paras 47 and 48; *Dumani v Nair & another* 2013 (2) SA 274 (SCA) para 32).

[26] That conclusion brings into sharp focus the question of remedy. As it was put in *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality & others* 2007 (6) SA 511 (SCA) para 17:

'. . . though the Constitution speaks through its norms and principles, it acts through the relief granted under it. And if the Constitution is to be more than merely rhetoric, cases such as this demand an effective remedy, since (in the oft-cited words of Ackermann J in *Fose v Minister of Safety and Security*) "without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced":' (Footnotes omitted.)

Courts, as Harms JA observed, should not be overawed by practical problems.[12] He added:

'[t]hey should "attempt to synchronise the real world with the ideal construct of a constitutional world" and they have a duty to mould an order that will provide effective relief to those affected by a constitutional breach. *Fose v Minister of Safety and Security* held that -

"*(a)*ppropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a *mandamus* or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights.

. . .

I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal."' (Footnotes omitted.)

Harms JA added 'what "effective relief" entails will obviously differ from case to case.'

[27] To be sure, courts proceed on the assumption that other arms of State will take prompt and competent steps to comply with its orders and that further judicial supervision will not be necessary. Moreover, there may be a myriad options available

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[12] *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae); President of the Republic of South Africa & others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA) para 42.

to government and it is usually given the flexibility and discretion in selecting the means by which its obligations can best be met. Roach and Budlender[13] point out that: 'complex remedial issues raise difficult questions implicating the separation of powers and the appropriate roles of the judiciary, the executive and the legislature. Relief that requires the state to take positive actions . . . raises polycentric issues that affect multiple parties and budgetary priorities. Yet . . . it is significant that both South African and Canadian courts have decided that on-going structural relief is appropriate in some instances, a conclusion that has also been reached by other courts, most notably India and the United States'. (Footnote omitted.)

In *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC) (*TAC No* 2) para 98, the Constitutional Court made clear that whilst there are no bright lines separating judicial, executive and legislative functions from each other, there are certain matters that fall pre-eminently within the domain of one or other of the arms of government. And whilst all arms of government should be sensitive to and respect this separation of powers, this did not mean that courts cannot or should not make orders that have an impact on policy. In short, therefore, the approach by a court needs to be flexible and responsive to the needs of a given case.

[28] The relevant authorities attempt to downplay the significance of the decision to close the PE RRO, contending its closure, coupled with the closure of the two other RROs gives rise to what it describes as 'inconvenience' for asylum-seekers. But that may well be to trivialise the vulnerability and desperate circumstances of many asylum seekers in the country. It does not appear to be disputed that most asylum seekers, who have been forced to flee their countries of origin, would in all likelihood have exhausted their financial resources and other means after having travelled considerable distances to reach South Africa. As a result, many join family, acquaintances and communities that are already established and who are able to help support them on arrival. If those communities are established in a particular geographic area of the country, such as the Eastern Cape, it goes without saying that that is where such persons will head. The suggestion by the relevant authorities therefore that asylum seekers freely choose to live and work in Port Elizabeth or the Eastern Cape and can likewise freely choose to live and work near one of the

[13] K Roach and G Budlender 'Mandatory relief and supervisory jurisdiction: When is it appropriate, just and equitable?' 2005 *SALJ* 325 at 326.

remaining RROs, is untenable. Fran Ansley makes the point that '[t]he building of social and economic capital and networks through a thicket of relationships and channels that are fusing immigrants into society in ways that already appear impossible to undo'.[14]

