IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case number: 1476/14

In the matter between:

ANNIE PELAGIE BAHAMBOULA	First Applicant
ABEBE LEGESSE BIRU	Second Applicant
GIVEMORE TALKMORE CHOGA	Third Applicant
MIREILLE YOLANDE NSIKOU DIMBA	Fourth Applicant
JEAN PIERR HABIMANA	Fifth Applicant
SIHLE BEAUTY NCUBE	Sixth Applicant
JOHN ILUNGA TSHISHIMBI	Seventh Applicant

And

THE MINISTER OF HOME AFFAIRS	First Respondent
THE DIRECTOR-GENERAL OF THE DEPARTMENT OF HOME AFFAIRS	Second Respondent
THE CHIEF DIRECTOR:ASYLUM SEEKERS MANAGEMENT	Third Respondent
THE ACTING MANAGER OF THE CAPE TOWN REFUGEE RECEPTION OFFICE	Fourth Respondent

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JUDGMENT: 8 MAY 2014

INTRODUCTION

1. The Applicants (represented by Mr Simonsz) instituted these proceedings on an urgent basis in which they seek inter alia the following relief:

1.1. A declaration that the Internal Memorandum of the Department of Home Affairs dated 21 January 2013 ("the Internal Memorandum") is unlawful and invalid insofar as it allows and/or requires the refusal of extensions of permits in terms of section 22 of the Refugees Act No 130 of 1998 ("extensions") to asylum seekers based on the number of extensions previously obtained by that asylum seeker.

1.2. An Order directing the Respondents immediately to ensure that no asylum seeker is refused an extension due to the number of extensions previously obtained by that asylum seeker.

2. The application was opposed by all four Respondents (represented by Messrs Bofilatos SC and Papier).

3. This Judgment is structured as follows:

3.1. First, I address the legal framework in respect of asylum seekers.

3.2. Second, I address the relevant evidence.

3.3. Third, the applicable law is discussed.

3.4. Finally, my findings and reasons therefor are addressed.

THE LEGAL FRAMEWORK

4. Key aspects of the legal framework applicable to the complaint raised by the Applicants are set forth hereunder.

5. The point of departure is the Refugees Act No 130 of 1998 ("the Act"). By way of background, the Act allows for persons to qualify for refugee status and regulates the process and requirements in respect thereof.

6. A person whose refugee status has not yet been determined is called an asylum seeker and afforded certain rights under the Act.

7. Chapter 3 of the Act deals with applications for asylum:

    7.1. Key aspects governing applications for asylum are: (a) that they must be made in person in accordance with the prescribed procedures to a Refugee Reception Officer at any Refugee Reception Office[1]; (b) the Refugee Reception Officer must deal with the application in accordance with the Act[2]; (c) no proceedings may be instituted or continued against any person in respect of his or her unlawful entry into or presence within the Republic if: (i) such person has applied for asylum in terms of the relevant provisions in the Act, until a decision has been made on the application and, where applicable, such person has had an

[1] Section 21(1) and 21(3).
[2] Section 21(2).

opportunity to exhaust his or her rights of review or appeal in terms of Chapter 4 of the Act; or (ii) such person has been granted asylum.[3]

7.2. Section 22 governs an asylum seeker permit. Given its relevance to these proceedings, the section warrants quoting in full:

> "(1) The Refugee Reception Officer must, pending the outcome of an application in terms of section 21 (1), issue to the 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.
>
> (2) Upon the issue of a permit in terms of subsection (1), any permit issued to the applicant in terms of the Aliens Control Act, 1991, becomes null and void, and must forthwith be returned to the Director-General for cancellation.
>
> (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.
>
> (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.
>
> (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.

[3] Section 21(4).

(7) Any person who fails to return a permit in accordance with subsection (2), or to comply with any condition set out in a permit issued in terms of this section, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding five years, or to both a fine and such imprisonment."

7.3. Section 23 regulates the detention of asylum seekers in circumstances where the Minister has withdrawn an asylum seeker permit in terms of section 22 (6).

