IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 2730/05

In the matter between:

DE GAULLE KILIKO 1st Applicant

LANDRY NTOFENE 2nd Applicant

MOUNKLA CEDICK TSIENO 3rd Applicant

FERMI IGOR PAMBOU NGOUALA 4th Applicant

MANDUDI THADEE VUETTE 5th Applicant

ALBAN MALEKE 6th Applicant

CHRISTOPHE STANISLAUS DIANTSIKOU BALOSSA 7th Applicant

and

THE MINISTER OF HOME AFFAIRS 1st Respondent

THE DIRECTOR-GENERAL, DEPARTMENT OF HOME AFFAIRS 2nd Respondent

THE CHIEF: IMMIGRATION SERVICES DEPARTMENT OF HOME AFFAIRS 3rd Respondent

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JUDGMENT: 16/01/006

VAN REENEN, J:

1] The first to seventh applicants are adult male citizens of and resided in the Democratic Republic of Congo prior to their entering the Republic of South Africa individually on different dates during the period 16 December 2004 to 28 February 2005. As such, they are "foreigners" as defined in section 1 of the Immigration Act, No 13 of 2002 (the

Immigration Act). In terms of section 9(4) of that act, a foreigner may enter the Republic of South Africa only if he or she produces to an immigration officer a passport valid for not less than 30 days after the expiry of his or her intended stay and has been issued with a valid temporary residence permit.

2] The Immigration Act, under the heading "Temporary Residence", provided in sections 10 to 23, for the issuing of different categories of permits granting foreigners the right of temporary residence in the Republic of South Africa. One such category is an "asylum seeker permit."

3] Section 28 of the Immigration Act provides that, subject to the Refugees Act, No. 130 of 1998 (the Refugees Act), the Department of Home Affairs (the Department) may issue a permit to an asylum seeker on terms and conditions that are prescribed by regulation.

4] An asylum seeker is in section 1 of the Refugees Act defined as a person who is seeking refugee status in the Republic of South Africa. As is apparent from the rather sparse averments in the affidavits deposed to by the applicants in support of the application, each one of them is an asylum seeker. Such averments have not been placed in issue by any of the respondents.

5] Section 21 of the Refugees Act provides that an application for asylum must be made to a refugee reception officer in person in accordance with the prescribed procedures and at any refugee reception office. Section 22 of the Refugees Act provides that a refugee reception officer must, pending the outcome of such an application, issue an applicant with an asylum seeker permit in the prescribed form. That section further provides that such a permit allows the holder thereof to sojourn in the Republic of South Africa, temporarily, subject to the conditions determined by the Standing Committee for Refugee Affairs (the Standing Committee) and are not in conflict with the Constitution of South Africa, 1996 (the Constitution) or international law as endorsed thereon by the refugee reception officer. In terms of section 22(3) of the Refugees Act such an officer is empowered to extend from time to time the period for which such a permit has been issued and also to amend the conditions subject to which it has been issued.

6] Section 21(4) of the Refugees Act provides that until a decision has been made on an application for asylum and, where applicable, an applicant has exhausted his or her rights of review or appeal under Chapter 4 of that act, no proceedings may be instituted or continued against a person in respect of his or her unlawful entry into or presence within the Republic of South Africa.

7] As prior to the issuing of an asylum seeker permit any foreigner who has entered the Republic of South Africa in conflict with the provisions

of section 9(4) of the Immigration Act, is an “illegal foreigner” as defined in section 1 thereof, and accordingly subject to arrest, detention and deportation, it is self-evident that the issuing of an asylum seeker permit is an important step in the process of being recognised as a refugee in the Republic of South Africa as well as the granting of asylum.

8] Section 8 of the Refugees Act imposes a duty on the Director-General of the Department to establish as many refugee reception offices in the Republic of South Africa as he may deem necessary, after consultation with the Standing Committee, and to appoint at least one adequately trained refugee reception officer and at least one similarly trained status determination officer in each such office. Whilst the first subsection of section 8 of the Refugees Act and Regulation 2(1)(a) of the Refugee Regulations - Regulation 6779 published in Government Gazette 21075 of 6 April 2000 (the Refugee Regulations) - in imperative terms oblige an asylum seeker in person and to submit an application for asylum to a refugee reception officer at a refugee reception office without delay, the second subsection thereof, in equally imperative terms, imposes an obligation on the refugee reception officer concerned to accept from the applicant an application in the form prescribed by the Refugee Regulations - (subsection 2(a)); to ensure that the said form is properly completed and, if necessary, to assist the applicant in that regard, (subsection 2(b)); and to submit the application, together with any information obtained from and relating to

an applicant, to a status determination officer for the purpose of arriving at a decision regarding the application (subsection 2(d)). The refugee reception officer may in addition conduct such enquiries as he or she deems necessary in order to verify the information furnished in an application for asylum (subsection 2(c)).

