Republic of South Africa

In the Western Cape High Court of South Africa
(Western Cape High Court, Cape Town)

In the matter between:

Case No: 20633/10

Ilunga Tshambila	First Applicant
Maivuno Kituza	Second Applicant
Edwin Mwanza	Third Applicant

Versus

The Minister of Home Affairs	First Respondent
The Director of the Department of Home Affairs	Second Respondent
The Refugee Reception Officer, Maitland	Third Respondent
Mr Richard Sikakane, Director of the Refugee Affairs Office, Maitland	Fourth Respondent

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Judgment delivered: 8 December 2010

LOUW J

[1] The applicants are asylum seekers in the Republic of South Africa. They seek orders in the following terms:

2. Declaring that the Respondents' refusal to allow asylum seekers to renew the permits issued to them in terms of Section 22 of the

Refugees Act 130 of 1998 at the Respondents' office in Maitland is unlawful and in contempt of court;

3. Directing the Respondents to renew upon application at Maitland the Section 22 permits of asylum seeker applicants presently living in Cape Town whose permits have been issued in another centre;
4. Ordering the Fourth Respondent to pay the Applicants' costs on the attorney and own client scale de bonis propriis.

[2] During the course of argument, Mr. Katz, who appeared with Mr. Simonz on behalf of the applicant informed me that the third applicant is no longer in South Africa and is consequently not seeking any relief. In what follows I will refer to the first and second applicants as the applicants.

[3] The application was launched on 16 September 2010. When the matter came before Moosa, J in the motion court on 22 September 2010 an interim order was made by agreement providing for a time table for the filing of papers and the postponement of the application for hearing on the semi-urgent roll on 22 November 2010. It was further ordered by agreement that

> Upon application, the respondents shall extend the section 22 permits of the applicants and any other person entitled to an extension thereof for so long as their permits may lawfully be extended, at the Cape Town Refugee Reception Centre, currently located in Voortrekker Road, Maitland, Western Cape.

[4] I was informed during argument that the permits of the applicants have since been extended as envisaged in the interim order.

[5] The only substantive issue that remains is that of the respondents' contempt of court and the issue of costs.

[6] Ms Williams on behalf of the respondents raised the following two preliminary issues and applied for certain passages in the applicants' papers to be struck out:

1. The respondents contend that the launching and replying papers contain inadmissible hearsay evidence and ask for certain passages to be struck out.
2. The respondents further contend that the replying papers introduce a host of new matter which they ask to be struck out.

[7] In the light of the conclusion to which I have come, it is not necessary to decide the respondents' application to strike out, save to say that the further instances of alleged non-compliance that are raised in reply do not constitute the basis upon which the relief was sought in the first instance and are therefore not considered in this judgment. Since at the very least the facts of each case where an application is alleged to have been refused will be different, a case for a class action or in terms of section 38 (d) of the Constitution has in my view not been made out.

[8] In order to establish that the respondents have committed the crime of contempt of court, the applicants must prove, beyond reasonable doubt, the following:

1. The order of court;
2. Service of the order of court;
3. Non-compliance with the order; and
4. Wilfulness and mala fides on the part of the respondents.

[9] The applicants' case is that the respondents have acted in contempt by not complying with the following two orders (the orders) made by this court:

1. An order made by agreement by Albertus AJ on 2 August 2001 in the case of Aden and Others v The Minister of Home Affairs and Anor (the Aden order) in the following terms:

1. The Respondents undertake to renew all permits in terms of Section 41 of the Aliens Control Act 96 of 1991 and Section 22 of the Refugees Act 130 of 1998 as well as exemptions in terms of Section 28 (2) of the Aliens Control Act and identity documents in terms of Section 30 of the Refugee Affairs Act at any office of the Department where the asylum seekers or refugees are living.
2. The Respondents will issue a directive to their various offices to give effect to this undertaking.

3. The Applicants will withdraw the applications launched under Case No. 9179/00 and 167/01.

4. Each party shall pay its own costs.

2. An order made by agreement by Yekiso, J on 22 October 2008 in the case Hirsi and Others v The Minister of Home Affairs and Others (the Hirsi order), in the following terms:

1. The Third Respondent's officials' refusal to renew in Cape Town the Section 22 permits of Cape Town based asylum seekers who were originally granted Section 22 permits at other centres is unlawful.