[29] Moreover, the relevant authorities expressly accept that the effect of their decision is that a person wishing to apply for asylum can now only apply to one of the three remaining RROs. Such person will, no doubt, have to return to that RRO in order, inter alia, to: have their interview conducted; their permit renewed; collect their decision; and, if necessary, lodge and have their appeal determined. The consequence is that such asylum seeker will now have to repeatedly and perhaps frequently travel a considerable distance to one of the three remaining RROs over a period of many months or years. For those who live and work in Port Elizabeth the closest RRO will now be the one in Durban, some 900km away. Travelling and accommodation costs are likely to be substantial – for many, resources that they simply do not have. Throw into the mix the elderly or infirm and parents of small children (who would probably have to make alternative child-care arrangements), for whom undertaking an extended journey to an RRO situated far away from the support structures of their communities and families may prove well-nigh impossible. Repeated visits to a distant RRO also have the potential to jeopardise the employment and job security of an asylum seeker. And given the admitted backlogs and failing systems at the remaining RROs, even those asylum seekers who manage to attend are at risk of not obtaining the assistance and protection that they require.

[30] It is important to stress that this case is not and has never been about an attempt to compel the DG to establish a new RRO where one has never existed previously. It concerns the lawfulness of a decision by the DG, as he puts it, to 'dis-establish' an RRO, which had been located in Port Elizabeth since 2000. Sight cannot be lost, as well, of the fact that his first decision to close the PE RRO to new arrivals was taken on 11 October 2011. That decision, which did not withstand scrutiny by our courts, made light of the fact that several communities of refugees and asylum

[14] F Ansley 'Constructing citizenship without a licence: the struggle of undocumented immigrants in the USA for livelihoods and recognition' in N Kabeer (ed) *Inclusive citizenship: Meanings and expressions* (2005) at 209.

seekers, including some 14 000 Somali refugees (who are represented in these proceedings by the first respondent), reside and work in that geographic region. Those communities provide vital support to new asylum seekers who have little to no financial resources and means of self-support. The relevant authorities appear to obfuscate the real complaint, which is not that there should be an RRO wherever asylum seekers or refugees choose to live, but that RROs should be sufficient in number and located so that asylum seekers and refugees are reasonably able to access the services that they require and to which they are entitled under the Act.

[31] Until the end of 2010 there were six fully functional RROs situated in five provinces and in metropolitan areas where asylum seekers could expect to access employment and basic services. Rogers J correctly recognised the prejudice caused to asylum seekers by the closure of the CT RRO, when he stated:[15]

'Thousands of asylum seekers will either have to abandon the idea of residing in the Cape Town area while their asylum applications are assessed, or they will need to spend time and money to travel on a number of occasions to RROs in the north of the country. If they have work in Cape Town, they may lose it because of the need to take off three or four days for each attendance at an RRO. If they have dependants, they would need to leave them in the care of others or travel with them.'

And, as Eksteen J noted in his judgment, 'the same consequences flow from the closure of the PE RRO for asylum-seekers who live and work in the Port Elizabeth area[16] - or indeed, anywhere in the Eastern Cape.'

[32] It is so that usually when a court reviews and sets aside a decision of an administrative body it almost always refers the matter back to that body to enable it to reconsider the issue and make a new decision (per Heher JA, *Gauteng Gambling Board v Silverstar Development Ltd & another* 2005 (4) SA 67 (SCA) para 1). Occasionally, however, as Heher JA added, 'the court does not give the administrative organ a further opportunity. Instead it makes the decision itself.' This appears to be such a case. Given the stubborn adherence by the DG to his initial decision, why he needs to bring his mind to bear on the matter again, as argued by counsel, is not rationally explained. As long ago as 21 October 2011 the respondents were informed

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[15] *Scalabrini Centre & others v Minister of Home Affairs & others 2013 (3) SA 531* (WCC) para 110.
[16] *Somali Association of South Africa Eastern Cape (SASA EC) v Minister of Home Affairs* 2013 JDR 1502 (ECP) para 47.

by Ms Lusu that the decision of the DG was 'cast in stone'. And, on 16 September 2012 in an e-mail addressed to all stakeholders Mr Mabulu, made reference to 'our irrevocable decision' to close the PE RRO. I earlier made reference to two applications by the respondents for leave to adduce further evidence – the first was the Parliamentary question and answer that I have already alluded to, the second pertains to an invitation by the relevant authorities circulated on 10 February 2015 calling a 'stakeholder meeting on the closure of files in the [PE RRO], effective 30 April 2015'. The invitation to that meeting which was scheduled for 20 February 2015, reads:

