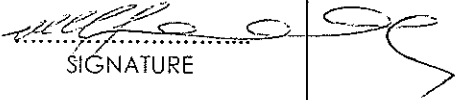


REPUBLIEK VAN SUID-AFRIKA



IN DIE HOË HOF VAN SUID-AFRIKA
(NOORD GAUTENG, PRETORIA)

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| (1) | REPORTABLE: YES/NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES/NO |
| (3) | REVISED. |
| | 14/12/2011 |
| | DATE |
| |  |
| | SIGNATURE |

In the matter between:

| | |
|---|-------------------|
| CONSORTIUM FOR REFUGEES AND MIGRANTS IN SOUTH AFRICA | FIRST APPLICANT |
| COORDINATING BODY OF REFUGEES COMMUNITIES | SECOND APPLICANT |
| HASSEN YSIN BASHURA | THIRD APPLICANT |
| ABDI ABDULLAHI YSUSF | FOURTH APPLICANT |
| TEMSED MOLKO TAKA | FIFTH APPLICANT |
| GEZEHAGN BERASA GALATO | SIX APPLICANT |
| EMNET ABAYHEH | SEVENTH APPLICANT |
| JAMES ASHENAFI ABO | EIGHTH APPLICANT |
| DAWIT MANEDO | NINTH APPLICANT |
| MARTHA KALACHO DINKSO | TENTH APPLICANT |

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| | |
|--|-------------------|
| MINISTER OF HOME AFFAIRS | FIRST RESPONDENT |
| DIRECTOR- GENERAL: DEPARTMENT OF HOME AFFAIRS | SECOND RESPONDENT |
| DIRECTOR: ASYLUM MANAGEMENT DIRECTORATE | THIRD RESPONDENT |
| CENTRE MANAGER: TIRORO REFUGEE RECEPTION OFFICE | FOURTH RESPONDENT |
| CENTRE MANAGER: MARABASTAD REFUGEE RECEPTION OFFICE | FIFTH RESPONDENT |

UITS PRAAK

LEGODI J

1. Initially the ten applicants sought relief in the following terms:

- “1. Directing the Respondents to grant the Third to Tenth Applicants immediate access to the Tshwane Interim Refugee Offices (TIRRO) or any such offices dealing with the files previously located at the Crown Mines Refugee Reception Offices, and to renew their refugees permits in terms of section 24 of the Refugee Act 130 of 1998;*
- 2. Declaring that the failure of the First and Second Respondents to establish adequate Refugee Reception Offices, including a Refugee Reception Office in the Johannesburg Metropolitan Municipality, is unlawful, unconstitutional and invalid;*
- 3. To the extent necessary, reviewing and setting aside the decision of the First and/or Second Respondent that no Refugee Reception Office would be established in the Johannesburg Metropolitan Municipality;*
- 4. Directing the First and Second Respondent to establish a Refugee Reception Office in the Johannesburg Metropolitan Municipality within 60 days of this order;*
- 5. Directing the Respondents to accept new asylum applications at both the Marabastad and TIRRO Refugee Reception Offices and at the new Johannesburg Offices contemplated in paragraph 4 above;*
- 6. Directing the Respondent to immediately put in place measures to maximise the productivity of the Marabastad and TIRRO Refugee Reception Offices;*
- 7. Directing the Respondents to immediately introduce an effective queue management system at the Marabastad and TIRRO Refu-*

gee Offices and, once established, at the new Johannesburg offices contemplated in paragraph 4 above which queue management system shall include, but is not limited to, the following:

- a) *Asylum seekers and refugees who seek the services of a refugee reception office are to be accepted and dealt with on a "first come, first served" basis;*
 - b) *All security guards operating at the Refugee Reception Offices are to be clearly uniformed;*
 - c) *There is to be no unnecessary use of force against the people in the queue outside the Refugee Reception Offices; including the use of the "sjambok",*
 - d) *Adequate signage must be erected outside the Refugee Reception Offices, clearly visible to those in the queue, stating the procedure for applying for asylum and clearly stating that there are no fees for any services within the refugee reception offices;*
 - e) *The signage referred to above shall be in at least four languages commonly used by asylum seekers and refugees at the Refugee Reception Offices, which shall include English;*
8. *Directing the Respondents to put in place a mechanism at both the Marabastad and TIRRO Refugee Reception Offices and at the new Johannesburg offices contemplated in paragraph 4 above to receive complaints from applicants for asylum, refugees and interested organisations about the queue management system and related issues;*
 9. *Directing the Respondent to initiate an immediate investigation of corrupt activities inside and outside of the Marabastad and TIRRO refugee reception offices;*
 10. *Directing the Respondents to file a report, on affidavit, with this court and the applicants on their compliance with paragraph 4 and 10 above, within 90 days of this order;*
 11. *Directing the Respondents to suspend the imposition of any fines for asylum seekers and recognised refugees who failed to renew their permits on or after 1 June 2011 at the Marabastad or TIRRO refugee*

reception offices, such suspension to remain in effect until such time as the Respondents file the report under paragraph 11 above.

