IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, GRAHAMSTOWN)

Case no: 3759/2011

Date heard: 10 May 2012
Date delivered: 14 May 2012

In the matter between

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

vs

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

JUDGMENT

PICKERING J:

This is an application by first, second and third respondents for leave to appeal to the Full Bench of this Division against part of my judgment and order handed down on 16 February 2012. The order made by me was as follows:

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

2. The first to third respondents are directed forthwith to open and maintain a fully functional Refugee Reception Office to provide services

to asylum-seekers and refugees, including new applicants for asylum, in the Nelson Mandela Bay Municipality.

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

Paragraphs 1 and 3 of the order are not assailed. The application for leave to appeal is directed at paragraph 2 thereof and in particular the order directing the first to third respondents "*forthwith*" to open and maintain a fully functional refugee reception office, the emphasis being on the word "*forthwith*". As set out in the Notice of Appeal the respondents submit, *inter alia*, that given the difficulties encountered by them in securing suitable premises for such an office it is impossible for them to comply with the terms of paragraph 2 of the order. What should have been ordered, so it is submitted, is that the office be opened within a reasonable time.

In developing his argument Mr. Moerane, who together with Ms. Manaka appeared for the respondents, stressed the averment made by second respondent in the papers to the effect that the process of securing suitable alternative premises for the reception office promised to be a "*protracted, difficult if not impossible task.*" I interpose to state that whilst it may prove difficult for the respondents to secure suitable alternative premises it is stretching the bounds of credulity too far to suggest that it might be impossible to do so in a city the size of Port Elizabeth. Apart from that, there are a number of interim measures which could be put in place whilst permanent premises were being secured.

Be that as it may, the real issue with which this application is concerned relates to the meaning of "*forthwith*" as used in paragraph 2 of the order. Mr. Moerane submitted, with reference to a thesaurus, that "*forthwith*" bore a number of meanings, such as "*immediately, directly, straight away, at once, without delay.*" The word "*forthwith*", so he submitted, bore any one of these connotations with the result that the effect of the order was that a fully

functioning refugee reception office had to be opened and maintained immediately upon delivery of the judgment.

In my view these submissions cannot be sustained. As was submitted by Mr. Budlender, who appeared with Mr. Van Garderen for the applicants and the respondents in the application for leave to appeal, the order cannot be construed in a vacuum. It cannot be read in isolation. The judgment as a whole provides the context within which it must be understood. As appears therefrom I was fully alive to the difficulties which respondents averred they would encounter in finding alternative premises. I was also well aware at the time of delivery of the judgment on 16 February 2012 that respondents had taken no steps to secure premises for purposes of re-opening the Refugee Reception Office because of their contention that the closure of the existing office was lawful. It was in that context that, having found that such closure was unlawful, I ordered respondents forthwith to open and maintain the office. Whatever similar meanings may be attributed to "*forthwith*" by the thesaurus consulted by Mr. Moerane, not only is the dictionary meaning of the word, as defined in the Concise Oxford English Dictionary, 11th edition, "*without delay*" but, furthermore, it is clear from numerous cases that the word "*forthwith*" in legal usage is not as peremptory as *"immediately*" and, in this context, means "*as soon as is reasonably possible in the circumstances*." See: Claassen: Dictionary of Legal Words and Phrases, 2nd Ed at F-50 et seq where all the relevant authorities are collected.

In other words, the respondents were obliged by the order to take all necessary and reasonable steps without delay to open and maintain a fully functioning refugee reception office even if such process did turn out to be a protracted one. Properly and objectively construed in the context of the judgment the order cannot, in my view, mean anything else and it is absurd to suggest that the order meant that the office should be open and functional immediately upon the judgment being delivered. In my view therefore there are no reasonable prospects of success on appeal on this ground.

Mr. Moerane submitted further that I erred in failing to remit the matter to second respondent for redetermination. In my view there is equally no merit in this submission. It is common cause that the closure of the office was unlawful. It was unlawful, *inter alia*, on the basis that the decision by second respondent to close the existing office could only have been taken after consultation with the Standing Committee, which he failed to do. The effect of this failure was therefore that his decision to close the office was a nullity and was void *ab initio*. As I pointed out, it was for second respondent, in the light of what was said in the judgment, to decide whether to take the matter further. Should he wish to do so there was and is nothing preventing him from consulting with the Standing Committee and, depending on the outcome thereof, thereafter coming to a decision afresh in accordance with the law. There is no merit in the circumstances in the submission by Mr. Moerane that I substituted my decision for that of second respondent and thereby usurped the powers that the legislature had conferred on the executive.

