Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No.: **4139/11**

In the matter between:

DENNIS SSEMAKULA	First Applicant
CHRISTELLE KABANGU MUSASA	Second Applicant
SARAH KUMWERO	Third Applicant
JEAN CLOTAIRE RUVAKO	Fourth Applicant
BEATHE MUSABYI MANA	Fifth Applicant
MUHAMEDI MATOVU	Sixth Applicant
TWAHA KATENDE	Seventh Applicant
GEORGE MUYOMBA	Eighth Applicant
JOHN JIKEME AFEEZ	Ninth Applicant
PATRICK KUYANDA KASHAMA	Tenth Applicant

and

THE MINISTER OF HOME AFFAIRS	First Respondent
THE DIRECTOR-GENERAL, DEPARTMENT OF HOME AFFAIRS	Second Respondent
THE DIRECTOR, REFUGEE RECEPTION CENTRE, MAITLAND	Third Respondent
THE REFUGEE RECEPTION OFFICER, REFUGEE RECEPTION CENTRE, MAITLAND	Fourth Respondent

---

JUDGMENT delivered on 5 MARCH 2012

DOLAMO, AJ

[1] The Applicants, all foreign nationals, brought an Application against the Respondents, in terms of Sections 38(a), (c) and (d) and 172(1) of the Constitution of the Republic of South Africa, for an order declaring the Respondents' policy, practice and/or conduct, since Monday the 7th February 2011, of refusing to accept asylum applications in terms of Section 21 and of refusing to issue Asylum Seekers with temporary asylum seekers permits ("ASP") in terms of Section 22 of the Refugees Act 130 of 1998 (the "Refugees Act") unless the asylum seekers were in possession of asylum transit permits ("ATP"), issued in terms of Section 23 of the Immigration Act No 13 of 2002 (the "Immigration Act"), to be inconsistent with the Constitution of the Republic of South Africa and the Refugees Act and therefore unlawful and invalid; directing the Respondents to forthwith accept such applications for and issue temporary ASP's in accordance with Section 22 of the Refugees Act, irrespective of whether the asylum seekers were in possession of ATP's or not. The Applicants also asked for costs to be paid jointly and severally by the Respondents who appear and oppose the application. The Respondents are the Minister of Home Affairs; the

Director-General: Department of Home Affairs; the Director: Refugee Reception Centre, Maitland and the Refugee Reception Officer: Maitland. I shall henceforth refer to them collectively as the "Respondents".

[2] The Applicants alleged in their founding papers that they were asylum seekers and nationals of various African Countries. They alleged to have fled from their respective countries of origin where they faced serious risk of persecution and danger to their lives and security, to the relative security of the Republic of South Africa. They face the same prospects of persecution and mortal danger if they were to return to their respective countries of origin. They entered the Republic of South Africa at different times and at various points but admittedly mostly not through recognized boarder posts to, seek asylum. As such many were not in possession of ATP's issued in terms of Section 23 of the Immigration Act which would have been issued to them had they entered this country at official boarder posts. Once in the Republic they made their way, *via* different routes, to Cape Town where they made several attempts at the Maitland Refugee Reception Office to lodge their individual applications for ASP's. The officials at this Centre refused to accept their applications, citing various reasons for doing so. One of the reasons, which crystalized since on or about 7th February 2011, was to demand an ATP's and, in the absence of such, to refuse to accept

applications for asylum permits. Confronted with this problem the Applicants, on or about Thursday the 10th February 2011, approached the Legal Resources Centre for assistance. On appraising himself of their situation their attorney of record send an e-mail calling upon the Third Respondent to respond to these allegations, which were termed "breathtakingly unlawful as to be almost criminal" by not later than noon on Monday the 14th February 2011. The Third Respondent did not respond, whereupon the Applicants launched the present application on an urgent basis as threatened in the said e-mail. The Applicants further stated in their papers that the alleged policy, practice or conduct of the Respondents prevented a large number of would be asylum seekers from exercising their legal and constitutional rights to apply for asylum and had the effect that such people were unable to obtain Section 22 asylum-seeker permits which consequently exposed them to the real risk of arrest and deportation as illegal foreigners.