7.4. Section 24 regulates the decision-making process and ultimate decision regarding applications for asylum.

8. The nub of the Applicants' complaint (at the inception of these proceedings) was that the Internal Memorandum reflects the extension policy, the effect of which is that it "allows and/or requires Department officials to refuse to extend s22 permits based on the number of previous extensions obtained by any given asylum seeker."

9. There can be no dispute (and indeed there is none) that the Internal Memorandum prescribed a process for the extension of section 22 permits that have reached twelve extensions and could result in the refusal of a section 22 permit based on the number of prior extensions that have been granted. In instances where an asylum seeker has been granted twelve extensions, the relevant office must first obtain the necessary authorisation from the Asylum Seeker Management Unit in Pretoria, before a further extension can be granted.

10. In their founding affidavit, the Applicants raised the following complaints in relation to the Internal Memorandum and in support of the declaratory order they seek:

10.1. First, it is unlawful because it violates the rights of all asylum seekers to have valid section 22 permits granted to them.

10.2. Second, there is no lawful basis for the Memorandum which was issued by the Third Respondent who had no powers under the Act or any Regulation to control or influence the issue of section 22 permits.

10.3. Third, the Internal Memorandum is irrational due to its "illogical disconnection between who is responsible for the enforcement of the extensions policy and who is punished."

10.4. Fourth, the Internal Memorandum and the extensions policy are being implemented in an arbitrary and vague fashion.

10.5. Fifth, the extension policy is unreasonable and unlawful because of the drastic consequences it creates for asylum seekers.

10.6. Sixth, the Internal Memorandum is unconstitutional.

10.7. Seventh, the process followed in adopting the Internal Memorandum was an improper one.

11. As regards the directory relief sought, the Applicants contend that it is complementary to the declaratory relief and founded on the right of all asylum seekers in terms of the Act and the Constitution to a valid section 22 permit.

THE EVIDENCE

12. In their founding affidavits, the Applicants contended that they are all lawful asylum seekers in South Africa and had all recently been refused extensions of their section 22 permits at the Cape Town Refugee Reception Office, due to the enforcement of the extension policy by Departmental officials.

13. In addition to the application having been brought on behalf of the Applicants, it was brought on behalf of and in the interests of all asylum seekers in South Africa "who may be affected by the extension policy" as well as in the public interest. In this regard, the Applicants aver that the extension policy has national effect.

14. The Applicants have further explained that in the course of the three months preceding the application, UCT Clinic has been approached by very large numbers of asylum seekers who are in exactly the same position as the Applicants. In support of this averment, a list of 301 persons is attached to the founding affidavit.

15. In their answering affidavits the Respondents oppose the relief sought on the following main bases:

15.1. The Internal Memorandum does not authorise and nor has any official refused the extension of a section 22 permit based on the number of extensions that an asylum seeker had previously obtained.

15.2. The Department of Home Affairs does not have a policy which seeks or has the effect of refusing the extension of section 22 permits of legitimate asylum seekers and which prevents the issuing of extensions based on the number of prior extensions, to the Applicants or any other asylum seeker in South Africa.

15.3. The Second Respondent decided on 31 January 2014 that the Cape Town Refugee Reception Office ("the CTRRO") should remain closed and that the Cape Town Temporary Refugee Facility ("the CTTRF") will continue not to accept applications for asylum in respect of any person who did not apply for asylum at the CTRRO on or before 30 June 2012. The Second Respondent furthermore decided that the following services will be provided at the CTTRF:

> "2.1 The finalisation of all existing applications lodged by asylum seekers on or before 30 June 2012 at the CTRRO, including the extension of their section 22 permits, pending the finalisation of their applications.
>
> 2.2 The granting of limited once off extensions of no fewer than 6 months of section 22 permits to the holders of those permits who applied for them at a Refugee Reception Office ("RRO") other than the CTRRO, subject to the express condition that they attend in future at the RRO at which they originally applied for asylum."