2. That the Third Respondent not refuse or fail to renew the Section 22 permits of Cape Town based asylum seekers simply because the said permits have been issued in different centres.

3. That the Respondents immediately renew the Section 22 permits of all asylum seekers on application pending the processing and finalisation of their applications for asylum.

4. The Respondents pay the Applicants' costs on the party and party scale.

[10] While both orders refer to Section 22 of the Refugees Act 130 of 1998, the Aden order contains a reference to the Aliens Control Act, 96 of 1991 which was repealed in its entirety by the Immigration Act, 13 of 2002. Nothing turns on the latter.

[11] The Aden order provides that the respondents shall renew all permits in terms of section 22 at any office of the department where the asylum seekers are living. The Hirsi order directs that the respondents shall not refuse or fail to renew the section 22 permits of Cape Town based asylum seekers simply because the said permits have been issued in different centres. Although not all the current respondents were parties to the matters in which the orders were made, it was accepted by the respondents during argument that for purposes of this application, they were all bound by both the orders.

[12] The Long title of the Refugees Act notes that the objects of the Act include '... to provide for the reception into South Africa of asylum seekers; to regulate applications for and recognition of refugee status ...' A person seeking recognition as a refugee in South Africa, must apply for asylum. An application for asylum is regulated by the provisions of Section 21 of the Refugees Act in the following terms:

> Application for asylum
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> 21 (1) An application for asylum must be made in person in accordance with the prescribed procedures to a Refugee Reception Officer at any Refugee Reception Office.

[13] Pending the outcome of an application for asylum, the asylum seeker must be issued with an asylum seeker permit. This application concerns the extension, in terms of section 22 (3) of the Refugees Act, of the periods for

which asylum seeker permits were originally issued to the applicants in terms of section 22 (1) of the Refugees Act or was later extended in terms of section 22 (3). Section 22 provides as follows:

> Asylum seeker permit
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> 22(1) The Refugee Reception Officer must, pending the outcome of an application in terms of section 21(1), issue to an applicant an asylum seeker permit in the prescribed form allowing the applicant to sojourn in the Republic temporarily, subject to any conditions, determined by the Standing Committee, which are not in conflict with the Constitution or international law and are endorsed by the Refugee Reception Officer on the permit.
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> (2) ...
>
> (3) A Refugee Reception Officer may from time to time extend the period for which a permit has been issued in terms of subsection (1), or amend the conditions subject to which a permit has been so issued.
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> (4) The permit referred to in subsection (1) must contain a recent photograph and the fingerprints or other prints of the holder thereof as prescribed.
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> (5) A permit issued to any person in terms of subsection (1) lapses if the holder departs from the Republic without the consent of the Minister.

(6) The Minister may at any time withdraw an asylum seeker permit if-

(a) The applicant contravenes any conditions endorsed on that permit; or

(b) The application for asylum has been found to be manifestly unfounded, abusive or fraudulent; or

(c) The application for asylum has been rejected; or

(d) The applicant is or becomes ineligible for asylum in terms of section 4 or 5.

[14] It is common cause that their original section 22 permits were issued to the applicants at Refugee Receptions Offices other than the Local Refugee Affairs Office in Maitland, Cape Town (the Maitland Office). The first applicant's original permit was issued in Braamfontein, Johannesburg. The second applicant's original permit was issued in Pretoria.

[15] The orders clearly do not require the respondents to simply approve the extension of the section 22 permits merely upon the application being made. The respondents and the relevant officials must consider each application and make a decision after applying his or her mind to the merits of the application. Seen in the context in which the orders were made, the orders prohibit the decision maker or relevant official at the Maitland Office who considers an application from an applicant who lives or is based in Cape Town, to refuse or fail to extend the permit for no reason other than that it was

originally issued by at Refugee Reception Office other than the Maitland Office.

[16] It is the applicants' case that the respondents, through their officials and employees, have done exactly that and have not complied with the Aden and Hirsi orders by refusing or failing to extend their section 22 permits for no reason other than that the permits were originally issued at other offices and not at the Maitland Office.

[17] It is common cause that the first applicant's permit was extended more than once on previous occasions at the Maitland Office prior to the events which have given rise to this application. The second applicant's permit had, however, not previously been extended at the Maitland Office. The first extension in her case at that office occurred on 6 April 2010. As discussed hereunder, the date stamp reflecting the date as 5 April 2010, is a clear mistake.

