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IN THE HIGH COURT OF CAPE TOWN

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 2739/05

In the matter between:

DE GAULLE KILIKO AND 6 OTHERS Applicants

And

THE MINISTER OF HOME AFFAIRS AND

2 OTHERS Respondents

JUDGMENT: 4/03/008

VAN REENEN, J:

1] On 16 January 2006 I handed down a written judgment in this matter in terms whereof: -

1.1] the conduct of the respondents by having introduced a policy and practice in the Refugee Reception Centre of the Western Cape which required officials to process no more than 20 asylum-seeker permits per day was declared unconstitutional because it was found to be inconsistent with the fundamental rights of illegal foreigners as embodied in sections 10 and 12 of the Constitution; and

1.2] a structural interdict was issued in terms whereof the Western Cape Chief Immigration Services Officer in the Department of Home Affairs was directed to

report to this court by not later than 3 May 2006 in the form of an affidavit on a number of delineated aspects.

2] I for the reasons set-out in paragraph 32 of that judgment, reported as **Kiliko and Others v The Minister of Home Affairs and Others** 2006(4) SA 114 (C) declined to make an order in terms of prayer 3 (incorrectly numbered as 4) of the notice of motion in terms whereof an order was sought directing the respondents to accept applications for asylum by asylum seekers on or within a reasonable time of such applications being made. I mention this merely to elucidate

why I have declined the invitation of Mr Katz, who represented the applicants in this matter, to grant a mandamus in that or a modified form.

3] Although the formulation of the terms of the structural interdict in a few respects inadvertently exceeded the confines thereof its intended purpose was to achieve a discontinuation of the policy and practice which had been found to have been unconstitutional and to monitor the implementation of the remedial measures that had been envisaged.

4] Mr Jurie de Wet, the Western Cape Chief Immigration Services Officer (Mr De Wet) in compliance with the terms of the structural interdict filed an affidavit, jurat 10 May 2006, as well as a supplementary affidavit, jurat 31 May 2006, in which he dealt with the aspects enumerated in the structural interdict and in doing so made reference to a number of remedial measures that were being envisaged but had by then not been implemented as yet. With a view to enabling the respondents to achieve the implementation of such measures and in order to assess the efficacy thereof I on 8 June 2006 postponed the interdict to 19 March

2007 and directed the Western Cape Chief Immigration Services Officer to file a further report in the form of an affidavit by not later than 7 February 2007 in respect of a further number of enumerated aspects.

5] Mr De Wet filed a report in the form of an affidavit which had been deposed to by him on 12 December 2007. He in paragraph 19 thereof mentioned that a process engineer had been appointed by the first respondent during December 2006 for the purpose of conducting a feasibility study; preparing a comprehensive report; and devising a plan to facilitate the

reception of asylum seekers. As it was foreshadowed that the outcome of the process engineers' recommendations would result in a more effective handling and timeous adjudication of new applications of asylum seekers, the matter was on the 19th of March 2007 and in chambers postponed by agreement between the parties' legal representatives sine die with a view to the finalization and implementation of the process engineer's recommendations.

6] By arrangement with the parties' legal representatives the matter was enrolled for

hearing on 18 February 2008. A report which had to be filed by the 3rd respondent by 31 December 2007 - but was filed only on 31 January 2008 - and was deposed to by Yoliswa Mzamane, an Assistant Director: Refugee Reception Office, Cape Town, annexed the said process engineer's report and dealt with other developments in the handling of applications for refugee status since the filing of the last report on 12 February 2007.

7] Me Mzamane, whilst avoiding to deal pertinently with the factual averments made by Mr Wiliam Ralph Kerfoot (Mr Kerfoot) the applicant's

attorney, conceded in paragraph 9 of her affidavit that the Refugee Reception Office in Cape Town lacks the capacity to help all persons on the same day that they present themselves for section 22 permits but contended that all reasonable steps have been or are being taken to alleviate the problem. Such steps include -

7.1] the acquisition of a building identified as NIB House in which is envisaged to house the Cape Town Refugee Reception Office by September/October 2008 and allegedly will prevent its functions from being hamstrung by space limitations.

7.2] that until the end of March 2008, and as a temporary measure, section 22 applications will be dealt with at the offices of the Department of Home Affairs in Barrack Street, Cape Town and thereafter at the Backlog Office located at Airport Industria Nyanga, Cape Town until such time as the NIB Building is ready for occupation;

7.3] that the complement of officials employed in various capacities in the Refugee Reception Office in Cape Town has been increased to 36; that a further 5 Refugee Reception Officers are to be appointed shortly; and that the appointment of a

further 2 Refugee Reception Office Managers has been approved in order to manage the work of the 14 Refugee Reception Officers;

7.4] that improvements brought about to the information technology systems of the Department of Home Affairs has brought about a reduction of the time required for the capturing of information of individual applicants for section 22 permits from 45 to 15 minutes;

7.5] that a system has been introduced to print section 22 permits on special bar-coded

security quality paper so as to counteract the fraudulent creation of such permits;

7.6] that a time-saving system has been introduced in terms whereof officers issuing section 22 permits are equipped with a computerised work station and camera so that photographs of applicants can be taken at the same point where information is gathered;

7.7] that the Department of Home Affairs is in the process of integrating its information technology services so as to avoid a duplication of applications for section 22 permits; to obviate the need of transferring

files between offices when applicants relocate; and to enable the centralised monitoring and management of the whole system;

7.8] that consultants have been appointed with the task of monitoring progress at the various refugee centres; to identify problems; and to devise turnaround strategies; and

7.9] that since 25 January 2008 a system has been introduced in terms whereof certain days have been allocated on which persons of different nationalities may apply for section 22 permits in order, so it is said, to

create "more order" thereanent. As an aside: it will not be surprising if also that system is subjected to a constitutional challenge in the future.

