

SOUTH AFRICA / JUDGMENT

Ssemakula and Others v Minister of Home Affairs and Others (4139/11) [2012] ZAWCHC 398 (5 March 2012)

[2012] ZAWCHC 398

COURT

Western Cape High Court, Cape Town

BEFORE

Dolamo

CASE / FILE NUMBER

4139/11

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No.: 4139/11

DATE : 05 MARCH 2012

In the matter between:

DENNIS SSEMAKULAFirst Applicant

CHRISTELLE KABANGU MUSASA.....Second Applicant

SARAH KUMWERO.....Third Applicant

JEAN CLOTAIRE RUVAKO.....Fourth Applicant

BEATHE ML SAB YI MANA.....Fifth Applicant

MUHAMEDI MATOVU.....Sixth Applicant

TWAHA KATENDE.....Seventh Applicant

GEORGE MUYOMBA.....Eighth Applicant

JOHN JTKEME AFEEZ.....Ninth Applicant

PATRICK KUYANDA KASHAMATenth.....Applicant

And

THE MINISTER OF HOME AFFAIRS.....First Respondent

THE DIRECTOR-GENERAL,

DEPARTMENT OF HOME AFFAIRS.....Second Respondent

THE DIRECTOR, REFUGEE RECEPTION CENTRE,

MAITLAND.....Third Respondent

THE REFUGEE RECEPTION OFFICER,

REFUGEE RECEPTION CENTRE, MAITLAND.....Fourth Respondent

JUDGMENT delivered on 5 MARCH 2012

DOLAMO, AJ

- [1] The Applicants, all foreign nationals, brought an Application against the Respondents, in terms of Sections 38(a), (c) and (d) and 172(1) of the Constitution of the Republic of South Africa, 1996, for an order declaring the Respondents' policy, practice and/or conduct, since Monday 7 February 2011, of refusing to accept asylum applications in terms of Section 21 and of refusing to issue Asylum Seekers with temporary asylum seekers permits ("ASP") in terms of Section 22 of the Refugees Act 130 of 1998 (the "Refugees Act"), unless the asylum seekers were in possession of asylum transit permits ("ATP"), issued in terms of Section 23 of the Immigration Act No 13 of 2002 (the "Immigration Act"), to be inconsistent with the Constitution of the Republic of South Africa and the Refugees Act and therefore unlawful and invalid; directing the Respondents to forthwith accept such applications for and issue temporary ASP's in accordance with Section 22 of the Refugees Act, irrespective of whether the asylum seekers were in possession of ATP's or not. The Applicants also asked for costs to be paid jointly and severally by the Respondents who appear and oppose the application. The Respondents are the Minister of Home Affairs; the Director-General: Department of Home Affairs; the Director: Refugee Reception Centre, Maitland and the Refugee Reception Officer: Maitland. I shall henceforth refer to them collectively as the "Respondents".
- [2] The Applicants alleged in their founding papers that they were asylum seekers and nationals of various African Countries. They alleged to have fled from their respective countries of origin where they faced serious risk of persecution and danger to their lives and security, to the relative security of the Republic of South Africa. They face the same prospects of persecution and mortal danger if they were to return to their respective countries of origin. They entered the Republic of South Africa at different times and at various points but admittedly, mostly not through recognized border posts to, seek asylum. As such many were not in possession of ATP's issued in terms of Section 23 of the Immigration Act which would have been issued to them had they entered this country at official border posts. Once in the Republic they made their way, via different routes, to Cape Town where they made several attempts at the Maitland Refugee Reception Office to lodge their individual applications for

ASP's. The officials at this Centre refused to accept their applications, citing various reasons for doing so. One of the reasons, which crystallized since on or about 7th February 2011, was to demand an ATP and in the absence of such, to refuse to accept applications for asylum permits. Confronted with this problem the Applicants, on or about Thursday the 10th February 2011, approached the Legal Resources Centre for assistance. On appraising himself of their situation, their attorney of record sent an e-mail calling upon the Third Respondent to respond to these allegations, which were termed "breathtakingly unlawful as to be almost criminal", by not later than noon on Monday the 14th February 2011. The Third Respondent did not respond, whereupon the Applicants launched the present application on an urgent basis as threatened in the said e-mail. The Applicants further stated in their papers that the alleged policy, practice or conduct of the Respondents prevented a large number of would be asylum seekers from exercising their legal and constitutional rights to apply for asylum and had the effect that such people were unable to obtain Section 22 asylum-seeker permits, which consequently exposed them to the real risk of arrest and deportation as illegal foreigners.

- [3] All the Respondents opposed the application.
- [4] The Respondents' opposing papers consisted of affidavits by the Deputy Minister to the First Respondent; Second and Third Respondents; as well as two confirmatory affidavits by Messrs. J.W. McKay Deputy- Director Immigration and A. Essel, Refugee Status

Determination

Manager, both of the First Respondent's Department. In all these affidavits the Respondents, in general, denied the existence of a policy, practice or directive by the Department of Home Affairs in terms of which applications for ASP were not accepted and asylum permits not issued, if the Applicants were not in possession of permits issued in terms of Section 23 of the Immigration Act. The Third Respondent went further and dealt in more details with the allegations in the Applicants' founding papers. Paragraphs 4 and 5 of his opposing affidavit, in particular, read as follows:

"4. I have read the founding papers in this application. The applicants contend that since February 2011, the respondents have refused to accept applications for asylum unless asylum-seekers are in possession of asylum transit permits issued in terms of section 23 of the Immigration Act 13 of 2002 ("the Immigration Act");).

5. But that is not so.

5.1. The Department has not adopted any policy, practice or directive, in terms of which an application for asylum is accepted only if the asylum-seeker is in possession of an asylum transit permit issued under section 23 of the Immigration Act.

- [1] See: Contactprops 25 (Pty) Ltd v Executive Council, Province of the Eastern Cape 2000 (3) All SA 443 (CK) at 446f.

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- [2] See: National Coalition for Gays and Lesbians Equality and Others v Minister of Home Affairs and Others 2000 (2) SA1 (CC) footnote 18.
- [3] See: President, Ordinary Court Martial and Others v Freedom Expression Institute and Others [1999] ZACC 10; 1999 (4) SA 682 (CC) at para 16.
- [4] Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 (1) SA 984 (CC) at para 234.
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