[18] The fourth respondent has deposed to an answering affidavit on behalf of himself and the three other respondents. The respondents do not dispute the existence of the Aden and Hirsi orders and the fact that they had knowledge of the orders. The respondents, however, deny non-compliance with the orders and contend in any event, that if there were non-compliance, that any breach of the orders was not committed deliberately and mala fide.

[19] In Fakie NO v CCII Systems (Pty) Ltd 2006 (4) (SCA), Cameron JA at 333C; 344 H-J, par [9], [10] and [42] stated:

> [9] The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and mala fide.' A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him- or herself entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith.
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> [10] These requirements – that the refusal to obey should be both wilful and mala fide, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent.
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> ...
>
> [42] ...

(c) (T) he applicant must prove the requisites for contempt (the order; service or notice; non-compliance) beyond a reasonable doubt;

(d) But, once the applicant has proved the order, service or notice, and non-compliance, the respondent bears the evidentiary burden in relation to wilfulness and mala fides: should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt.

[20] Mr Katz submitted on behalf of the applicants that the failure of the first, second and third respondents to depose to an answering affidavit is fatal to their case because they failed to advance evidence in discharge of the evidentiary burden they bear in relation to wilfulness and mala fides. (Fakie NO at 344J – 345 A: par [42]).

[21] The fourth respondent stated in his answering affidavit that while the first respondent bears the ultimate responsibility for the operation of the Maitland Office, his primary function as the head of the Maitland Office is the overall management and supervision of the officials of the department employed at the Maitland Office and that he is responsible for the implementation of the Legislation there. The fourth respondent further states that he was duly authorised by all the respondents to depose to the answering

affidavit and that all the respondents oppose the application. These assertions by the fourth respondent are not disputed by the applicants.

[22] The fourth respondent has personal knowledge of what occurred at the Maitland Office during the relevant time and he has testified on behalf of the respondents. It cannot be said that there is no evidence by the respondents. While it is undoubtedly correct, as was submitted by Mr Katz, that the fourth respondent cannot make an affidavit on behalf of the other respondents in the sense of giving evidence on matters which are within the knowledge only of the other respondents, this is not what the fourth respondent has sought to do. The fourth respondent testified to matters which he says are within his knowledge. There is no reason why the other respondents cannot rely on such evidence to discharge the evidentiary burden resting upon them. The question in regard to this point remains whether on all the evidence it has been proved beyond reasonable doubt that the respondents' conduct was wilful and mala fide.

[23] The first applicant, who is from the Democratic Republic of the Congo, relies on an incident which he says occurred on Friday 27 August 2010. It is common cause that this was during the period of the nationwide strike by civil servants which lasted from 19 August to 6 September 2010.

[24] The fourth respondent explains in his answering affidavit that, in order to allow for an even spread of applications to be processed daily and to reduce xenophobic tensions, persons of different nationalities are served at

the Maitland Office on different days of the week. Congolese asylum seekers, together with those from Burundi, Rwanda, Congo – Brazzaville, Uganda and Kenya are served on a Monday. Tuesdays are reserved Somalis. Wednesdays are mixed days and any nationality except Zimbabweans are served. Thursdays and Fridays are reserved exclusively for Zimbabwean asylum seekers. The first applicant is aware of this arrangement. He does not explain why he came to the Maitland Office on a day reserved for Zimbabweans.

[25] The first applicant recounts the incident on which he relies as follows:

> 'I went to the Third and Fourth Respondents' premises at Maitland to renew my permit. Although there was a strike in progress, officials were renewing asylum seeker permits. An official of the Respondents looked at my papers while I was standing in the queue and stated that I could not be helped as I should go to Johannesburg to renew my permit. He flatly refused to assist me on these grounds.'

[26] The fourth respondent who decided not to go on strike explains that he was the only person present at the Maitland Office during the strike who had the authority to extend the section 22 permits. Because of the circumstances created by the strike, he did so manually and he extended approximately 600 permits per day. As a result of the exigencies of the situation, the fourth respondent explains, he was not able to extend the section 22 permits of all those who attended the Maitland Office on each day during the strike. He

was forced by the circumstances to make a choice for the reasons which he explained in his answering affidavit as follows:

49.3. When a section 22 permit has been issued at a different centre and the asylum seeker attends at the Cape Town centre for an extension thereof, his or her particulars are verified either via a computer enquiry or by fax with the other centre. It was not possible to obtain information by facsimile transmission during the strike because, to the best of my knowledge and belief, all the other Home Affairs offices were not operational. Although I could access information held at other offices electronically, using the computer system would have slowed the process down considerably with the result that even fewer people would have been assisted during the strike.