8] What is apparent from the aforegoing is that the Department of Home Affairs has belatedly introduced measures designed to alleviate the inordinate influx of asylum seekers to the City of Cape Town and its environs. That such measures are neither timeous nor adequate is abundantly clear from the facts reflected in the affidavits of Mr Kerfoot and the affidavits and documents that have been annexed thereto. It

appears, on the facts at my disposal, that of the approximately 300 people who had presented themselves at the offices of the Cape Town Refugee Centre on a daily basis during the period approximately end of November to approximately mid December 2007, only 50 to 60 could be issued with section 22 permits. The affidavits of those who have repeatedly but unsuccessfully attempted to obtain section 22 permits paint a graphic and debilitating picture of the gross inhumanity which is being meted out to asylum seekers because of the failure on the part of the South African authorities to fully adhere to the International Instruments as

regards the treatment of refugees assented to by the Government and to fully comply with the laws passed by it in order to give effect thereto. The failure to provide sufficient facilities to enable asylum seekers to submit applications to Refugee Reception Officers without delay and to have then considered by Status Determination Officers have as a consequence that until they are issued with section 22 permits they are subject to all the disadvantages and disabilities that have been enumerated in paragraphs 27 and 28 of the earlier judgment herein.

9] One's offended sense of justice and instinctive desire for the imposition of remedial action must however yield to three pivotal considerations. The first is the nature of the present proceedings. What cannot be disregarded is the fact that the relief which had been sought originally has been dealt with in the earlier judgment herein so that, save for aspects of the structural interdict that have not been fully addressed as yet or have remained unresolved, I am **functus officio.**

The second is that because of the demands on the public purse as a result the Government's numerous constitutionally prescribed

commitments, available resources are not unlimited (Cf **Fose v Minister of Safety and Security** 1997(3) SA 786 (CC) at paragraph 72). Accordingly the most that can be expected of the Department of Home Affairs is "to purposefully take all reasonable steps to ensure maximum compliance with [its] constitutional obligations" (See: **S v Jaipal** 2005(4) SA 581 (CC) at paragraph 56) and that there is no basis on which it could be found that those measures which have already been or are intended to be implemented in the immediate future are unreasonable. Especially as a comparison of the data in paragraph 7.11 of the affidavit of Me

Mzamane and paragraph 9 of the affidavit of Mr De Wet of 10 May 2006 show a marked increase in a number of applications for section 22 permits that are being processed at present. The third is that courts in deference to the doctrine of the separation of powers go to great lengths when fashioning orders to avoid intruding into the preserve of the executive arms of government. Accordingly the nature of any relief to be granted by me must refrain from prescribing how the Department of Home Affairs should perform its functions as regards the handling of asylum seekers.

10] In the light of the aforegoing and despite the robust views articulated by me during the presentation of argument, I incline to the view that I can do little more than to issue an order in the following terms:

The matter is postponed to 12 December 2008 and the structural interdict is extended to that date but only to the extent that the Chief Immigration Services Officer of the Western Cape (and no other official) is directed to file a report in the form of an affidavit with this court by no later than 5 December 2008 (no further indulgences will be allowed) in which the following aspects are fully dealt with:

10.1] whether the relocation of the Refugee Reception Office to NIB House has been completed or not. If not, what the reasons are and if so what effect it has had on the providing of more facilities for the acceptance of applications for refugee status and the consideration of status determination applications and more in particular, the number of such applications that are being processed on a daily basis;

10.2] the extent to which the improvement and the integration of the information technology system has been completed

and if so, what effect it has had on the number of asylum seeker applications and status determinations that are being processed;

10.3] the combined impact of the measures in 10.1 and 10.2 above on the escalating backlog of section 22 applications and status determinations.

11] I have given serious consideration to appointing a rapporteur to report to this court as regards the matters in 10 above but have decided against it. I did so for principally two reasons. The first is that the rapporteur's function would

merely have been that of a conduit between the officials of the Department of Home Affairs and this court and secondly, that the costs of a rapporteur would have been disproportionate to the limited benefit that could be gained therefrom.

12] The respondents are further ordered to pay the costs of the application on 18 February 2007 but exclusive of the costs of preparing the ringbinder containing copies of other applications for relief against one or more of the respondents herein. It is recorded that such

costs are to be taxed on a scale as between party and party.

13] In conclusion: The Legal Resources Centre has a proud record of having assisted litigants in redressing the human rights abuses people had been subjected to prior to the advent of our present constitutional dispensation. It is indeed ironic that less than fourteen years into our newly established democracy the need has again arisen for that institution to feel obliged to assume that laudable role. Its staff, especially Mr Kerfoot, must be commended for the invaluable services they are providing to

geographically and socially dislodged fellow human beings who are so desperately in need of the services that they provide.

D. VAN REENEN