9] The Director-General of the Department has established five refugee reception offices in the Republic of South Africa. The refugee reception office for the Western Cape is located in Cape Town in a building complex occupied by other operational divisions of the Department. On 18 April 2005, the date on which Mr Arthur Frazer, the Deputy Director-General: National Immigration Branch in the Department (Mr Frazer) deposed to the respondents' answering affidavit there were nine officials of the Department who were assigned to the refugee reception office in Cape Town. Of those officials 6 were assigned to deal with the issuing and the extending of asylum seeker permits under section 22 of the Refugees Act and 3 with status determinations under section 24.

10] Each of the applicants who on 22 March 2005 deposed to affidavits in support of the application chronicled their unsuccessful attempts at gaining access to the refugee reception offices in Cape Town in order to apply for asylum. Their attempts were futile despite the fact that a number of them slept outside the said offices throughout the night on different occasions or arrived there during the early hours of the

morning. Each one of them, without fail, on a daily basis, except on or about 9 March 2005, observed that only a limited number of individuals were allowed to enter the refugee reception offices. On that date the 26 persons who succeeded in being admitted were arrested and taken to Pollsmoor prison but later released. The Cape Times of 2 March 2005 carried a report of an incident that had taken place the previous day when frustrated asylum seekers inexcusably, but in the light of the facts recited above perhaps understandably, forced their way into the Cape Town refugee reception office and had to be physically restrained by officials of the Department. Their actions resulted in injuries that necessitated hospital treatment having been sustained by a number of those who had forced their way into the building.

11] The applicants, asserting that the first-, second- and third respondents by having unreasonably and unlawfully failed to provide them with the necessary facilities and proper opportunities to submit applications to obtain refugee status in the Republic of South Africa were acting in breach of the duties imposed by sections 2 and 22 of the Refugees Act; in conflict with the provisions of sections 9, 10, 12 and 33 of the Constitution; and in violation of the canons of international law, in their own interest, in the interest of asylum seekers as a class; as well as the interest of the public, instituted proceedings in this court in which they, on an urgent basis, asked for an order against the respondents –

> "11.1 declaring as invalid and inconsistent with the Constitution, the practice and policy of the

Respondents concerning the manner in which they accept applications for asylum and issue permits in terms of Section 22 of the Refugees Act, 1996;

11.2 directing them to accept applications for asylum by asylum seekers on or within a reasonable time of such application being made; and

11.3 an order for costs, jointly and severally, the one paying the other to be absolved."

12] The applicants' **locus standi** to have brought the instant application was not assailed. To the extent that, despite the fact that the applicants reserved their rights thereanent, the relief sought by them may have been rendered moot by reason of the fact that since the institution of the application asylum seeker permits have been issued to them, they in my view, were in any event entitled to have brought the application acting in the public interest in terms of the provisions of section 38(d) of the Constitution. I say so as in my view, most, if not all, the criteria required for standing under that subsection that were enumerated by O"Regan J in **Ferreira v Levin NO and Others; Vryenhoek and Others** 1996(1) SA 984 (CC); 1996(1) BCLR 1, at para 234, and Yacoob J in **Lawyers for Human Rights and Another v Minister of Home Affairs and Another** 2004(7) BCLR 775 (CC); 2004(4) SA 125, at para 18, are present. In particular their vulnerability because of a 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 non-governmental organisations that would be able to assist them.