15.4. Permits of asylum seekers are extended in accordance with the Second Respondent's decision of 31 January 2014 irrespective of whether they previously had more than twelve extensions and irrespective of the existence of the memorandum of 21 January 2013.

15.5. The following changes have been effected to the guidelines of 21 January 2013:

15.5.1. The computerised block on the Department's National Immigration Information System (NIIS) has been removed;

15.5.2. It is no longer necessary to procure "validation and authorisation" from Asylum Seeker Management at the Department's head office for the unblocking and extension of section 22 permits where the holder thereof has received more than 12 previous extensions;

15.5.3. The RRO managers at the RRO including the CTTRF are now authorised to grant extensions to section 22 permit holders who have received more than 12 previous extensions. These RRO managers will not refuse to extend a person's section 22 permit purely because he or she has received more than 12 previous extensions;

15.5.4. The RRO managers must still obtain a date from the Standing Committee on Refugee Affairs ("the SCRA") or the

Refugee Appeal Board ("the RAB") in instances where a person's section 22 permit has been extended for more than 12 times. These dates will then be recorded on such a person's section 22 permit when it is extended.

15.6. The Second and Fifth Applicants are both in possession of valid section 22 permits which expire on 14 August 2014.

15.7. The Sixth Applicant's permit expires on 30 June 2014.

15.8. There is no record of the First, Third, Fourth and Seventh Applicants having attended at the CTTRF in order to renew their section 22 permits. However, should they attend the CTTRF for an extension of their section 22 permits, they will be issued with extensions thereof.

16. In their Replying Affidavits, the Applicants:

16.1. Concede that all of the Applicants are in possession of section 22 permits.

16.2. Contend that the Respondents appear to have conceded the relief sought by the Applicants.

16.3. Contend that notwithstanding the official stance of the Respondents the Memorandum (and/or the blocking policy contained therein) is still being implemented sporadically.

16.4. Provide two further examples of asylum seekers who had been refused extensions due to having had too many previous extensions.

16.5. Contend that there will not be "perfect implementation" of the Department's policy but the more realistic situation is that while many officials will comply with the policy, some will not. On this basis, it is contended that a Court Order is required. In this regard, the Applicants state: "At least one purpose of the directory order sought by the Applicants is to make it clear that no matter which official, where, is doing the extensions, he or she cannot refuse or fail to provide extensions due to the number of previous extensions of the asylum seeker in question."

17. In the further affidavits filed, the Applicants refer to a further eight asylum seekers (who have received 12 extensions) and are alleged to have been told that they cannot have their permits renewed further. The Respondents address the position in respect of two of these persons, and explain why it is unlikely that a third person presented at their offices. No explanation is given in relation to the remaining five persons.

18. It is for those remaining five persons that the Applicants contend this case is very much alive.

19. The Respondents, in their most recent affidavit attach a list of names of asylum seekers who have received extensions of their permits since 31 January 2014.

The list reflects the names of asylum seekers who have had more than twelve previous extensions. The Respondents further contend that the list is "clear proof" that the CTRRF has been extending the permits of all asylum seekers with valid section 22 permits in line with the DG's decision of 31 January 2014.

20. In light of the above evidence, it is common cause (and was confirmed at the hearing of the matter) that there is no complaint in relation to the seven Applicants in respect of whom these proceedings have been instituted. The Applicants have also approached the matter on the basis that the Internal Memorandum has now been withdrawn, *de facto*, by the Department. The Applicants further accept that "a very large number – probably the majority – of asylum seekers are now being assisted with extensions in a lawful manner." However, they contend that a small number of asylum seekers are not being or have not been so assisted. On this basis, they submit that they are entitled to the relief sought.

21. In light of the aforegoing, a key question that falls to be determined is whether the relief sought in this application is in fact moot.

THE LAW

22. The Constitutional Court has explained:

> "A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law."[4]

[4] National Coalition for Gay & Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 (CC) ("National Coalition") at fn 19; cited with approval by the Supreme Court of Appeal, per Navsa JA, in Radio Pretoria v Chairman, Independent Communications Authority of South Africa and Another 2005 (1) SA 47 (SCA) ("Radio Pretoria") at para 39.