'In the spirit of fair administrative justice, the Department of Home Affairs cordially invites you to a stakeholder meeting. The Port Elizabeth Refugee Reception Office was closed on the 21 October 2011. Subsequently, the Office commenced a process of closing case files. This process will culminate on the 30 April 2015, whereby all applicants are expected to have presented themselves at the Office to finalize their case or have their applications deemed as abandoned. Categories of asylum seekers to come forward by the 30 April 2015 include those:

- Awaiting finalization of the Refugee Status Determination processes;
- Awaiting finalization of the Appeal process;
- Awaiting finalization of the Review by the Standing Committee on Refugee Affairs;
- Still to collect their final decisions on status determination, appeal or review.'

As the respondents point out, whilst the invitation purports to invite stakeholders to a meeting 'in the spirit of administrative justice', it is clear from the invitation itself that the DHA has already 'commenced a process of closing case files' and intends to complete this process by 30 April 2015. This approach is extraordinary given that the more recent decision to close the PE RRO was set aside by Eksteen J. And, regardless of this pending appeal against the decision of Eksteen J, the DHA is, according to the circular, taking active steps to implement the previous decision of the DG to close the PE RRO. But that earlier decision was declared unlawful and set aside by Pickering J. All of this appears to evidence a fixed view on the part of the relevant authorities to close the PE RRO irrespective of the circumstances or their legal obligations.

[33] Despite being ordered by Pickering J to reopen the PE RRO, and despite having been refused leave to appeal by both the high court and this Court, the DHA simply took no steps to comply with that order. Mr Apleni explains:

‘77.6 I deny that the Respondents took no steps at all to comply with the order of 16 February 2012. That court order was overtaken by events, as communicated in my letter to Lawyers for Human Rights dated 21 September 2012. . .

. . .

96.3 I admit that the exercise of the power afforded in section 8(1) of the Refugees Act is constrained by the principle of legality. I have submitted in various parts of this affidavit that consequent on the court order of 16 February 2012, I remedied the failure to act in accordance with the terms of section 8(1) of the Refugees Act. I have now taken a new, rational and lawful decision as required in law, to close the PERRO.’

It is not clear to me why Mr Apleni denies that they ‘took no steps at all to comply with the order of [Pickering J]’, when, as a matter of fact, it is patent that for six months after the issuance of the order of Pickering J they did nothing. That denial, it needs be added, is irreconcilable with his later statement ‘I remedied the failure to act’. Implicit in the latter statement is an acknowledgement that he had indeed failed to act in compliance with the order of court. Most alarming though is that in circumstances where he was being pressed to comply with Pickering J’s order, he withheld for several months from the relevant stakeholders the fact that a new decision had been taken. In my view the relevant authorities were not free, in their election, to simply disregard the order of Pickering J. The cornerstone of democracy and the rule of law is the uncompromising duty and obligation upon all persons, more especially State departments, to obey and comply with court orders. There are processes in place for those who disagree with court orders. But they are not free to simply turn a blind eye to the order nor do they have any discretion to not obey the order.

[34] In *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Limited* (619/12) [2013] ZASCA 5 (11 March 2013); [2013] 2 All SA 251 (SCA) para 17 it was put thus:

‘. . . as Froneman J observed in *Bezuidenhout v Patensie Sitrus Beherend Bpk* 2001 (2) SA 224 (E) at 229B–C:

“An order of a court of law stands until set aside by a court of competent jurisdiction. Until that is done the court order must be obeyed even if it may be wrong (*Culverwell v Beira* 1992 (4) SA 490 (W) at 494A-C). A person may even be barred from approaching the court until he or she has obeyed an order of court that has not been properly set aside (*Hadkinson v Hadkinson* [1952] 2 All ER 567 (CA); *Bylieveldt v Redpath* 1982 (1) SA 702 (A) at 714).”’