13] The respondents opposed the application and delivered and filed an answering affidavit deposed to by Mr Frazer as well as a confirmatory affidavit by Mr Jurie De Wet the Chief Immigration Services Officer in the Department in the Western Cape (Mr De Wet) whom, it was foreshadowed, would deal with the institutional and operational problems facing the refugee reception office in Cape Town, but failed to do so. The respondents, subsequently and unilaterally, also introduced a supplementary affidavit by Mr Frazer, jurat 30 May 2005. The applicants in response to the respondents' answering affidavits delivered and filed a replying affidavit to which were annexed the affidavits of nine further asylum seekers, deposed to on 20 April 2005, in which they set out their own abortive attempts, until 18 April 2005, to have gained access to the refugee reception offices in Cape Town. The respondents, to their credit, did not object to the admission of such supporting affidavits: neither did they seek to have them struck out on the basis that they dealt with matters that should have been embodied in the founding papers. They also did not seek an opportunity to respond thereto. I, even in the absence of such complaisance on the part of the respondents, would have allowed the admission of such affidavits, in the exercise of the discretion deposed in me, on the basis that they served to negate certain allegations regarding the introduction

by the Department of certain remedial measures in order to address the applicants' complaints (See: **Juta and Co Ltd and Others v De Koker and Others** 1994(3) SA 499 (T) at 510 F – 511 F).

14] Mr Frazer's original and supplementary affidavits exhibit three notable features. The first is that he is at pains to point out that the applicants have been issued with asylum seeker permits, but does not make any mention thereof that the understanding between the attorneys concerned was that their issuing would not render the matter moot. The second is that the respondents, save for not having admitted the applicants' identities and nationalities; the reasons why they left their countries of origin; and that they are entitled to refugee status, failed to join issue with any of the factual averments made in the applicants' affidavits. The third is an implied recognition that the existing system of dealing with refugees has fallen short, in that details were provided of short-, medium- and long term policies and strategies with a view to dealing with "the refugee problem" on a local as well as national level.

15] The following have been identified as constituting such policies and strategies –

a) that as it is recognised that the premises in which refugee reception centres are housed are not large enough to meet current requirements the Department is engaged in efforts to extricate itself from existing lease agreements and is engaged in

discussions with the Department of Public Works to find alternative appropriate premises;

b) as the Department is aware of the backlogs at the refugee reception centres throughout South Africa it is developing a strategic plan of a general nature to transform refugee affairs in South Africa in terms of short-, medium- and long term objectives with a view to transforming the Department into an "efficient and caring organ of state" and circumscribing the manner in which its officials are to fulfil their constitutional and statutory obligations thereanent;

c) in order to give effect to such plans –

i) an Immigration Turnaround Task Team was created during 2004 in order to deal with specific issues concerning immigration and refugee affairs and resulted in the establishment of a National Immigration Board on 12 April 2005;

ii) refugee affairs was during 2004 upgraded to a directorate, the post advertised; candidates short-listed and interviewed; and an appointment about to be made;

iii) with a view to improving service delivery the information technology systems in the Department were being improved by the establishment of link-ups between the computers in the different refugee reception centres and the bringing into use of computers donated by the United Nations High Commissioner for Refugees;

iv) an investigation with a view to providing the Department with a proposed organisational program for refugee affairs was commissioned and a draft report produced during February 2005;

v) as no standard operating procedures existed nationally the compilation of such a document was commissioned and finalized in February 2005;

vi) The Deputy Director-General: National Immigration Branch, during February 2005 made unannounced visits to refugee reception offices, including Cape Town, during which he "was able to verify some of the complaints made by the applicants and other asylum seekers" and the "challenges" facing the officials working at such centres. As a result it was directed that 70 contract posts be created nationally, 14 whereof were allocated to the refugee reception offices in Cape Town for the purpose of, inter alia, the proper management of queues. The persons who have been appointed to those posts have been undergoing training and 10 of them were to assume duty as refugee status determination officers on 30 May 2005.

16] Mr Frazer in his founding affidavit attributed the ever escalating back-log of asylum seeker applications at refugee reception centres to a global phenomenon as well as an inability to predict the magnitude of

the exodus of citizens from their countries of origin which has increased exponentially each year and his department's limited capacity to deal therewith. Although the gloomy picture sketched in his founding affidavit was that the back-log in the processing of asylum seeker permits; extensions thereof; as well as status determinations in terms of section 24 as at January 2005, had grown to 34042, he in a supplementary affidavit, jurat 30 May 2005 - introduced without any demur on the part of the applicants' counsel - on the basis of alleged significant progress and changes in the operational systems of the department since he had deposed to his founding affidavit, adopted a significantly more optimistic tone. The changes and progress alluded to by him are the following: -