49.4. I consequently took the decision to only extend permits during the strike period to asylum seekers who had submitted their application for asylum to the Cape Town office and who were known to that office. The strike called for expediency and I at no stage breached any court order relating to the extension or renewals of section 22 permits. Despite the strike, huge crowds of people descended at the Maitland office and they were advised by me that only those asylum seekers who had applied for asylum in Cape Town would have their section 22 permits extended at the Cape Town office while the strike was underway. The asylum seekers who had had their permits issued elsewhere were requested to return to the Cape Town office for the

extension of their permit once the strike ended. Not one person was told to apply for the renewal of their permits at a different centre. They were also given the assurance that in the event of their permits expiring during the strike period, no steps would be taken against them. Stated differently, and although an asylum seeker's section 22 permit may have expired in the strike period, he or she would not be arrested or prejudiced in any manner.

[27] The official who allegedly told the first applicant while standing in the queue, to go to Johannesburg for the extension and who is alleged to have refused for that reason to assist the first applicant is not identified by the applicant. It could not have been the fourth respondent who was the only person present at the Maitland Office with the authority to extend the permit. If it is accepted that the permit was not extended on 27 August 2010 because it had originally been issued elsewhere, it was done for an acceptable reason namely that because of the strike the fourth respondent was forced by circumstances to manually extend only the permits of those applicants whose permits had originally been issued in Cape Town. In my view the respondents have established a reasonable doubt as to whether the non-compliance with the orders was wilful and mala fide.

[28] The second applicant relies on three incidents of alleged non-compliance which is said to have occurred:

1. On an unspecified date prior to 6 April 2010 (the first occasion);

2. On 2 August 2010 (the second occasion);

3. On 17 August 2010 (the third occasion).

I shall deal with each of these incidents in turn.

[29] The first incident is alleged to have occurred on date prior to 6 April 2010. The second applicant states that she fled the DRC in early 2008 and arrived in South Africa on 3 February 2008. She applied for and was granted an asylum seeker temporary permit at the Pretoria Reception Office. She moved to Cape Town in March 2010. She states that initially she was 'refused assistance' in Cape Town. She does not disclose what reason was given for her being refused assistance. She then approached the Legal Resources Centre, who in the person of Mr. Kerfoot sent a letter to the fourth respondent (Annexure MK 2). The letter is undated but in reply it is stated that it was dated 22 April 2010. The letter records the second applicant's instructions which include that she had approached the Maitland Office approximately three weeks earlier in order to extend her section 22 permit and that

> '(a) n official working there informed her that they were unable to assist her due to the fact that her permit was issued in Pretoria.'

The letter further draws the fourth respondent's attention to the Hirsi order and a copy of the order is annexed. The letter then continues

'In light of above kindly ensure that the necessary arrangements are made for [the second applicant's] file to be transferred to Maitland and that she is assisted with the renewal of her section 22 permit as a matter of extreme urgency.'

[30] The applicant states that after the letter was sent, she was assisted. It is common cause that the second applicant's permit was extended at the Maitland Office to 2 August 2010. The stamp reflecting the extension is dated 5 April 2010, a Sunday, but this is clearly a mistake and the extension must have occurred on the next working day, that is Monday 6 April 2010.

[31] The launching papers therefore do not contain evidence on oath that the application for renewal on the first occasion was refused because the second applicant's original permit had been issued in Pretoria. The lack of evidence under oath is not remedied in reply. The reference by Mr. Kerfoot in his affidavit to the contents of his letter MK 2, does not take it further than that he was instructed by the second applicant as to the reason for the refusal to assist. Although the second applicant did file a confirmatory affidavit in reply, she does not deal with and confirm her instructions as set out in the letter MK 2.