23. Although that is the basic principle, the Constitutional Court has held that, where it is in the interests of justice to do so, it has a discretion to consider and determine matters even if they have become moot.[5] The following principles have emerged in this regard:

23.1. The Court's discretion must be exercised according to what the interests of justice require. A prerequisite for the exercise of the discretion is that any order which this Court may make will have some practical effect either on the parties or on others. Other factors that may be relevant to the exercise of the Court's discretion will include the nature and extent of the practical effect that any possible order might have, the importance of the issue, its complexity and the fullness or otherwise of the argument advanced.[6]

23.2. The following factors have been held to be potentially relevant to the exercise of the Court's discretion[7]:

23.2.1. The nature and extent of the practical effect that any possible order might have;

[5] Independent Electoral Commission v Langeberg Municipality 2001 (3) SA 925 (CC) (2001 (9) BCLR 883) para 11; MEC for Education, KwaZulu-Natal and Others v Pillay 2008 (1) SA 474 (CC) (2008 (2) BCLR 99; [2007] ZACC 21) para 32; Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another Intervening) 2001 (3) SA 893 (CC) (2001 (2) SACR 66; 2001 (7) BCLR 685; [2001] ZACC 18) para 70; Pheko and Others v Ekurhuleni Metropolitan Municipality 2012 (2) SA 598 (CC) (2012 (4) BCLR 388; [2011] ZACC 34) para 32.
[6] Independent Electoral Commission v Langeberg Municipality 2001 (3) SA 925 (CC) (2001 (9) BCLR 883) para 11.
[7] MEC for Education, KwaZulu-Natal and Others v Pillay 2008 (1) SA 474 (CC) (2008 (2) BCLR 99; [2007] ZACC 21) para 32.

23.2.2. The importance of the issue;

23.2.3. The complexity of the issue;

23.2.4. The fullness or otherwise of the argument advanced; and

23.2.5. Resolving disputes between different courts.

23.3. A further relevant consideration is whether the resolution of a moot issue will be in the public interest. This will be the case where it will either benefit the larger public or achieve legal certainty.[8]

23.4. In matters concerning a challenge to legislation, which legislation was repealed prior to an appeal Court giving judgment, it was held that "neither of the applicants, nor for that matter anyone else, stands to gain the slightest advantage today from an order dealing with their moribund and futureless provisions. No wrong which we can still right was done to either applicant on the strength of them. Nor is anything that should be stopped likely to occur under their rapidly waning authority."[9] It was in that context that the Constitutional Court ultimately concluded:

> "[17] In all those circumstances there can hardly be a clearer instance of issues that are wholly academic, of issues exciting no interest but a historical one, than those on which our ruling is

[8] South African Congo Oil Co (Pty) Ltd v Identiguard International (Pty) Ltd 2012 (5) SA 125 (SCA) at par 5. See too: Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae) 2008 (2) SA 472 (CC) (2008 (4) BCLR 442) para 29. See also Executive Officer, Financial Services Board v Dynamic Wealth Ltd and Others 2012 (1) SA 453 (SCA) paras 43 – 44.

[9] JT Publishing JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others 1997 (3) SA 514 (CC) at par 16 and 17.

wanted have now become. The repeal of the Publications Act has disposed altogether of the question pertaining to that. And any aspect of the one about the Indecent or Obscene Photographic Matter Act which our previous decision on it did not answer finally has been foreclosed by its repeal in turn. I therefore conclude that we should decline at this stage to grant a declaratory order on either topic."