a) pursuant to meetings held with Mr Fred Johnson of the Department of Public Works during May 2005, agreement has been reached to expand the office space of the refugee reception office in Cape Town;

b) since the inception, on 23 April 2005, of an overtime project in the Cape Town refugee office 129 interviews have been held with asylum seekers on Saturdays despite the fact that a number of them had not turned up for interviews. This is proclaimed by Mr Frazer as "a remarkable improvement" and a demonstration of his Department's commitment to improve its operational systems to process applications by asylum seekers more expeditiously; and

c) that during April and May 2005 respectively 420 and 314 asylum seekers were interviewed and issued with asylum seeker permits.

17] Mr Frazer, on the basis of the aforegoing, submitted that the steps taken by his department to alleviate the delays in the processing and issuing of permits "are being institutionalised and thus becoming a permanent feature of the respondents' operational capacity". He, presumably carried away by his own nebulous grandiloquence, contended that the relief sought by the applicants was unjustified and should be dismissed.

18] The applicants sought to introduce as evidentiary material the report of the Public Protector of the Republic of South Africa into certain allegations that the Braamfontein refugee reception office (now the Rosettenville premises) applied practices whereby refugees were denied access to the building in which it was located and thereby denied access to the asylum system and procedures as required by International and South African Law. As the allegations that formed the factual basis for that report have not been placed before this court in an acceptable evidentiary manner, it will be disregarded in arriving at a decision herein despite the fact that the complaint with which it dealt appears to be **in pari materia.**

19] The respondents in turn referred to an application brought by the Pretoria Law Clinic on behalf of the Somali Refugee Forum and

Another against the Minister of Home Affairs and Others in the Transvaal Provincial Division on 23 February 2005 for relief "not dissimilar" to that requested by the applicants, in which an order had been granted by agreement, in terms whereof the respondents therein had to file by 30 April 2005, a uniform policy and procedure with the court showing ways in which the respondents intended giving effect over the short-, medium- and long term to the provisions of sections 21, 22 and 23 of the Immigration Act as well as regulations 2 and 4 promulgated thereunder. That court postponed the application pending compliance with the order made by it. The stance adopted by the respondents in their opposing affidavit in the instant matter, was that as the relief sought was substantially similar to that sought in those proceedings it had to be postponed until that court has made an order. The applicants resisted that proposal and adopted the attitude that the instant application needs to be decided on its own facts. The respondents' counsel in their heads of argument, as well as in argument before this court, did not persist with the request that the matter be postponed but asked that the application be dismissed and that the respondents be ordered to pay the applicants' costs up to the stage when the respondents' answering affidavits were filed alternatively, that an order be made "endorsing" paragraph 5 of the order made by the Transvaal Provincial Division which provides for an appropriate modus operandi to be followed by the respondents at the refugee reception offices in Cape Town. I accept that the reference should have been to paragraph 5 of the document annexed to the

respondents' counsels' heads of argument marked "B" and styled "Plan for Facilitating Reception of Asylum Seekers at Refugee Reception Offices.

20] The applicants' counsel in turn persisted with the relief sought in the notice of motion.

21] As the applicants are seeking relief by means of notice of motion that is final in form, the approach to be followed where there are disputes of fact is that the relief claimed may, as a general rule, be granted only if the facts averred in the applicants' papers and have been admitted by the respondents, together with the facts alleged by the respondents, justify such an order. Where however denials do not raise real, genuine or bona fide disputes of fact and, in the absence of an application in terms of rule 6(5)(g), a court is satisfied as regards an applicant's inherent credibility, it may proceed on the basis that the denied facts are correct and include them among the facts to be used in determining whether the relief sought should be granted or not (See: **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984(3) SA 623 (AD) at 634 E – 635 C). The respondents did not specifically admit or deny the applicants' factual averments. The closest it came to placing any averments in issue was to have recorded that their failure to have done so should not be construed as an admission of their identities, nationalities and the reasons why they left

their countries of origin or that they qualify for refugee status in terms of section 24 of the Refugees Act.