12. *Directing that any of the Applicants or Respondents may re-enrol this matter for hearing at any stage, if necessary on duly supplemented papers, to deal with any need for further orders arising out of the orders set out in paragraph 4 to 11 above;*
13. *Directing the respondents to pay the costs of this application, jointly and severally, on the attorney-client scale."*

2. The issue were substantially narrowed when this matter was argued before me on the 8 December 2011. The relief that was eventually sought and argued on behalf of the applicants, as also indicated in the applicants' written heads of argument are set out as follows:

- "3. *Declaring that failure of the First and Second Respondents to establish adequate Refugee Reception Offices, including a Refugee Reception office in the Johannesburg Metropolitan Municipality;*
4. *To the extent necessary, reviewing and setting aside the decision of the First and/or Second Respondents that no Refugee Reception Office would be established in the Johannesburg Metropolitan Municipality;*
5. *Directing the First and Second Respondents to establish a Refugee Reception Office in the Johannesburg Metropolitan Municipality within 60 days of this order".*

3. Counsel for the applicants conceded that the establishment of the Refugees Reception offices was limited to Johannesburg area only. Therefore, prayers 3 above should be seen in the light of the narrowed relief sought. The issue or issues that had to be determined in these proceedings, were agreed to be as follows:

- 3.1 Whether the second respondent, being the Director- General of the Department of Home Affairs ever took a decision not to es-

establish another Refugee Reception Offices in the area of Johannesburg? And if so, whether such a decision is unlawful both procedurally and substantively?

4. The Director-General of the Department Home Affairs derives his or her powers to establish Refugee Reception Offices from section 8 of Refugees Act 130 of 1998 which provides as follows:

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

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

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

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

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

5. As regards to the first and main issue raised, counsel for the applicants argued that the decision not to establish a refugee reception office in Johannesburg, must have been taken during the period after the respondents were ordered by the South Gauteng Court on the 25 March 2011 to close Crown Mines reception office. The contention by the respondents, were that such a decision was never taken.

6. Just a brief background. The Minister of Home affairs and others having been ordered to close down the Crown Mines Refugee Reception Office, and having ordered to establish another such office in Johannesburg within 60 days from the 25 March 2011, an application for leave to appeal against the order of establishment of the refugee reception office in Johannesburg within 60 days was delivered.
7. Subsequent thereto, the applicants in that case, abandoned the order with regards to the establishment of the Refugee Reception office in Johannesburg within 60 days. On the 27 May 2011, the respondents in the present proceedings then announced the transfer all the files from Crown Mines to the Tshwane Interim Refugee Reception office, which I will refer to in this judgment as Pretoria office, although in the papers is referred to as TIRRO.
8. On the 19 September 2011 the applicants instituted the present proceedings in terms of which relief was sought in the terms as indicated in paragraph 1 of this judgment. The relief sought was based on a number of allegations made regarding the operation and management of the Pretoria Office and the Marabastad Refugee Reception office. Most of these allegations, if not all, have fallen by the wayside in the light of the narrowed relief sought, as indicated in paragraph 2 of this judgment.
9. Counsel for the respondents in these proceedings took the point that, the relief sought by the applicants have not been made out in the founding papers. True, a party's case must be made in the founding papers. Initially, the applicants' case seems to have been mainly based on the fact that an order was made in the South Gauteng High court in terms of which the Minister of Home affairs was obliged to establish another Refugee Reception Office in Johannesburg after the closure of the Crown Mines Refugee Reception Office. However, at one point in the founding affidavit, the applicants expressed themselves as follows:

“12.2 The Second is the decision of the first and or the second respondents to refuse to open a Refugee Reception Office in Johannesburg, following the closure of the Crown Mines Refugee Reception Office pursuant to a court order in a separate matter brought by various businesses.”

10. The quotation above was said in the context of showing the nature of the applicants' application. Firstly, by seeking to show persistent inability of significant numbers of asylum seekers and recognised refugees to gain access to Marabastad Refugee Reception Office and the Pretoria Office.

11. The Respondents answered to paragraph 12.1 and 12.2 of the founding affidavit, in two lines. Firstly, by admitting that the Crown Mines Refugee Reception Office was closed pursuant to a court order. Secondly, by stating that they however, deny that the remaining allegations made in these paragraphs are correct and also that the applicants were entitled to the relief sought.

12. Further, in paragraph 15 of the founding affidavit, the applicants expressed themselves as follows:

“15. In the light of this, the decision to refuse to open the Refugees Reception Office in Johannesburg following the closure of the Crown Mines office and the inability of asylum seekers and refugees to access the Marabastad office and the Pretoria office mean that the respondents are in breach of their obligations under the refugee Act, the Constitution and international Law.”