23.5. In another matter dealing with legislation which had been repealed prior to the matter being heard by the Appeal Court, it was held[10]:

> "[15] However, where the relevant legislative provision has been repealed after the High Court has made the order of invalidity, but before this Court hears the confirmation or appeal proceedings or before it gives its order, the need for certainty may well fall away. There may, however, be a need for the Court to give a judgment on the appeal or confirmation proceedings in order to resolve the dispute which gave rise to the litigation between the parties, or for other reasons.
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> [16] In my view, however, s 172(2) does not require this Court in all circumstances to determine matters brought to it under that subsection. At least where the provision declared invalid by the High Court has subsequently been repealed by an Act of Parliament, the Court has a discretion to decide whether or not it should deal with the matter. In this regard, the Court should consider whether any order it may make will have any practical effect either on the parties or on others.
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> [17] In this case the new legislation replaces all relevant aspects of the legislative framework upon which the dispute between the parties was based. The basis upon which the parties approached the High Court has disappeared and the grant of the relief claimed, as well as any confirmation of an order of constitutional invalidity, can serve no purpose. ...."

24. In **Rail Commuters Action Group v Transnet Ltd t/a Metrorail** 2005 (2) SA 359 (CC) it was held:

> "[106] I have concluded that Metrorail and the Commuter Corporation bear an obligation in terms of the SATS Act interpreted in the light of the Constitution to ensure that

[10] President, Ordinary Court Martial v Freedom of Expression Institute 1999 (4) SA 682 (CC).

reasonable measures are taken to provide for the safety and security of rail commuters on the rail commuter service they operate. In this Court, they both denied that they bore such an obligation. The first form of relief that is sought by the applicants is declaratory. Section 172(1)(a) of the Constitution states that this Court must declare 'any law or conduct that is inconsistent with the Constitution' to be invalid to the extent of its inconsistency. It is a special constitutional provision, different to the common-law rules governing the grant of declaratory orders. It does not mean, however, that this Court may not make a declaratory order in circumstances where it has not found conduct to be in conflict with the Constitution. Indeed s 38 of the Constitution makes it clear that the Court may grant a declaration of rights where it would constitute appropriate relief:

> 'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.'

Unlike under s 172(1)(a), the courts are not obliged to grant a declaration of rights but may do so where they consider it to constitute appropriate relief. The principles developed at common law, and under the provisions of the Supreme Court Act, will provide helpful guidance to consider whether such a declaratory order should be made, though of course the constitutional setting may at times require consideration of different or additional matters.

[107] It is quite clear that before it makes a declaratory order a court must consider all the relevant circumstances. A declaratory order is a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of our Constitution and its values. Declaratory orders, of course, may be accompanied by other forms of relief, such as mandatory or prohibitory orders, but they may also stand on their own. In considering whether it is desirable to order mandatory or prohibitory relief in addition to the declarator, a court will consider all the relevant circumstances.

[108] It should also be borne in mind that declaratory relief is of particular value in a constitutional democracy which enables courts to declare the law, on the one hand, but leave to the other arms of government, the Executive and the Legislature, the decision as to how best the law, once stated, should be observed."

(Own Emphasis)

25. The question of mootness was most recently addressed in the matter of **Director-General of the Department of Home Affairs and Another v Mukhamadiva** [2013] ZACC 47 (12 December 2013) (as yet unreported). That matter was argued against the following factual background. Ms Mukhamadiva, a foreign national, was refused entry into South Africa when she arrived at Cape Town International Airport. She thereafter obtained an order requiring the Department of Home Affairs to show good cause why she should not be permitted to enter the country. However, before the order could be executed, Ms Mukhamadiva returned to her country of origin and did not participate further in the proceedings. This notwithstanding, the High Court proceeded, of its own accord, to investigate why its order had not been implemented. The Constitutional Court held as follows:

> [33] Long before our constitutional dispensation, the principle has always been clear: courts should not decide matters that are abstract or academic and which do not have any practical effect either on the parties before the court or the public at large. In *Geldenhuys*[11] Innes CJ stated, in the context of the granting of declaratory orders where no rights have been infringed, that courts of law exist to settle concrete controversies and actual infringements of rights, and not to pronounce upon abstract questions, or give advice on differing contentions.[12]
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> [34] This principle, which is fundamental in the conception of the function of the court,[13] was confirmed in subsequent cases of the Appellate Division.[14] In *Graaff-Reinet Municipality* Watermeyer CJ found that though this principle originated as a rule of practice, it has since crystallised into a rule of law.[15] And in *Flats Milling Co* the Court again highlighted the principle that courts do not normally decide academic questions of law,[16] and stressed the need for the

