IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 17770/15

In the matter between:

CISHAHAYO SAIDI	First Applicant
TWENTY SEVEN OTHERS	Second to Twenty Eighth Applicants

And

THE MINISTER OF HOME AFFAIRS	First Respondent
THE DIRECTOR GENERAL, DEPARTMENT OF HOME AFFAIRS	Second Respondent
MS THEMBI NDLOVU, ACTING MANAGER, CAPE TOWN REFUGEE FACILITY	Third Respondent
THE STANDING COMMITTEE FOR REFUGEE AFFAIRS	Fourth Respondent
MR K SLOTH-NIELSEN, N.O CHAIRPERSON OF THE STANDING COMMITTEE FOR REFUGEE AFFAIRS	Fifth Respondent
THE REFUGEE APPEAL BOARD	Sixth Respondent

MR M CHIPU N.O, REFUGEE APPEAL BOARD Seventh Respondent

HEARD : TUESDAY 3 NOVEMBER 2015

DELIVERED : THURSDAY 26 NOVEMBER 2015

JUDGMENT

Nuku, AJ

[1] This application concerns the decision by Third Respondent refusing to extend the permits ("section 22" permits) issued to Applicants in terms of section 22 of the Refugees Act 130 of 1998 ("the Act").

[2] The Applicants are all foreigners from various African countries who sought refugee status in South Africa. Their applications for asylum were refused and after exhausting the internal remedies provided for in chapter 4 of the Act, they have instituted proceedings for the review and setting aside of the decisions refusing them the refugee status. All these reviews are still pending before this Court. In this judgment the words application for asylum and application for refugee status have been used interchangeably.

[3] The First to Seventh respondents are the Minister of Home Affairs; the Director General, Department of Home Affairs; Ms Thembi Ndlovu, the Acting

Manager, Cape Town Refugee Facility; the Standing Committee for Refugee Affairs; Mr K Sloth-Nielson, N.O. Chairperson of the Standing Committee for Refugee Affairs; the Refugee Appeal Board and Mr M Chipu N.O., Refugee Appeal Board, respectively.

[4] The Applicants brought the application on an urgent basis. The application was to be heard on 29 September 2015 on which date it was postponed to 3 November 2015.

[5] The facts in this matter are largely common cause and can be summarised as follows: The applicants have all had their applications for refugee status refused. Whilst their applications for refugee status were pending they were all issued with asylum seeker permits in terms of Section 22 (1) of the Act. These permits have been extended from time to time whilst the determination of the applications for refugee status were pending. All the Applicants have had their applications for refugee status refused. The Applicants have all instituted review proceedings in this Court seeking to review and set aside the decisions to refuse their applications for refugee status. After the institution of the review proceedings, the Applicants, the predecessor of the Third Respondent would extend the permits from time to time pending the finalisation of the review proceedings. This, it appears he or she would do on merely being advised by the office of the State Attorney that review proceedings have been initiated in the High Court application for review has been launched. When Ms Thembi Ndlovu assumed office she took the view that it was unlawful to extend the section 22

permits after an applicant had exhausted the internal appeal and review remedies provided for in the Act. Her attitude was that the Act does empower her to extend a section 22 permit after the applicant for refugee status has exhausted his or her review and appeal remedies as provided for in Chapter 4 of the Act. Her attitude was that pending the outcome of the Court review of the decision to refuse the application for refugee status it is only a Court that can direct her to extend the section 22 permit. As a result of that change in the approach by the Third Respondent the permits that had been issued to the applicants have either not been extended or are not going to be extended by the third respondent on the basis that she is not empowered by the Act to extend the said permits.

[6] The issue for determination by this Court is whether the Act empowers the refugee reception officer (The Third Respondent in this application) to extend the period for which a section 22 permit has been issued after an applicant for refugee statues has exhausted the internal appeal and review remedies as provided for in Chapter 4 of the Act.

[7] The relevant sections of the Act are section 21(4), section 22(1) and section 22(3) which read as follows:

1. Section 21 (4) - *"notwithstanding any law to the contrary, 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 – (a) such person has applied for asylum in terms of sub Section (1), until a decision has been made on the application and where*

applicable, such person has had an opportunity to exhaust his or her rights of review or appeal in terms of Chapter 4."