[3] All the Respondents opposed the application.

[4] The Respondents' opposing papers consisted of affidavits by the Deputy Minister to the First Respondent; Second and Third Respondents; as well as two confirmatory affidavits by Messrs. J.W. McKay Deputy-

Director Immigration and A. Essel, Refugee Status Determination Manager, both of the First Respondent's Department. In all these affidavits the Respondents, in general, denied the existence of a policy, practice or directive by the Department of Home Affairs in terms of which applications for ASP were not accepted and asylum permits not issued if the Applicants were not in possession of permits issued in terms of Section 23 of the Immigration Act. The Third Respondent went further and dealt in more details with the allegations in the Applicants' founding papers. Paragraphs 4 and 5 of his opposing affidavit, in particular, read as follows:

> "4. I have read the founding papers in this application. The applicants contend that since February 2011, the respondents have refused to accept applications for asylum unless asylum-seekers are in possession of asylum transit permits issued in terms of section 23 of the Immigration Act 13 of 2002 *("the Immigration Act")*.
>
> 5. But that is not so.
>
> 5.1 The Department has not adopted any policy, practice or directive, in terms of which an application for asylum is accepted only if the asylum-seeker is in possession of an asylum transit permit issued under section 23 of the Immigration Act.
>
> 5.2 There is likewise no policy, practice or directive, allegedly implemented since Monday 7 February 2011, in terms of which asylum-seekers are refused permits under section 22 of the Refugees Act 130 of 1998 *("the Refugees Act")*, unless they are in possession of asylum transit permits issued under the Immigration Act.

5.3 The Minister, Deputy Minister and the Director-General, the second respondent, prior to the launching of this application, were unaware of the allegations by the applicants and others that an asylum transit permit under section 23 of the Immigration Act was a prerequisite for an asylum application or the issuance of a permit under section 22 of the Refugees Act. In this regard I refer to the affidavits by the Deputy Minister and the Director-General, filed herewith.

5.4 For these reasons it will be argued that the applicants are not entitled to the relief sought."

[5] The Third Respondent also dealt with a meeting, attended by top-ranking officials of the Respondents, which was held on the 2nd February 2011, where numerous issues were discussed. These issues, according to him, included matters such as an analysis and trends in asylum seekers management statistics, vacancies at various offices, the turn around time in processing applications and appeals by asylum seekers and the operation of various refugee centres. To meet these challenges a suggestion, nothing more than a mere suggestion, he contended, was made to regulate the processing of applications by "continuing" with the practice of issuing asylum transit permits under Section 23 of the Immigration Act when asylum seekers reported at a border post. I pause here to point out that the alleged practice was to continue to issue Section 23 permits at the border

post and not to insist on such a permit when an application for a refugee permit was made.

[6] Third Respondent went on to allege that there appeared to have been a misunderstanding on the part of some managers of refugee centres that the suggestion to continue with the issuing of ATP's at boarder posts, emanating from the meeting of the 2nd February 2011, was in fact a directive to require the production of ATP's, as a prerequisite, from Applicants for refugee permits. This misunderstanding, according to him, led to some of the managers seeking clarification from Mr. McKay. Mr. McKay's clarification is said to be contained in his email dated the 24th February 2011 (Third Respondent erroneously stated the date to be the 23rd February 2011) which was directed to officials in the First Respondent's department. Since considerable time was spent in argument referring to this e-mail and its interpretation and, as reference will be made to it hereinafter, I deem it appropriate to quote it verbatim. It reads as follows:

> "I would like to draw your attention to the reported concerns indicating that asylum seekers reporting to the Refugee Reception Offices without S23 or valid travel documents are not assisted which has also been confirmed by Musina (e-mail message below). At the meeting held in Cape Town on 02 February 2011 with DM a range of option to deal with high volume of applicants for asylum were discussed and one of them

was a suggestion for us to look at implications if we insist or give first preference to those asylum seekers with S23 or valid travel documents. This was a measure that needed to be looked into to encourage asylum seekers entering the Republic to use the designated Ports of Entry and not a decision to be implemented (as yet).