22] The gravamen of the applicants' complaint is that the respondents have failed to provide them and other similarly circumstanced individuals with a proper opportunity to submit applications for asylum and refugee status. That complaint is articulated as follows in the founding affidavit –

> "The practice and procedure they [the Respondents] have adopted for dealing with newly arrived asylum-seekers is unreasonable in the extreme and is unlawful. It is also inefficient."
>
> (Record: page 8, paragraph 31) and
>
> "The practice adopted as well as the policy apparently adopted as described in the affidavit of the Seventh Applicant breaches both the duties of the Respondents' servants in terms of Sections 21 and 22 of the Refugees act and is inconsistent with the provisions of Sections 9, 10, 12 and 33 of the Constitution. It also violates International Law."
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> (Record: page 8; paragraph 32)

23] The practice and policy to which the applicants are alluding is that a predetermined number of applications for asylum are accepted; extension of asylum seeker permits granted; and status determinations at the Cape Town refugee reception offices considered

everyday. That such a policy is in fact in place is supported by firstly, first applicant's statement to the effect that his attorney was advised by an official in the Department's employ namely, a Mrs Kolia told him that a policy decision had been taken in terms whereof only 20 new arrivals were seen every day - a statement which has not been denied; and secondly the following statement of Mr Frazer in paragraph 16 of his answering affidavit:

> "In terms of present capacity, 4 of the 6 RR Officers dealing with section 22 permits and extensions thereof, are required to process in total, 20 section 22 applications per day, the remaining 2 officers are required to process in total, 12 section 22 extensions per day. The 3 RR Officers dealing with status determinations in terms of section 24 of the Act, are required to process in total 32 status determinations per day."

24] As on my reading of the provisions of section 21 of the Refugees Act, those factual averments in the applicants' affidavits which the respondents in paragraph 7 of Mr Frazer's answering affidavit requested not to be construed as having been admitted by their failure to have admitted or denied them explicitly, do not constitute prerequisites for the acceptance and consideration of an application for asylum, the application, in my view, is capable of being considered and decided solely on the applicants' papers.

25] It is abundantly clear from the founding and supporting affidavits filed on behalf of the applicants, that at least 16 refugees had individually and on different occasions during the period mid December 2004 to mid April 2005 (except on 9 March 2005) unsuccessfully attempted to gain access to the refugee reception offices in Cape Town for the purpose of making application for asylum seeker permits. The respondents were not in a position to refute those averments. The best they could do was to attribute the Department's inability to provide the required facilities to an inordinate influx of refugees into the Republic of South Africa and its lack of capacity to deal with the volume of applications expeditiously and efficiently. So dire and persistent has the problem been that the back-log of applications for asylum, extensions of asylum seeker permits and the finalization status determinations have increased from 4864 in April 2000 to 34042 in January 2005. This untenable situation was allowed to develop despite the fact that the Republic of South Africa in 1995 became a party to the 1951 United Nations Convention Relating to the Status of Refugees; the 1967 Protocol Relating to the Status of Refugees; and the 1969 Organization of African Unity Convention Concerning the Specific Aspects of Refugee Problems in Africa and furthermore promulgated and brought into operation on 1 April 2000 the Refugees Act, No 130 of 1998 in order to give effect to the international legal instruments; principles and standards relating to refugees; and provide for the reception into South Africa of asylum seekers. In the light thereof it is somewhat surprising - I cannot put it more euphemistically - that the

rudimentary remedial steps alluded to by Mr Frazer in his answering and supplementary affidavits were devised and/or implemented only as from 2005 and only after the instant as well as another application for substantially similar relief had been launched. What is even more stupefying is that in the face of back-logs of the stated magnitude it has been resolved to introduce as from 1 March 2005, an interview as part of applications for asylum, when it is not specifically required by section 21 of the Refugee Act. Not only is the legality thereof justifiably questioned by the applicants but, as is to be expected, its introduction adversely affects the expeditiousness with which such applications are capable of being processed.

25] The applicants on the basis of the aforestated facts contend that the practice and procedure adopted by the Department in dealing with asylum seekers is not only inefficient, unlawful and unreasonable, but also in breach of its officials' duties and obligations under sections 21 and 22 of the Refugees Act but is furthermore inconsistent with the provisions of sections 9, 10, 12 and 33 of the Constitution. It is also alleged that it violates international law. As prayer 2 of the notice of motion is limited to the invalidity and inconsistency of the said policy and practice with the stated sections of the Constitution, I shall similarly restrict the ambit of this judgment.