In all the circumstances I am unpersuaded that there are any reasonable prospects of success on appeal. The application for leave to appeal must therefore be dismissed with costs. Both counsel agreed that in such event the costs of two counsel should be allowed.

I turn then to consider the applicants' application in terms of Rule 49(11) of the Uniform Rules of Court. In that application the applicants seek the following relief:

> "*1. Directing that notwithstanding any application for leave to appeal and/or appeal by any of the first to fifth respondents against the order granted by this Court on 16 February 2012, and pending the outcome of any such appeal:*
>
> *1.1 Paragraph 2 of the order granted on 16 February 2012 is not suspended; and*
>
> *1.2 The second respondent is directed to maintain a fully functional Refugee Reception Office in the Nelson Mandela Bay Municipality, including but not limited to*

ensuring that the Refugee Reception Office re-commences receiving, accepting and processing new applications for asylum within two weeks of the date of this order.

2. *Directing that the costs of this application be paid by any respondent who opposes the relief sought*."

Of relevance to this application is that respondents have accepted that the closure of the office by second respondent was unlawful. It is also of relevance, in my view, that despite the fact that nearly 12 weeks have passed since the judgment was delivered there is no indication before me as to what steps, if any, the respondents have taken in the meantime in an attempt to comply with the order. I do not agree with Mr. Moerane's submission in this regard that this is irrelevant. It is relevant to the bona fides of the respondents and the issue as to whether the appeal was noted for purposes of delay. Although the Rule 49(11) application was filed late in the day it would have been a simple matter for the respondents to have replied thereto informing me what steps, if any, they have taken towards the re-opening of the office. Mr. Moerane informed me that should leave to appeal be refused the respondents intended to petition the President of the Supreme Court of Appeal for such leave. In the event of leave to appeal being granted on petition the matter would no doubt be referred for hearing to a Full Bench of this Division. In that event a further period of some months would elapse prior to the appeal being heard. By the time any such appeal was finally disposed of more than the reasonable period which respondents contend they have not been afforded would have elapsed.

I can conceive of no prejudice whatsoever to respondents should paragraph 1.1 of the application be granted, namely that paragraph 2 of my order granted on 16 February 2012 be brought into operation, neither could Mr. Moerane seriously suggest any. On the other hand, the prejudice to the applicants and the asylum seekers they represent in this application is manifest should the operation of paragraph 2 of the order continue to be suspended pending any further applications for leave to appeal. The second

respondent summarily and unlawfully closed the office. There is no reason why the respondents should be permitted to delay any further in the redressing of that wrong.

I agree, however, with the submission by Mr. Moerane that paragraph 1.2 would in effect vary the order granted by me. In my view, therefore, there is no basis for the granting of the order sought in that paragraph. Despite this, the applicants have achieved substantial success in this application and there is no reason why the costs of this application should not also be borne by the respondents, such costs to include the costs of two counsel.

Accordingly the following order will issue:

1. The application for leave to appeal by first, second and third respondents is dismissed with costs, such costs to include the costs of two counsel.
2. Notwithstanding any further application for leave to appeal and/or appeal by any of the respondents against the order granted by this Court on 16 February 2012, and pending the outcome of any such appeal, paragraph 2 of the order granted on 16 February 2012 is not suspended and first to third respondents are directed to give effect thereto.
3. The first, second and third respondents are ordered to pay the costs of the Rule 49(11) application such costs to include the costs of two counsel.

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J.D. PICKERING
JUDGE OF THE HIGH COURT

Appearing on behalf of Applicant: Adv. S. Budlender and Adv. J. Van Garderen

Instructed by: Lawyers for Human Rights, Johannesburg Law Clinic
c/o Refugee Rights Centre, Nelson Mandela Metropolitan University
Mr. Linto Harmse

Appearing on behalf of Respondents: Adv. M.T.K. Moerane S.C. and Adv. N. Manaka
`Instructed by: State Attorneys Offices, Port Elizabeth.