Beylieveldt v Redpath 1982 (1) SA 702 (A) stated at 714E-G:

'In *Hadkinson v Hadkinson* (1952) 2 All ER 567 sê DENNING LJ, met verwysing na 'n party wat 'n Hofbevel verontagsaam het, te 575B-C:

"... I am of opinion that the fact that a party to a cause has disobeyed an order of the Court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impeded the course of justice in the cause, by making it more difficult for the Court to ascertain the truth or to enforce the orders which it may make, then the Court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed."

Ek gaan, met eerbied, akkoord met hierdie benadering.'

[35] It is a most dangerous thing for a litigant, particularly a State department and senior officials in its employ, to willfully ignore an order of court. After all there is an unqualified obligation on every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. It cannot be left to the litigants to themselves judge whether or not an order of court should be obeyed. There is a constitutional requirement for complying with court orders and judgments of the courts cannot be any clearer on that score. No democracy can survive if court orders can be shunned and trampled on as happened here.[17] As this Court stressed in *Gauteng Gambling Board & another v MEC for Economic Development, Gauteng* 2013 (5) SA 24 (SCA) para 52: '[o]ur present constitutional order is such that the State should be a model of compliance. It and other litigants have a duty not to frustrate the enforcement by courts of constitutional rights.'

[36] That the State must obey the law, is a principle that is fundamental to any civilised society. The logical corollary is that the State, its organs and functionaries cannot arrogate to themselves the right not to obey the law or elevate themselves to a position where they can be regarded as being above the law. That seems to be precisely what has occurred here. Unfortunately it seems to me, in the light of the history of this matter, that there is every likelihood of a future repetition of similar conduct on the part of the relevant authorities. That being so, a declaratory order,

[17] *Hadkinson v Hadkinson* [1952] 2 All ER 567 at 569C-G; *Supreme Court Reference No 1 of 2012; Re Prime Minister and National Executive Council Act 2002 Amendments and Reserve Powers of the Governor General* [2012] PGSC 20 paras 345-349. See also *X Ltd v Morgan-Grampian (Publishers) Ltd* [1990] 2 All ER 1 at 11B-G.

without more, will be inadequate and place an unfair burden on the successful litigants in a case such as this of grave systemic problems and when officials have proven themselves not deserving of trust. In that regard what was said in *Kalil NO & others v Mangaung Metropolitan Municipality & others* 2014 (5) SA 123 (SCA) para 30 is apposite:

‘ . . . This is public-interest litigation in the sense that it examines the lawfulness of the exercise by public officials of the obligations imposed upon them by the Constitution and national legislation. The function of public servants and government officials at national, provincial and municipal levels is to serve the public, and the community at large has the right to insist upon them acting lawfully and within the bounds of their authority. Thus where, as here, the legality of their actions is at stake, it is crucial for public servants to neither be coy nor to play fast and loose with the truth. On the contrary, it is their duty to take the court into their confidence and fully explain the facts so that an informed decision can be taken in the interests of the public and good governance.’

[37] It goes without saying that the refugees and asylum seekers encountered here are amongst those who are most in need of protection. They do not have powerful political constituencies and their problems, more often than not, are ignored by government. Previous orders of our courts appear to have done little to make their problem visible and to cause the relevant authorities to comply with their obligations. In *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC) para 129, the Constitutional Court held that additional relief in the form of a structural interdict should be granted where ‘it is necessary to secure compliance with a court order’ – namely, ‘a failure to heed declaratory orders or other relief granted by a Court in a particular case’. Given the intransigence on the part of the relevant authorities, it thus seems important to provide a remedy to the respondents that is both effective and meaningful, for, as Ackermann J made plain in *Fose* para 69:

‘Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated.’

[38] In *Sibiya & others v Director of Public Prosecutions, Johannesburg, & others* 2005 (5) SA 315 (CC) paras 60-62 – a case concerned with the substitution of the death sentence - the Constitutional Court pointed out that ‘the process has taken so

long that it will be inadvisable for this Court to assume that the death sentences will be substituted as envisaged'.