26] As has already been stated: until an asylum seeker permit has been issued to a foreigner who has entered the Republic of South Africa in

conflict with the provisions of section 9(4) of the Immigration Act, he or she is an illegal foreigner and subject to apprehension, detention and deportation in terms of sections 32, 33 and 34 of the Immigration Act. He or she may furthermore not be employed by anyone (section 38); may not be provided with training or instruction by any learning institution (section 39); and is, save for necessary humanitarian assistance, severely restricted as regards a wide range of activities that human beings ordinarily participate in; and all persons are prohibit from aiding, abetting, assisting enabling or in any manner helping him or her (section 42) under pain of criminal prosecution.

27] The State, under international law, is obliged to respect the basic human rights of any foreigner who has entered its territory and any such person is under the South African Constitution entitled to all the fundamental rights entrenched in the Bill of Rights, save those expressly restricted to South African citizens (See: **Dawood, Shalabi and Thomas v Minister of Home Affairs and Others** 2000(1) SA 997 (C) at 1043 I - 1044 E). Until an asylum seeker obtains an asylum seeker permit in terms of section 22 of the Refugees Act he or she remains an illegal foreigner and as such subject to the restrictions, limitations and inroads enumerated in the preceding paragraph, which self-evidently, impacts deleteriously upon or threatens to so impact upon at least his or her human dignity and the freedom and security of his or her person. In that context the availability of adequate facilities to receive; expeditiously consider; and issue asylum seeker permits

would not only be consistent with the State's obligations in terms of the international instruments to which it has become a party and the legislation enacted by it in order to give effect thereto, but would also comply with the obligation under section 7(2) of the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights. Also the provisions of section 195 of the Constitution to the effect that the Public Administration must be governed by the democratic values and principles that are enshrined in the Constitution and, inter alia, include the promotion of efficient, economic and effective use of resources (subsection (1)(b)) and responsiveness to peoples' needs (subsection (1)(e)) would be served thereby. The Department by having failed since 2000 to introduce adequate and effective measures to address a gradually worsening situation, is primarily and materially responsible for the lack of reasonably adequate facilities essential for an expeditious handling of applications for asylum seeker permits. The delays caused by such lack of facilities have, in my view, undoubtedly resulted in the violation of the fundamental rights of asylum seekers under the Constitution and also under the Refugees Act.

28] It is at least implicit in the nature of the remedial steps already implemented or envisaged, as well as Mr Frazer's responses to the applicants' averments, that the policies and practices of which the applicants complained and acknowledged by him are the result of a lamentable lack of capacity on the part of his department to have taken steps to efficiently handle the volume of applications for asylum. Mr

Frazer's explanations for such lack of capacity are no more than that. As regards compliance with the law is concerned the State is required to lead by example (see: **Mohamed and Another v President of the Republic of South Africa and Another** 2001(3) SA 893 (CC); 2001(7) BCLR 685, at paragraph 68) and administrative convenience is not acceptable as an excuse (See: **Singh et al v Minister of Employment and Immigration et al** [1985] 14 CRR 13 especially the views of Wilson J at 57 which were referred to with approval by Makgoro and Sachs JJ in the minority judgment in **Bell Porto School Governing Body v Premier Western Cape** 2002(9) BCLR 891 (CC); 2002(3) SA 965, at paragraph 170). The Constitutional Court in **Jaipal v S** 2005(5) BCLR 423 (CC), at paragraph 56, has held that, as far as the upholding of the fundamental rights and other imperatives of the Constitution are concerned, all those involved in the public administration, must, despite a lack of adequate resources, purposefully take all reasonable steps to ensure maximum compliance with constitutional obligations even under difficult circumstances and that "… responsible, careful and creative measures, borne (sic) out of consciousness of the values and requirements of our Constitution should go a long way to avoid undesirable situations."

29] Whilst it is gratifying to know that steps to remedy the undesirable situation as regards the receiving and processing of asylum seeker permits have now been introduced - rather belatedly - it is clear from the facts that have been placed before this court that the applicants

were entitled to have approached it for relief in terms of prayer 2 of the notice of motion both in their own as well as in the public interest. As is apparent from the nine further supporting affidavits that have been filed, the situation had not been adequately addressed by 20 April 2005, the date on which those individuals deposed to their affidavits.