2. Section 22 (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."*

3. Section 22 (3) - *"a refugee reception officer may from time to time extend the period for which a permit has been issued in terms of sub Section (1), or amend the conditions subject to which a permit has been so issued."*

[8] The starting point in the statutory interpretation is to ascertain the intention of the legislator. This is done by taking, "*the language of the instrument, or of the relevant portion of the instrument as a whole and where the words are clear and unambiguous to place upon them the grammatical construction and to give them their ordinary effect*." (See Venter v R 1907 TS 910 at 913 and the subsequent cases).

[9] It is clear that sections 21 (4) and 22 (1) are concerned with a person who has applied for asylum up to the stage where such person has exhausted his or

her rights of review or appeal in terms of Chapter 4 of the Act. It also appears that in respect of such a person the refugee reception officer is obliged to issue to the applicant a section 22 permit. In respect of section 21(4) this is clear from the following words used by the legislator, namely: "***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 – (a) such person has applied for asylum in terms of sub Section (1),* ***until a decision has been made on the application and where applicable, such person has had an opportunity to exhaust his or her rights of review or appeal in terms of Chapter 4***." (my emphasis).

In respect of section 22(1) it is also clear from the following words used by the legislator, namely: "*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*" (my emphasis).

[10] Section 22 (3), on the other hand, confers a discretion on the Refugee Reception Officer to extend a section 22 permit. It is inconceivable that the legislator would have intended to confer a discretion to issue a section 22 permit on the Refugee Reception Officer in circumstances where he or she is in any event obliged by law to do so. The section itself makes no reference to the exhaustion of internal appeals and reviews and this must be for good reason.

[11] Having regard to the fact that under section 22 (1) the Refugee Reception Officer is obliged to issue a permit up to the stage when the applicant has exhausted his or her review or appeal in terms of Chapter 4 , It would be absurd to also give the refugee reception officer the discretion to issue the permit which in any event he is obliged to issue.

[12] Clearly Section 22 (3) is designed to deal with instances where the Refugee Reception Officer is not obliged to issue the permit. Thus, the Refugee Reception Officer has the discretion to extend a section 22 permit. This power certainly is available to the Refugee Reception Officer in circumstances where an applicant for asylum whose application has been refused has instituted judicial review proceedings.

.

[13] Having found that Third Respondent has the statutory power to issue the section 22 permits the next question is whether her decision which was based on her perceived lack of statutory authority falls to be reviewed and set aside.

[14] The Respondents have considered that the decision of the third respondent in terms of which she refused to grant section 22 permits to the applicants falls within the definition of a decision as contemplated in section 3 of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”). The Respondents, further contended that the Third Respondent’s decision remains valid until set aside. The applicants have requested this Court, to the extent necessary, to review and set aside the decision of the Third

Respondent refusing to extend the section 22 permits to the applicants and their families. They have argued that the Third Respondent's decision is reviewable on the following grounds, namely:

1. that the decision was materially influenced by an error of law, as provided for in section 6(2) (d) of PAJA; The decision was plainly taken on the basis of the mistaken assumption that the Third Respondent had the power to renew or extend permits and that they could only extend the permits if a Court ordered them to do so. The belief is wrong for the reasons already advanced. Therefore, the decision must be set aside.

2. that the decision was irrational as provided for in section 6 (2) (f) (ii) of PAJA. The decision is not related to the purpose of the power, or the information before the administrator. It should have been obvious that the purpose of sections 21 (4), 22 (1) and 22 (3) of the Act is to allow asylum seekers to remain in the country until their applications are finalised. The Third Respondent's decision undermines that purpose.

3. that the decision is unreasonable as provided for in section 6 (2) (h)) of PAJA. The decision is so unreasonable that no reasonable decision maker could have made it. As demonstrated above the only consequence of that decision will be to waste the Court's time and public money with no benefit to the public but massive prejudice to the refugees. This is blatantly unreasonable.

4. that the decision is otherwise unlawful or unconstitutional as provided for in section 6 (2) (h) of PAJA. The decision is unlawful and unconstitutional because it has caused, and will continue to cause, the violation of rights of applicants and others in their position.

[15] Having found that the Third Respondent has the discretion to issue the section 22 permits it follows that her refusal to do so on the basis of her she had no statutory to do so was materially influenced by an error of law referred to in Section 6 (2) (D) of PAJA. For that reason alone the Third Respondent's decision falls to be reviewed and set aside.