The DDG has further reiterated that all new arrivals at the Refugee Reception Offices must be attended to.

I would also like to indicate that no directive has been issued to refuse those asylum seekers without S23 or valid travel documents. I do not understand therefore how such a change can be implemented without a directive and agreed upon process.

You are therefore directed not to implement suggestions//proposals – these remain possible options – until informed decisions on them are taken and approved."

[7] The denials by the Respondents of the existence of policy, practice and/or conduct invoked a sharp response from the Applicants who stated that "it went beyond rational belief" that they, who came from different countries in Africa, would have somehow conspired to waste their and their legal representatives' time by repeatedly engaging in imaginary complaints against the Respondents. To substantiate this assertion that the conduct complained about was still continuing, despite the Respondents' denials, the Applicants filed additional affidavits, one by Kaajal Ramjathan-Keogh who was employed as a Manager by Lawyers for Human Rights in its Refugee and Migrant Rights Program and the other by one Alaina Evelyn Varvaloucas, who was an intern at a non-governmental organization, People Against Suffering, Oppression and

Poverty ("Passop"), wherein they claimed to have witnessed applicants for Refugee Permits who had no ATP's still being turned away. The Applicants also invited the Respondents, an invitation which was ignored, to respond to these new allegations.

[8] At the time this matter was heard all the Applicants were already issued with their Asylum Permits, prompting the Respondents to argue that the matter was moot as between the parties. The Applicants, however, persisted with the application for a declaratory order on the grounds that the outcome was of importance, not only to them, but to other refugees who may find themselves in similar circumstances as they were as a result of the conduct of the Respondents. The Applicants accordingly sought a declaratory order to the effect that the Respondents' conduct was inconsistent with the Constitution of the Republic of South Africa and the provisions of Sections 21 and 22 of the Refugees Act and therefore unlawful and illegal. The Applicants did not state in their papers which provisions of the Constitution were violated by the conduct of the Respondents. I am however satisfied that this is not fatal to their course as one can assume, which assumption is also in line with the Rule 16A notice which was filed, that the alleged violation was, inter alia, of their constitutional rights to equality (Section 9); human dignity (Section 10); freedom and security of person (Section 12) and just administrative action (Section 33).

[9] Mr. Atkins, who appeared for the Applicants, argued that, although the Respondents have denied that there was a policy or practice by the Respondents with which the Applicants could take issues,

failed to deny that the "conduct" of the First Respondent's officials, which was also a source of the complaint by the Applicants, was not in accordance with the policy of the First Respondent's department. For this reason alone, he argued, the Applicants were entitled to the relief prayed for in the notice of motion. He also argued that the Respondents were economic with the truth when they alleged that there was a misunderstanding regarding the decision taken at the meeting of the 2nd February 2011 which was to continue with issuing permits in terms of Section 23 of the Immigration Act, because this was clearly transformed into conduct by certain officials. According to him the only inference to be drawn from the e-mail of Mr. McKay, wherein he sought to clarify the decision taken on Section 23 permits, was that this had in fact been formulated into a policy, practice, directive or conduct which was to be implemented once informed decisions on them had been taken; that, notwithstanding the various emails exchanged by various of the First Respondent's officials trying to clarify the matter amongst themselves, on the one hand, and other interested parties, such as representatives of the United Nations Commission for Refugees (UNHCR), on the other, the founding affidavits of the Applicants revealed various incidents after the 15th February 2011 where an ATP was still demanded when applying for a Refugee Permit. He, however, conceded that as from the 28th February 2011 (four days after the launch of this application), after Respondents' officials had made an undertaking to that effect, applications were accepted without requiring the production of an ATP from an applicant. He also made reference to the affidavit of Ms. Varvaloucas as proof that the conduct complained of was still continuing, the launching of this application and the alleged directives clarifying

the issue having been unsuccessful in regulating the unlawful conduct of the Respondent's officials. This according to him, justified the grant of a declaratory order against the Respondents, in the terms prayed for, and that there could be no prejudice to the Respondents since such orders would merely confirm the existing law.