30] In the circumstances the applicants in my view are entitled to an order in terms of prayer 2 of the notice of motion. This court is by section 172(1) of the Constitution empowered to declare any law or conduct that is inconsistent with it invalid to the extent of its inconsistency. In the premises an order is made declaring that the conduct of the respondents by having introduced a policy and practice in the refugee reception office of the Western Cape in terms whereof their officials are required to process only 20 asylum seeker permits per day is inconsistent with the fundamental rights of illegal foreigners as embodied in sections 10 and 12 of the Constitution.

31] As far as the relief sought in prayer 4 (it should have been numbered 3) is concerned, it is common cause that the applicants have already been provided with the required permits. As far as other illegal foreigners are concerned their numbers and identities are not known (save for the deponents to the nine affidavits that were filed in support of the application) but they themselves have not sought relief of any kind. In the circumstances any order made in terms of prayer 4 would not only hold the risk of offending against the doctrine of separation of

powers (Cf: **South African Association of Personal Injury Lawyers The Heath and Others** 2001(1) BCLR 77 (CC) 2001(1) SA 883, at paragraph 26); but would furthermore be so vague as to be impossible of enforcement in the event of non-compliance. Courts, understandably, are loathe to make orders of that kind and I accordingly, decline to do so. However, as the manner in which the Department discharges its duties and obligations to refugees not only deleteriously affects the freedom and dignity of a substantial number of disadvantaged human beings but also fails to adhere to the values embodied in the constitution, I incline to the view that the instant case is an appropriate one for the granting of a structural interdict (See: **Rail Commuter Action Group v Transnet Ltd t/a Metrorail and Others (No 1)** 2003(5) SA 518 (C) at 590 F – I) under claim 6 of the Notice of Motion which is for further and alternative relief. The requirements to invoke that prayer for the making of an order not specifically claimed and were enumerated by Berman J in **Port Nolloth Municipality v Xhalisa; Luwala and Others v Port Nolloth Municipality** 1991(3) SA 98 (C) at 112 D – E, in my view, are present. The purpose of the structured interdict that I intend making is to ensure that the manner in which the respondents receive and process applications for asylum in the future does not offend against any of the State's obligations under international law and its obligations under the Constitution as well as the legislation applicable to refugees. In my view the only manner in which that objective could be achieved is to require the respondents to provide this court with a report in the form

of an affidavit by the Western Cape Chief Immigration Services Officer in the Department of Home Affairs by not later than 3 May 2006, in which the following aspects, to the extent that they apply to the Cape Town refugee reception office, are dealt with –

31.1 whether, and if so, the extent to which the reception procedures set out in paragraph 5 of the document styled "Plan for Facilitating Reception of Asylum Seekers at Refugee Reception Offices - Annexure "B" to the respondents' counsels' heads of argument - have been implemented.

31.2 The numbers of officials assigned to -

31.2.1 the receiving of applications for asylum seeker permits;

31.2.2 the extension of asylum seeker permits already granted; and

31.2.3 determining the status of fugitives to whom asylum seeker permits have been issued.

31.3 The days of the week on which such tasks are performed, the number of hours each official is obliged to work every day; and the hours during the day that such officials are accessible (to the extent that such access is necessary for the discharge of their functions) to those requiring their services. If any official is not accessible for the performance of such tasks for the full duration of every workday what is the justification therefor?

31.4 Whether provision has been made for the working of overtime by officials involved in the tasks in 31.2 above, and if so, the numbers and the duties of those involved therein; the days of the week on which overtime is worked by such or other officials; and the hours during which such services are rendered outside normal office hours;

31.5 The number, on a daily basis, of illegal foreigners who attend at the refugee reception offices in Cape Town for the purpose of applying for asylum seeker permits;

31.6 The total number of applications for asylum seeker permits the refugee reception office in Cape Town is capable of attending to and granting on a daily basis;

31.7 Details of what the extent of the back-log was in respect of applications for asylum seeker permits, extensions thereof and status determinations on 30 April 2005 and what such back-log, if any, was on 30 April 2006;

31.8 The progress, if any, that has been made with the availability of more suitable premises as well as improvements, if any, in the information technology facilities not only in the refugee reception offices in Cape Town but also the linkage of such facilities between the different centres in the Republic of South Africa.