[16] This leads me to the next question: whether the applicants had a legitimate expectation to be issued with the permits. The requirements for legitimacy of t he expectation were succinctly set out in ***National Director of Public Prosecutions v Phillips and Others*** 2002 (4) SA 60 (W) at paragraph 28, and endorsed in ***South African Veterinary Council v Szymanski*** 2003 (4) SA 42 (SCA) at paragraph 19, as follows:

> *"the law does not protect every expectation but only those which are "legitimate". The requirements for legitimacy of the expectation, include the following:*
>
> *(i) The representation underlying the expectation must be "clear, unambiguous and devoid of relevant qualification" : D E Smith, Wolf & …..(OPCIT at 425 para 8-055). The requirement is a sensible one. It accords with the principle of fairness in public*

administration. Fairness both to the administration and the subject. It protects public officials against the risk that their unwitting ambiguous statements may create legitimate expectations. It is also not unfair to those who choose to rely on such statements. It is always open to them to seek clarification before they do so, failing which they act at their peril.

(ii) *The expectation must be reasonable: administrator, Transvaal v Trobb (Supra at 756i – 757B); D E Smith, Wolf & ……… (Supra at 417 para 8 – 037).*

(iii) *The representation must have been induced by the decision maker; D E Smith, Wolf & ……. (OPCIT at 422 para 8 – 050); Attorney-General of Hong Kong VNG UYUEN SHIU (1983) to All ER 346 (PC at 350 H-J).*

(iv) *The representation must be one which was competent and lawful for the decision-maker to make without which relliance cannot be legitimate.* ***Hauptfleisch v Caledon Divisional Council*** *1963 (4) SA 53 (C) at 59 E-G".*

[17] Counsel for Respondents did not take issue with the first three requirements for legitimate expectation, namely, whether there was a representation underlying the expectation which was clear, and an unambiguous and devoid of relevant qualification, that the expectation was reasonable and that the representation was induced by the decision-maker, namely, the Third Respondents predecessor. What the respondents take

issue with is the fourth requirement relating to whether the representation was one which it was competent and lawful for the decision-maker to make without which the reliance cannot be legitimate. This was premised on the notion that the Act does not empower the decision-maker to issue a permit without a Court Order after the applicant has exhausted his or her internal remedies as provided for in chapter 4 of the Act.. I have already dealt with this aspect above and found that the Act does empower the Refugee Reception Officer to extend the section 22 permits and therefore this argument is unsustainable. In the end I am satisfied that the applicant's had a legitimate expectation that their permits would be extended.

[18] The next issue that the applicants sought was tan order directing the Third Respondent to issue the applicants with the section 22 permits. This was referred to as substantive legitimate expectation by counsel for Applicants. It was argued that although there is some uncertainty in our law about what a person is entitled to once he or she has established a legitimate expectation, the time has come to recognise that legitimate expectations can, in some circumstances, give rise to both procedural and substantive rights.

[19] Counsel for the applicants has referred to ***Kwazulu-Natal Joint Liaison Committee v MEC Department of Education, Kwazulu-Natal and Others*** 2013 (4) SA 262 where without pronouncing on the recognition of the doctrine of legitimate expectation the Court ordered the respondent to pay in accordance with an undertaking which it had made.

[20] In am not persuaded that it would be appropriate order the Third Respondent to extend the section 22 permits to substitute the for the following reasons: The Third Respondent laboured under a material error of law and as such did not even exercise the discretion vested in her by Section 22 (3) of the Act; Except for the personal details of the applicants there is no material before the Court to assess whether or not it would be reasonable or otherwise of the Third Respondent to refuse or to extend the section 22 permits. This is a matter that requires consideration by the Third Respondent as she is now aware that she has the discretion to extend the section 22 permits.

[21] As the Applicants have been successful I cannot think of any reason why it should not be awarded costs.

In the result I make the following Order:

1. It is declared that Section 22 (3) of the Refugees Act 130 of 1998 vests a Refugee Reception Officer discretion to extend the section 22 from time to time after an applicant for asylum has exhausted his or her rights of review or appeal in terms of Chapter 4 of the Act.

2. The decision to refuse to extend the permits of the applicants is reviewed and set aside. The matter is remitted back to the Third Respondent for consideration.

3. The respondents are ordered to pay costs

NUKU, AJ