[10] Mr. Moerane on behalf of the Respondents commenced his address by submitting that the affidavits of Keogh and Varivaloucas, filed out of time as they were, should be struck out, alternatively, ignored by the Court. His contention was that the Applicants were supposed to have made out their case in the founding and not in their replying papers. According to him the introduction of these new facts at this late stage deprived the Respondents of the opportunity to respond thereto. Furthermore, he submitted that the affidavit of Varivaloucas contained hearsay evidence, did not refer to any of the Applicants nor a specific person or persons and, overall, did not advance the Applicant's course any further for lack of details. His main argument, however, remained the submission made in the heads of argument that the matter was moot and that the declaratory order sought by the Applicants will serve no purpose as it will be a mere statement of the law as contained in the statute in question.

[11] The papers as well as the arguments presented by Counsels make the following issues pertinent for resolution:

11.1 whether there are any real dispute of facts and if so, whether they are capable of resolution on the papers;

11.2 whether the affidavits of Keogh and Varivaloucas should be struck out or ignored;

11.3 whether the matter is moot as between the parties and, if so;

11.4 whether the Applicants are still entitled to a declaratory order due to the alleged importance of the matter.

[12] I deal first with the question of the dispute of facts. Mr. Moerane argued that there was a real dispute of facts on the papers, which the Applicants should have foreseen. He proposed that this Court should follow the general rule, formulated by Corbett JA in *Plascon Evans Paints v Van Riebeeck Paints* 1984(3) SA 623 (AD), and followed in subsequent judgments and recently by Harms DP in *National Director of Public Prosecutions v Zuma* 2009(2) SA 277 (SCA) a case to which Mr. Atkins also referred, that when there is a dispute of facts a final order should only be granted in motion proceedings if the facts as stated by the Respondents, together with the admitted facts in the Applicant's affidavits justify such an order. He also produced a schedule of what, according to the Respondents, were real dispute of facts. I found this schedule a useful guide to the areas which the Court should focus when dealing with this aspect but, by no means conclusive. On the other hand, and in the eyes of the Applicants, the denials by the Respondents, which are said to create real dispute of facts, were nothing but disingenuous. To Mr. Atkins the denials by Third Respondent did not go far enough as the existence of a conduct by the Respondents' Officials was not denied, and that there were no real dispute of facts which were incapable of resolution on the papers.

[13] In the *Zuma* matter *supra* Harms DP stated the rule in the *Plascon Evans* matter as follows:

> *"[26] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr. Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers".*

[14] The facts which were common cause between the parties were the following: the Applicants who are foreign nationals applied for asylum seekers permits at various times but mainly during February 2011 at the Maitland Refugee Centre. After initially being turned back for want of ATP they were eventually granted Asylum Permits. This was after the launch of the present application. It is also common cause that in term of Section 21 of the Refugees Act the only requirement which an Applicant must comply with is that he or she must make the Application in person according to the prescribed procedure and that he or she must have his or her fingerprints taken (and, if older than sixteen years, furnish two recent photographs of himself or herself). That on receipt of an application complying with the requirements of Section 21 the Respondent were obliged, in terms of Section 22 of the Refugees Act, to issue Asylum Seekers' Permits to the applicants therefore; that during the month of February 2011, more particularly as from

the 7th, the Respondents' officials started demanding ATP's as a prerequisite for accepting applications for ASP's; that this practice or conduct had stopped by the time the application was heard, and the Applicants had been issued with their permits. What is in dispute was whether this demand for ATP's was as a result of a policy, practice, directive or conduct by the Respondent's which would be in violation of Section 21 of the Refugees Act and the Constitution as alleged by the applicants or merely a misunderstanding as contended by the Respondents.