31.9 Whether, and if so, the extent to which any such remedial steps that have already been introduced have resulted in

an improvement in the speed and manner in which applications for asylum seeker permits being are dealt with.

31.10 Have any projections been made as regrds anticipated increases in applications for asylum in the future and have any strategies been put in place as regards budgeting for, the recruiting and training of additional staff if the projections show a need therefor? and

31.11 Details of how far each of the applicant's application for refugee status has progressed.

32] The respondents must prior to filing a copy of a report deliver a copy thereof to the applicants' attorneys of record and the applicants will be entitled to respond thereto on oath, if so advised, by not later than 18 May 2006 and in turn must deliver a copy thereof to the respondents' attorneys of record.

33] The respondents are entitled to reply to such response by not later than 30 May 2006.

34] In the premises the following orders are made –

a) It is declared that the conduct of the respondents by having introduced a policy and practice in the refugee reception centre of the Western Cape in terms whereof officials are required to process only 20 asylum seeker permits per day is inconsistent

with the fundamental rights of illegal foreigners as are embodied in sections 10 and 12 of the Constitution.

b) The respondents are directed to provide this court, by not later than 3 May 2006, with a report in the form of an affidavit by the Western Cape Chief Immigration Services Officer in the Department of Home Affairs in which the following aspects, to the extent that they apply to the Cape Town refugee reception office, are dealt with –

i) whether, and if so, the extent to which the reception procedures set out in paragraph 5 of the document styled "Plan for Facilitating Reception of Asylum Seekers at Refugee Reception offices - Annexure "B" to the respondents' counsels' heads of argument - have been implemented;

ii) The numbers of officials assigned to –

aa) the receiving of applications for asylum seeker permits;

bb) the extension of asylum seeker permits already granted; and

cc) determining the status of fugitives to whom asylum seeker permits have been issued.

iii) The days of the week on which such tasks are performed, the number of hours each official is obliged to work every day; and the hours during the day that such officials are accessible (to the extent that such access is necessary

for the discharge of their functions) to those requiring their services. If any official is not accessible for the performance of such tasks for the full duration of every workday what is the justification therefor?

iv) Whether provision has been made for the working of overtime by officials involved in the tasks in 31.2 above, and if so, the numbers and the duties of those involved therein; the days of the week on which overtime is worked by such or other officials; and the hours during which such services are rendered outside normal office hours;

v) The number, on a daily basis, of illegal foreigners who attend at the refugee reception offices in CapeTown for the purpose of applying for asylum seeker permits;

vi) The total number of applications for asylum seeker permits the refugee reception office in Cape Town is capable of attending to and granting on a daily basis;

vii) Details of what the extent of the back-log was in respect of applications for asylum seeker permits, extensions thereof and status determinations on 30 April 2005 and what such back-log, if any, was on 30 April 2006;

viii) The progress, if any, that has been made with the availability of more suitable premises as well as improvements, if any, in the information technology facilities not only in the refugee reception offices in Cape

Town but also the linkage of such facilities between the different centres in the Republic of South Africa.

ix) Whether, and if so, the extent to which any such remedial steps that have already been introduced have resulted in an improvement in the speed and manner in which applications for asylum seeker permits are being dealt with.

x) Have any projections been made as regards anticipated increases in applications for asylum and have any strategies been put in place as regards budgeting for, the recruiting and training of additional staff if the projections show a need therefor?; and

xi) Details of how far each of the applicant's application for refugee status has progressed.

c) The respondents prior to filing a copy of their report are directed to deliver a copy thereof to the applicants' attorneys of record and the applicants may respond thereto on oath, if so advised, by not later than 18 May 2006 and must deliver a copy thereof to the respondents' attorneys of record.

d) The respondents will be entitled to reply to such response by not later than 30 May 2006.

e) The application, to the extent that it relates to the relief sought in prayer 4 of the Notice of Motion, is postponed to 8 June 2006 for the purpose of considering the report and any responses thereto

and to consider the further conduct of the matter, including costs, in the light thereof.

f) As the applicant's have been substantially successful in respect the relief claimed in prayer 2 of the notice of motion, they in my view, are entitled to be awarded their costs up to the date of the handing down of this judgment on a party and party basis as against the respondents jointly and severally, the one paying, the other to be absolved.

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D. VAN REENEN