It accordingly held:

'This court has the jurisdiction to issue a *mandamus* in appropriate circumstances and to exercise supervisory jurisdiction over the process of the execution of its order [*Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC) (2002 (10) BCLR 1033) in paras [104] - [107].] It is appropriate in this case for this to be done.'[18]

In resisting the grant of a mandamus, the relevant authorities placed great store by the dicta of Nugent JA in *Scalabrini* (paras 74-76) to the effect that: the fate of the [RRO] is for the DG to decide; a court should not supplant that function; and, courts ought not to compel the impossible. It must be remembered that in that case Nugent JA took the view that the information on the papers was insufficient to support the conclusion of the high court that its order was capable of being complied with. I do not believe that we are at a similar disadvantage in this case. The relevant authorities accept that an RRO can be set up within three months and the DG has made it clear that he has 'not closed the door to the establishment of additional RROs in other parts of the country'. In any event, we are not concerned with the establishment of an entirely new RRO, but with one that has been in existence and operational since 2000. And, as the DG has made plain, 'the establishment of the Lebombo RRO went beyond the challenges presented by the PERRO'. Thus, as he put it, 'with or without a fully functioning PERRO, a new RRO at Lebombo has been identified as a strategic imperative to enable the Department to ensure that the objectives of the Refugees Act are attained'. Accordingly, any order as may issue in respect of the PE RRO will not directly impact on the DHA's plans in so far as Lebombo is concerned. Any such order will thus not have the effect of constraining governmental policy in that regard or trespassing on the domain of the executive.

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[18] See also 11 *Lawsa* 2 ed para 411; *Sibiya & others v Director of Public Prosecutions, Johannesburg & others* 2005 (5) SA 315 (CC) para 64; *Nyathi v MEC for Department of Health, Gauteng & another* 2008 (5) SA 94 (CC) para 92; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & others (Centre on Housing Rights and Evictions & another, Amici curiae)* 2010 (3) SA 454 (CC) para 7;*Occupiers of Mooiplaats v Golden Thread Ltd & others* 2012 (2) SA 337 (CC) para 21; *Pheko & others v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC) para 53.

[39] To sum up: In my view, this is an appropriate case, for a court to exercise its supervisory jurisdiction to secure compliance with its order. On the one hand, it is necessary that the respondents should know what progress is being made by the relevant authorities and also to avoid being faced, once again, with a *fait accompli* (*Western Cape Minister of Education and Others v Governing Body of Mikro Primary School and Another* 2005 (10) BCLR 973 (SCA) para 51). On the other, the relevant authorities can always approach the court to extend the period should it turn out to be too short. This procedure, moreover, allows the court to be informed about the progress being made in the implementation of its order. It follows that the conclusion by Eksteen J (para a), that the decision by the DG 'taken on 30 May 2012 to close the PE RRO to new applicants for asylum' was unlawful and fell to be set aside, cannot be assailed. However, paragraphs (b) and (c) of the high court's order need to be reformulated in line with the views expressed in this judgment.

[40] In the result, save for setting aside paragraphs (2) and (3) of the order of the court below, and substituting them with the orders that follow, the appeal is dismissed with costs, to be paid by the first to third appellants jointly and severally, and to include the costs of two counsel. Paragraphs (2) and (3) are substituted with the following:

'(2.1) The first to third respondents are directed to restore by 1 July 2015 the refugee reception services to the Port Elizabeth Refugee Reception Centre such that new applicants for asylum will be able to make applications in terms of s 21 of the Refugees Act 130 of 1998 and, if they qualify, be issued with permits in terms of s 22 of the said Act.

(2.2) The second respondent, the Director General of the Department of Home Affairs, shall report in writing to the applicants not later than 15 April 2015 and, thereafter, on or before the 15th day of each succeeding month as to what steps have been taken and what progress has been made to ensure compliance with the aforesaid order.

(3) The parties are granted leave to apply upon the same papers, supplemented insofar as they consider that to be necessary, for further relief.'

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V M Ponnan
Judge of Appeal

APPEARANCES:

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