13. The respondents in an answer to the averments made in paragraph 15 of the founding affidavit responded as follows:

“15.1 I do not agree with the Applicants that the department has an obligation to open a Refugee Reception Office at Johannesburg following the closure of Crown Mines Refugee Reception office.

15.2 I also do not agree with the Applicants that the Department has refused to open the Refugee Reception Office in Johannesburg.”

14. Remember, the issue under decision is whether or not the applicants have made a case for the first and main issue as identified in paragraph 3 of this judgment. Although the issue was initially raised, based on the order that was made on the 25 March 2011 against Minister of Home affairs and others, it is clear that as a secondary consideration, the applicants moved to the point that a decision was taken not to establish a new or another refugee reception office in Johannesburg. The respondents had the opportunity to respond thereto, and their contention has persistently been that such a decision was never taken. In other words, I am satisfied that a case has been made in the founding papers, and the respondents had responded thereto.

15. I now turn to deal with the issue whether or not the decision not to open or establish a refugee reception office has been taken by the respondents. I understood the suggestion to be such a decision could be inferred from the following sets of facts:

15.1 Firstly, that the respondents appealed against the order in terms of which they were directed to establish a refugee reception office upon closure of Crown Mines office;

15.2 Secondly, that the letters that were exchanged between the parties after the application for leave to appeal against the order was delivered, displayed such an intention not to establish refugees office in Johannesburg.

15.3 Lastly, that the respondents had said so, in no uncertain words, that a decision had been taken not to establish such an office in Johannesburg.

16. I do not think that the fact that the respondents had appealed against the order them, in itself could infer a decision not to establish refugee offices in Johannesburg. Secondly the fact that the applicants in the South Gauteng High Court case were caused or convinced to abandon such an order, cannot be seen as a decision not establish a new office in Johannesburg.

17. However, seen in context, the two factors may not necessarily be irrelevant to the issue whether or not a decision not to establish an office in Johannesburg, has been taken. Remember, on the 27 may 2011 the respondent issued a public statement, in terms of which the public was notified of transfer of all the files from closed Crown Mines Refugee Office to Pretoria office. In the statement amongst other, it was stated as follows:

"The Refugee Centre in Crown Mines, Johannesburg will cease operations with effect from 1 June 2011. This is a consequence of a Judgment handed down by the South Gauteng High Court in March this year. The Judgment was a result of a challenge by the business community in the area to the existence of the Refugee Centre on the basis of what they considered 'an extreme nuisance and irritation factor' caused by the large presence of refugees and/or asylum seekers in the area. The business complained that the refugees and asylum seekers misbehaved, litter, defecate in public, create a traffic hazard and render conditions intolerable for business. The court ordered thus that the Department relocate the refugee centre to a different area somewhere in Johannesburg. In this regard, the Department has decided to relocate and transfer the operations of the Crown Mines Refugee Centre to the Refugee Reception Centre to the Refugee Reception Centre, located at the Pretoria Show-Grounds, Souter Street in Pretoria West.

However, the Department is of the view that the long-term solution to these public complaints lies in the possible establishment of asylum\refugee reception centre along the border areas near ports of entry administered by the Department of Home Affairs. The Department is currently considering this and other options. Once Internal processes have been finalised and a decision reached with the concurrence of the cabinet, Minister Dlamini Zuma will indeed communicate such a decision to the public."

18. Counsel for the respondent sought to rely on the last two sentences of quotation above. In other words, a decision when reached with the concurrence of the cabinet, Minister Dlamini Zuma, 'will indeed be communicated to the public'. I understood the submission by Counsel on behalf of the respondents, to have been, if a decision was taken, it would have been communicated to the public. In the answering affidavit, the respondents do not deal with the steps taken since the 27 May 2011, particularly with regard to the establishment or not of refugees office in Johannesburg.

19. However, the respondents in their answering affidavit, seek to deal with the problems of establishing a refugee reception offices, and the plan or program to be effective and efficient. Such efforts not necessarily meant for Johannesburg. For example, they deal in the answering affidavit, with the deployment of members of the defence force at the ports of entry and also a pilot project at O R Tambo International Airport. Having sought to explain what the Department is doing, and having expressed the need for the establishment of refugee Reception offices at ports of entry, it is then stated as follows in paragraph 2.16 of the answering affidavit:

"I deal later with the impediments associated with establishing Refugee Reception Offices in Metropolitan Centre. I also point that in support of Cabinet decision, the Department has decided to move existing Refugee Reception Offices closer to the ports of entry. In line with Cabinet decision, the Department has also reduced the time for the validity of

the asylum permit in section 23 of the Immigration Act 13 of 2002(the Immigration Act) from 14 days to 5 days. I must emphasis that this amendment has not yet come into operation. We believe that relocating the refugee Reception Office to the ports of entry will be in line with the policy direction of Department and will ensure that legitimate asylum seekers will be able to be processed at the ports of entry before they get lost in the vastness of the country with the consequent difficulty of tracing them."