[11] Geldenhuys and Neethling v Beuthin 1918 AD 426 (Geldenhuys).
[12] Id at 441.
[13] Ex parte Ginsberg 1936 TPD 155 at 157-8.
[14] Attorney-General, Transvaal v Flats Milling Co (Pty) Ltd and Others 1958 (3) SA 360 (A) (Flats Milling Co) and Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board 1950 (2) SA 420 (A).
[15] Graaf-Reinet Municipality id at 424.
[16] Flats Milling Co above n 22 at 372. See also R v Singh 1944 AD 366.

pronouncement made by the Court not to be an academic decision but an operative decision that has a practical effect on persons before it.[17]

[35] In *Premier van die Provinsie van Mpumalanga*[18] Olivier JA, after discussing the rationale behind section 21A of the Supreme Courts Act,[19] laid down the importance of avoiding vague concepts such as "abstract", "academic" and "hypothetical" as yardsticks for the exercise of an appeal court's jurisdiction to hear an appeal. The question is a positive one, whether a judgment or order of the court will have a practical effect and not whether it will be of importance for a hypothetical future case.[20]

[36] Following on earlier judicial statements, in *JT Publishing*[21] Didcott J wrote, in the context of declaration orders, that the well-established and uniformly observed policy directs courts not to exercise their discretion in favour of deciding issues that are merely abstract, academic or hypothetical.[22] He added that this Court would not be obliged to determine an issue which, because of its abstract, academic or hypothetical nature, once determined would produce no concrete or tangible result.[23]

[37] The position as set out in *JT Publishing* was confirmed and developed by this Court in subsequent judgments.[24] In *President of the*

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[17] Flats Milling Co above note 22 at 374.

[18] Premier van die Provinsie van Mpumalanga v Stadsraad van Groblersdal [1998] ZASCA 20; 1998 (2) SA 1136 (SCA).

[19] The principles set out above were initially legislated in the General Law Third Amendment Act 129 of 1993, which inserted section 21A into the Supreme Courts Act 59 of 1959. This was then substituted by the Judicial Matters Amendment Act 104 of 1996. Section 21A(1) provided:

> "When at the hearing of any civil appeal to the Appellate Division or any Provincial or Local Division of the Supreme Court the issues are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone."

The Supreme Court Act has since been repealed and replaced by the Superior Courts Act 10 of 2013 which provides in section 16(2)(a)(i):

> "When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone."

[20] Premier van die Provinsie van Mpumalanga above n 26 at 1141. See also President of the Ordinary Court Martial and Others v The Freedom of Expression Institute and Others [1999] ZACC 10; 1999 (4) SA 682 (CC); 1999 (11) BCLR 1219 (CC) (President of the Ordinary Court Martial) at para 13-4and Simon NO v Air Operations of Europe AB and Others [1998] ZASCA 79; 1999 (1) SA 217 (SCA) at 226.

[21] JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others [1996] ZACC 23; 1997 (3) SA 514 (CC); 1996 (12) BCLR 1599 (CC) (JT Publishing) at 525A-F.

[22] Id at 525B. This principle was accepted with the necessary caveat that it could be departed from in special circumstances after taking into account certain relevant factors.

[23] Id.

[24] See Wiese v Government Employees Pension Fund and Others [2012] ZACC 5; 2012 (6) BCLR 599 (CC) at para 22; AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another

Ordinary Court Martial this principle was accepted and extended to confirmation proceedings brought in terms of section 172(2) of the Constitution. Again, the Court was enjoined, in exercising its powers, to consider whether any order it made would have a practical effect on the parties before it or on others.[25] And in *National Coalition* the Court noted that a matter is moot and not justiciable if it no longer presents an existing or live controversy.[26]"

(Own Emphasis)

DISCUSSION AND FINDINGS

26. The question of mootness must, in my view, be considered against the following facts:

26.1. The Respondents have made clear that they do not have a policy which seeks or has the effect of refusing the extension of section 22 permits of legitimate asylum seekers and which prevents the issuing of extensions based on the number of prior extensions to the Applicants or any other asylum seeker in South Africa.