[15] In argument before Court Mr. Atkins eventually conceded that there was no proof of a policy directive or practice pointing to the requirement of ATP's as a prerequisite for an application in terms of Section 21 of the Refugees Act but maintained that there was indeed such a conduct. He found support for his contention in the alleged failure by the Respondents to deny its existence in their opposing papers. According to him paragraphs 4 and 5 of Third Respondents opposing affidavit did not go far enough as to deny the existence of this conduct. Nor did all the other affidavits filed by the Respondents. Consequently, he argued that the Respondents' officials had elevated a suggestion emanating from the meeting of the 2nd February 2011 to conduct and would soon have been translated into policy, once informed decisions had been taken.

[16] I respectfully do not agree with these submissions. It is obvious from the other e-mails that were attached to the Applicants' founding affidavits that Respondent officials were trying to seek clarification regarding the minutes of the 2nd February 2011. For example, when Lindile Kgasi was confronted by the contents of Sergio Calle Nosena's e-mail of the 14

February 2011 she immediately on the 15th February 2011 sought clarification from her colleagues. Similarly, Mfundo Ngozwana merely expressed his interpretation of the notes from the said meeting which were forwarded to him. Mr. Jackson McKay ultimately set the record straight on the 24th February 2011 in his e-mail quoted above. The language used is straight forward and there is no ambiguity as to the message conveyed. One is left in no doubt that he was clarifying any misconceptions regarding what was discussed and agreed upon in the meeting of the 2nd February 2011.

[17] There is therefore in my view no dispute or facts which cannot be resolved on the papers before court. I agree with Mr Moerane that the only finding that can be made on the papers in respect of this issue is that the Respondents never adopted any policy, directive or practice in terms of which Section 23 ATP was a prerequisite for an asylum application or the issuance of a permit under Section 22 of the Refugees Act..

[18] The question remains, however, whether the misunderstanding, admitted by the Respondent, resulted in "conduct" which would justify an order in the terms sought by the applicants. The Respondent's contention is that the matter is now moot between the parties and no purpose will be served by an order whose only purpose is to state the existing law. The Applicants insisted that a declaratory order would be necessary even if it is a confirmation of the existing law if we are to avoid a repeat, in future, of the circumstances in which the Applicants found themselves were their constitutional rights were affected by the Respondents' conduct.

[19] Mr. Moerane argued that since the Applicants have conceded that there was no longer any conduct, policy or directive, as far back as the 17th May 2011, in terms of which an Applicant for asylum will only be assisted if he/she was in possession of an asylum transit permit, there was no longer any practical and/or substantive relief for Applicants to pursue. That the matter has therefore become moot as between the parties. That while this Court was empowered in terms of Section 38 and 172(1)(a) of the Constitution, and in terms of Section 19(1)(a)(iii) of the Supreme Court Act 59 of 1959 ("the Supreme Court Act"), to grant a declaratory order it has a discretion to do so and may refuse to grant an order when such an order would have no practical effect. Relying on *Ex Parte* Noriskin 1962(1) SA 856 (D) he also argued that a Court should not grant a declaratory order when the legal position has already been clearly defined by statute.

[20] Mr. Atkins, on the other hand, submitted that even if it was found that the issuing of the refugee permits to the Applicants rendered the matter moot as between the parties, which was not conceded, this Court was called upon to exercise its discretion and grant a declaratory order in favour of the Applicants because of the importance of the matter not only to the Applicants but to other would be asylum seekers whom he described as a vulnerable group. If I understood this argument correctly the declaratory

order is necessary to prevent a likely situation arising where the Respondents' officials would relapse into the alleged unlawful conduct of demanding ATP's which is contrary to the provisions of the Refugee Act and which may be prejudicial to future would be but undefined asylum seekers.