[32] As is pointed out by the fourth respondent in his answering affidavit, according to the endorsements on the second applicant's section 22 permit 'MK 1', the permit was last extended outside Cape Town on 4 January 2010 at the Tirro Reception Office, with an expiry date on 4 April 2010. 4 April 2010

was a Saturday and the permit was extended at the Maitland Office on Monday 6 April 2010, but was incorrectly dated 5 April 2010 (a Sunday). The second applicant's evidence regarding Mr. Kerfoot's undated letter MK 2 is confusing and does not accord with the rest of the evidence. According to the second applicant, the letter preceded the extension of her permit on 5/6 April 2010. Yet it is alleged that the letter was only generated on Ms Draga's computer on 22 April 2010.

[33] In my view, the evidence that the extension of the permit was refused on the first occasion for the reason that the permit was originally issued in Pretoria is not reliable and does not establish non-compliance with the orders on the first occasion.

[34] The second applicant alleges that she returned to the Maitland Office on 2 August 2010 for the further extension of her permit, but was refused. She says that she was given a handwritten note (MK 3) which reads:

> Client has a decision pending; and as such must go to Pretoria to collect. Her file will not be transferred with a pending decision.

[35] The fourth respondent states that the respondents keep detailed statistics of all persons who attend the Maitland Office and that there is no record of the second applicant attending the Maitland Office on 2 August 2010. The fourth respondent denies that he gave the note to the second applicant and after making enquiries, the staff at the Maitland Office also

denied having done so. While the fourth respondent denies receiving the letter written by Mr. Kerfoot on 10 August 2010 (MK 4), he curiously does appear to have replied to the letter in an e-mail on 23 August 2010 to Ms Billy of the LRC.

[36] If it is accepted, however, that the second applicant did receive the note MK 3 from an official at the Maitland Office, it is not at all certain that the note is evidence of non-compliance with the orders. The note does not state that the reason for the refusal or failure to extend the permit was because the permit had originally been issued in Pretoria. The reason given in the note is that the second applicant 'has a decision pending' and that because her file will not be transferred with a pending decision, she must go to Pretoria to collect. It is not clear what it is she has to collect: her file or the extension of the permit.

[37] The second applicant has consequently not established non-compliance with the orders on the second occasion. In any event, even if the unnamed official did not comply with the orders, there is at least a reasonable doubt that he did so wilfully and mala fide.

[38] The third occasion relied upon by the second applicant was Tuesday 17 August 2010. He says the following:

15. I tried to get my permit extended again on 17 August 2010 at the Fourth Respondent's offices but was again told I would have to go to Pretoria.

16. I cannot afford to travel to Pretoria.

17. I cannot understand why the Respondents seem to be obsessed with the fact that in my case 'a decision is pending'. I understand from my attorney that the Respondent's Cape Town Office regularly renews Section 22 permits pending decisions from the Standing Committee For Refugee Affairs and the Refugees Appeal Board.

    These decisions are being communicated to Applicants in Cape Town when the decision has been made in Pretoria. There is no reason why a decision by a Refugee Status Determination Officer in Pretoria cannot be forwarded to Cape Town in the same manner.

[39] The fourth respondent in his answering affidavit agrees that section 22 permits are regularly renewed at the Maitland Office and that decisions are communicated to asylum seekers in Cape Town where decisions have been made at a different Refugee Reception Centre. However, it does not appear from all these statements that the reason for the refusal, if it did occur (the fourth respondent points out that the official concerned is not identified, that the second applicant attended on a day reserved for Somalis and that there is no record of the second applicant's attendance on that day), was that the original permit was issued in Pretoria and not at the Maitland Office. In any event, the facts deposed to by the second applicant, read with the answering

affidavit of the fourth respondent, create at least a reasonable doubt that the non-compliance occurred wilfully and mala fide.

[40] It follows that the application cannot succeed and must be dismissed. The respondents ask that the applicants pay the costs of the application. The general rule is that costs should follow the event, but this rule is subject to the basic principle that costs are in the discretion of the judge which discretion must be judicially exercised upon a consideration of the facts of the case. In essence, it has been said, it is a matter of fairness to both sides. Although the applicants have not been successful, they were not unreasonable in bringing the application. Genuine disputes on issues that are of public interest arose. In the circumstances and in the exercise of the discretion afforded this court, I am of the view that no order as to costs should be made.

It is ordered that:

1. The application is dismissed.
2. There will be no order as to Costs.

W.J. LOUW

Judge of the High Court