26.2. The Respondents have stated that permits of asylum seekers are extended in accordance with the Second Respondent's decision of 31 January 2014 irrespective of whether they previously had more than twelve extensions and irrespective of the existence of the memorandum of 21 January 2013. Accepting the Respondents' evidence in this regard, the Applicants have approached the matter on

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[2006] ZACC 9; 2007 (1) SA 343 (CC); 2006 (11) BCLR 1255 (CC) at para 27; National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) (National Coalition) at para 21; President of the Ordinary Court Martial above n 28 at paras 13-8; and President of the Republic of South Africa and Another v Hugo [1997] ZACC 4; 1997 (4) SA 1 (CC); 1997 (6) BCLR 708 (CC) at paras 51 and 54.

[25] President of the Ordinary Court Martial above n 28 at paras 13-8.

[26] National Coalition above n 32 at para 21.

the basis that the Internal Memorandum has now been withdrawn, *de facto*, by the Department.

26.3. Certain changes (as identified above have been effected) to the guidelines of 21 January 2013.

26.4. The Respondents have attached an extensive list of names of asylum seekers who have received extensions of their permits since 31 January 2014 notwithstanding having had more than twelve previous extensions.

26.5. It is common cause (and was confirmed at the hearing of the matter) that there is no complaint in relation to the seven Applicants in respect of whom these proceedings have been instituted.

26.6. The Applicants accept that "a very large number – probably the majority – of asylum seekers are now being assisted with extensions in a lawful manner."

27. Notwithstanding the aforegoing, the Applicants contend that they are nevertheless entitled to the relief sought in this application for inter alia the following reasons:

27.1. A small number of asylum seekers are not being or have not been so assisted in terms of the Department's guidelines of 31 January 2014.

27.2. In the transition from the old policy to the new, “there is always going to be, at the very least, a period of transition when mistakes, inefficiencies, corruption or incompetence plays a role and asylum seekers are unlawfully refused extensions.”

27.3. Some of the persons (six on the Applicants’ version) referred to in the Supplementary Replying Affidavit shows that persons are being refused section 22 permits based on the number of prior extensions.

27.4. The Department, like any government department, suffers from a degree of bureaucratic ineptitude.

28. I do not agree that the above mentioned factors are sufficient to entitle the Applicants to the relief sought for the following reasons:

28.1. I have no reason to doubt the Respondents’ contention that they do not have a policy which seeks or has the effect of refusing the extension of section 22 permits of legitimate asylum seekers and which prevents the issuing of extensions based on the number of prior extensions to the Applicants or any other asylum seeker in South Africa. Indeed, the Applicants did not suggest otherwise.

28.2. I also accept that permits of asylum seekers are extended in accordance with the Second Respondent’s decision of 31 January 2014 irrespective of whether they previously had more than twelve extensions and irrespective of the existence of the memorandum of 21

January 2013. There was no dispute in relation to the list of names put up by the Respondents in support of this averment.

28.3. There is no complaint in relation to the seven Applicants in respect of whom these proceedings have been instituted.

28.4. I accept that unlike in the cases referred to above (in the context of legislation having been repealed), there is no indication from the Respondents that the Internal Policy has been withdrawn. Indeed, the suggestion appears to be that it was amended by the January 2014 Policy. It is common cause that the effect of the amendment is that it removes the Applicants' complaint. Significantly, the Applicants raise no complaint in respect of the January 2014 Policy.

28.5. I also do not accept that a Court Order of the nature sought is justified in order to "cure" an official's intransigence or ineptitude or indeed to address "mistakes, inefficiencies, corruption or incompetence".

28.6. I also do not accept that a government's failure to meet a threshold of absolute perfection in the implementation of its policies, ought to entitle litigants to relief of the nature sought in this application. Indeed, Mr Simonsz was unable to point to me any authority for the proposition that relief of the nature sought has previously been granted on the basis of a failure to implement government policies in each and every instance.