[21] I deal first with the question whether a declaratory order as sought by the Applicants can be made in terms of Section 19(1)(iii) of the Supreme Court Act. Section 19(1)(iii) provides as follows:

> "(1)(a) A provincial or local division shall have jurisdiction over all persons residing or being in and in relation to all causes arising and all offences triable within its area or jurisdiction and all other matters of which it may according to law take cognizance, and shall, subject to the provisions of subsection (2), in addition to any powers or jurisdiction which may be vested in it by law, have power –
>
> (i) to hear and determine appeals from all inferior courts within its area of jurisdiction;
>
> (ii) to review the proceedings of all such courts;
>
> (iii) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination."

[22] This subsection has been interpreted in a number of decisions to mean that a court will not deal with, or pronounce upon, abstract or academic

points of law and that there must be an existing and concrete dispute between persons, albeit as to future or contingent rights, before the court will out (see *Erasmus: Superior Court Practice* A 1-33 and the authorities quoted in footnote 2 thereto; *Ex Parte Nell* 1963 (17) SA 584 (A) at 760 A-C a contrary view, however, was held: that an existing dispute is not a prerequisite to an exercise by a court of the jurisdiction conferred by this section as long as there were interested parties upon whom the declaratory order will be binding). The contradictions imported by the Nell decision however should not detain us as I am of the view that a prerequisite for the use of this section does not apply to the Applicants, as will appear from what is stated below.

[23] The requirement that all interested parties are to be joined in an application for a declaratory order[1] under this subsection clearly makes it unsuitable for the present circumstances. This section is therefore not available as to the Applicants for this reason. I find it unnecessary to discuss the further requirements of this section. That leaves the provisions of Section 38 and 172(1)(a) on which the Applicants in any event as relied the only applicable sections under which this court may bring out the kind of declaratory order requested by the Applicants.

[1] See Contact Props 25 (Pty) Ltd v Executive Council, Province of the Eastern Cape [2000] 3 A11 SA 443 (CK) at 446t

[24] A matter is moot as between the parties, as defined by Ackermann J if "it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law."[2] But mootness does not spell an end to the matter. The Court may still exercise its discretion and entertain the matter if the declaratory order it may bring out will have a practical effect on the parties or on others[3]. In exercising its discretion the Court will naturally look inter alia at the importance of the issue to the affected parties, the complexity and the fullness or otherwise of the arguments advanced.

[25] Before dealing with what the effect of mootness will be in this matter I deem it appropriate to emphasise that the Applicants have brought this Application in terms of Section 38(a); (c) and (d) as well as Section 172(1)(a) of the Constitution for the effective enforcement of their constitutional rights. They allege to be doing so in their own interest, in the interest of a group or class of persons and generally in the public interest. They have also filed a Rule 16A notice which clearly underlines their reliance on the Constitutional provisions. The application of Section

---

[2] National Coalition for Gays and Lesbians Equality and Others v Minister of Home Affairs and Others 2000(2) SA 1 (CC) at n18.
[3] See Resident, Ordinary Court Martial and Others v Freedom Expression Institute and Others 1999(4) SA 682 (CC) at n9 et par [16]

19(1)(a)(iii) of the Supreme Court Act, therefore, in my view, finds limited application. The sections of the constitution relied on by the Applicants widens the scope of the discretion which this court can exercise: i.e. whether to entertain the matter beyond its mootness and to bring out a declaratory order or to refuse to do so.

[26] In the circumstances therefore, while I agree with Mr. Moerane that the matter has become moot as between the parties I deem it in the interest of justice to extend the enquiry into whether the declaratory order sought by the Applicants would be of any benefit to any group or class of persons or the general public post this application. I cannot summarily shut the door in the face of this call to look into the efficacy of an order which may advance the protection of constitutional rights.

[27] Originally the Applicants could rightfully claim to be acting in terms of Section 38(9); (6); and (d) but in my view their standing in terms of 38(a) has now fallen off since they have been granted the relief they were seeking. They may still have standing in terms of subsections (c) and (d). In terms of (c) and (d), however, the Court has to be circumspect in invoking this provisions.