20. The underlining is my emphasis. By the way, the answering affidavit was deposed to on the 31 October 2011. At the risk of repeating, I also point out that in support of Cabinet decision, the Department has decided to move existing Refugees Reception Offices closer to the ports of easily, in line with the cabinet decision...', can bring no doubt as to the decision taken. The decision to move the existing Refugee Reception Offices closer to the ports of entry, should further be seen in the purported rationale of the Department to do so. Again at the risk of repetition, 'to ensure that legitimate asylum seekers will be able to be processed at the ports of entry before they get lost in the vastness of the country with the consequent difficulty of tracing them.'
21. Having regard to all the above, and also failure to explain efforts if any, towards establishment of refugees offices in Johannesburg, I am satisfied that a decision has been taken by the respondents not to establish a new refugee reception office in Johannesburg. The respondents see, the establishment of Refugee Reception office in Metropolitan Centres as being impediment. In paragraph 4 of the answering affidavit, they seek to allude to some of these impediments. Business Communities and other members of the public are also said to be opposed to the establishment of refugee reception offices closer to them especially in the Metropolitan Centres. The bare denial that a decision has not been taken should therefore be seen in the context of all of these.

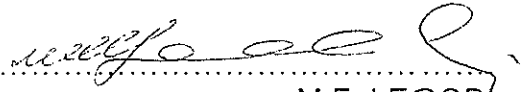
22. However, my finding in regard to the decision not to establish a refugee reception office in Johannesburg, should not be seen as imposing an obligation or directing the respondents to establish a refugee reception offices in Johannesburg. This aspect, should then bring me to deal with relief sought under (5) as indicated in paragraph 2 of this judgment.
23. I have been requested to order the respondents to establish a refugee reception office in Johannesburg. The decision as to whether or not to establish and where to establish such an office, is legislative power conferred on the second respondent in terms of section 8 of the Refugee Act 130 of 1998, quoted earlier in this judgment. Our courts are always mindful and reluctant to assume powers of the decision making authority, with their own. I want to imagine that only in exceptional circumstances would a court of law make decisions that was supposed to be made by any such decision making authority. I can find no such exceptional circumstances in the present proceedings.
24. It was conceded on behalf of the respondent that any decision not to establish an office in Johannesburg would have been unprocedurally unfair, seen in the light of the provisions of section 4. I think this concession was correctly made. The Crown Mines Refugee Reception office which was rendering, but, to the public service was closed. But, wether such an office should actually be established in Johannesburg, is for the second respondent to decide.
25. Section 4 of PAJA deals with an administrative action affecting the public. It provides as follows:
- (1) In cases where an administrative action materially and adversely affects the rights of the public, an administrator, in order to give effect to the right to procedurally fair administrative action must decide whether-*
- (a) To hold a public inquiry in terms of subsection (2);*
- (b) To follow a notice and comment procedure in terms of subsection (3);*

- (c) To follow the procedures in both subsection (2) and (3);*
- (d) Where the administrator is empowered by any empowering provision to follow a procedure which is fair but different, to follow that procedure; or*
- (e) To follow another appropriate procedure which gives effect to section 3.”*

25. It is further conceded on behalf of the respondents that the decision not to establish a refugee reception office in Johannesburg would have amounted to an administrative action as defined under PAJA. Therefore, in taking such a decision, the process of consultation as envisaged in section 4 of PAJA would have been a requirement for a procedurally fair decision. Such a process is not for the court to pursue or to ignore by making its own decisions, on whether or not to establish another refugee reception office in Johannesburg. The appropriate order contrary to the relief sought under paragraph 5 as set out under paragraph 2 of this judgment would be to remit the matter to the second respondent for further consideration. Counsel for applicants correctly conceded to this.

26. Consequently an order is hereby made as follows:

- 26.1 It is hereby declared that the respondents had made a decision not to establish a Refugee Reception Office in Johannesburg and such a decision is hereby declared to be procedurally unfair and invalid.
- 26.2 The decision referred to in 27.1 above is hereby reviewed and set aside.
- 26.3 The decision whether or not to establish another Refugee Reception Office is hereby remitted to the second respondent for his or her reconsideration on the suitability or otherwise of establishing such an office in Johannesburg.
- 26.4 The respondents to pay the costs of the application, the one paying the others to be absolved.

A handwritten signature in cursive script, appearing to read 'M.F. Legodi', written over a horizontal dotted line.

M.F. LEGODI
JUDGE OF THE HIGH COURT