28.7. There is no ambiguity or uncertainty in respect of the regulatory framework. The Applicants persist in their relief in order to address the question of implementation of government policy.

29. I am of the view that applications for extensions of section 22 permits are granted by the Department notwithstanding the number of prior extensions. I accept, that there may be instances where despite the Respondents' approach as set forth in its papers in this application, persons are "sporadically" refused extensions of section 22 permits on account of the number of prior extensions. Their recourse, in those circumstances, is to challenge the impugned decision or decisions.

30. I also do not accept that the alleged position of the further applicants named in the supplementary replying affidavit can be used to justify the relief sought. It is a trite principle of motion proceedings that an applicant must make his case in his founding affidavit. In this regard, it has been held[27]:

> " An applicant who elects to seek relief in notice of motion proceedings must (save in exceptional circumstances) make his case and produce all the essential evidence, which would be led at a trial, in his supporting affidavits. It is not for the applicant to simply make general allegations and when those allegations are dealt with in reply to come forward with replying affidavits giving details supporting the general allegations originally set out in the supporting affidavit. The purpose of the replying affidavit is to reply to averments made by the respondent in his answering affidavit and should not be used to supplement his cause of action or still less to introduce a new case. In Mauerberger v Mauerberger 1948 (3) SA 731 (C) SEARLE J after reviewing the authorities decided that it was clearly settled law that in replying affidavits an applicant is not allowed to set forth details of allegations which should have appeared in the original supporting affidavit. Although the Court can in suitable cases exercise its discretion and

[27] Bergkelder, Die v Delheim Wines (Pty) Ltd 1980 (3) SA 1171 (C) at 1176G-H.

> allow new matter to appear in replying affidavits it will not hesitate, where an applicant has merely set out a skeleton case in his supporting affidavits, to strike out any fortifying paragraphs in his replying affidavit."
>
> (Own Emphasis)

31. While I do not suggest that the Applicants made out a skeleton case in their founding affidavit, the point is that their complaint was raised in respect of the seven applicants and the broader interests referred to above. Pursuant to the Respondent's answer ultimately no further complaint was raised in relation to the Applicants. In these circumstances, it is not appropriate for the Applicants to place reliance on a number of <u>further</u> individuals whose specific details did not appear in the founding affidavit. In this regard the Applicants suggest that some of the persons were referred to in a list attached to the founding affidavit. While it is correct that some of these names were indeed referred to in that list, that list contained 301 names in an annexure to the founding affidavit. That cannot, in my view justify a stance that the Respondents had to explain the position in relation to the 301 persons, particularly bearing in mind that their names and peculiar circumstances were not specifically addressed in the founding affidavit.

32. For these reasons, I am of the view that this application is moot and falls to be dismissed.

33. As regards the question of costs, I am of the view that each party should bear their own costs for the following reasons:

33.1. First, the general rule is that unsuccessful litigants against the State who are seeking to vindicate constitutional rights should not be mulcted with costs.[28]

33.2. Secondly, the Courts have long recognised that where a litigant was reasonable in launching a case, costs should not be awarded against him or her.[29]

34. In this case, the application was by no means "frivolous or vexatious, or in any other way manifestly inappropriate". Indeed, aspects of the internal policy were defended by the Department in correspondence dated 3 December 2013.

35. In the result, I make the following Order:

35.1. The application is dismissed.

35.2. Each party is to pay their own costs.

BY ORDER OF COURT

[28] Biowatch Trust v Registrar, Genetic Resources, and Others 2009 (6) SA 232 (CC) at paras 21-25.
[29] Chetty v Louis Joss Motors 1948 (3) SA 329 (T); Palley v Knight 1961 (4) SA 633 (SR); Rainbow Chicken Farm (Pty) Ltd v Mediterranean Woollen Mills (Pty) Ltd 1963 (1) SA 201 (N); Nieuwoudt v Joubert [1988] 2 All SA 189 (SE).