[28] In *Ferreira v Levin and Others and Vryehoek and Others v Powell NO and Others* [1996(1) SA 984 (CC)] at 1104-1105 O'Regan J mentioned factors which may be considered by the Court in determining whether a person was genuinely acting in the public interest. These will include whether there was another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought and the extent to which it is of general and prospective application; the range of persons or groups who may be directly or indirectly affected by an order made by the Court and the opportunity that those people have had to present evidence and argument to Court[4]. I propose to adopt the same approach as a guide in determining whether a declaratory order in this matter will be of any benefit to the groups or class of people envisaged and/or on the general public.

[29] Refugees have been described as a vulnerable group of people, in the South African context, because of their lack of means, support systems, family, friends or acquaintances, a likely lack of or limited understanding of the South African legal system and its values and also a limited knowledge of any lawyers and/or non-governmental organization that could assist them[5]. I cannot find fault with this general description of the circumstances of refugees but, on the facts of this case, it would appear that, mostly if not

[4] See par 234 of the Ferreira judgment
[5]

all the refugees involved or, at least those who presented themselves to the Maitland Refugee Reception Centre, were aware of the non-governmental organizations operating in this field, may have come into contact with them and know of the sterling work they do. I also mention in passing that it will also, be incumbent upon these organizations to make themselves visible at these centres so as to assist those who are in dire need of their services. Having said that it is also the duty of the Courts to assist these vulnerable group by removing any illegal obstacles which may hamper non-governmental organisations in their effectiveness and to ensure that refugees enjoy their constitutional rights. This Court is therefore enjoined to fulfill this role. In doing so it, however, must operate within the parameters of reason and logic and in pursuit of the constitutional imperatives.

[30] It is abundantly clear from the aforegoing that the Respondents had no policy and/or practice of refusing to accept asylum applications in terms of Section 21 or of refusing to issue asylum seekers with temporary asylum seekers permits in terms of Section 22 of the Refugees Act. There was no such policy practice and/or directive as on the 7th February 2011 and the subsequent dates. What happened, however, was that the misunderstanding referred to by the Third Respondent which led to some officials refusing to accept this application if they were not accompanied by an ATP found

application for a very brief period of time. This according to Mr. Atkins, was conduct which justifies an intervention by this Court. I am not convinced that this was of a sustained nature as to amount to conduct which requires reaction in the form of a declaratory order from this Court. It was of a brief and flirting moment, not persisted with once it was identified and has since come to an end. As argued by Mr Moerane the allegations in the affidavits of Kaajal Ramjathan-Keogh and Alama Evelyn Varvaloncas, even if I accept them do not take the matter any further since they do not refer to any specific person and contain hearsay evidence. I am of the view that they cannot be used as proof of the continuation of the conduct. No useful purpose, to the group or class of people who were affected thereby or, who may be affected thereby or to the general public, will be served by bringing out a declaratory order, especially in the circumstances where Section 21 of the Refugee Act, regulate the legal position in clear and unambiguous terms.

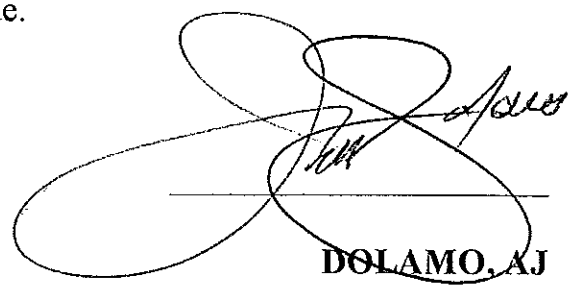
[31] I therefore find that the Applicants have failed to proof that a declaratory order, post the mootness of the matter, is in the public interest or that it will benefit any future asylum seekers.

[32] Lastly, the Respondents have conceded that if they were to succeed no cost order would be of any use to them. I share the same view and consequently no order as so costs will be made.

[33] The order I make therefore is the following:

32.1 the application is dismissed; and

32.2 no order as to costs is made.



DOLAMO, AJ