

Reportable

**IN THE HIGH COURT OF SOUTH AFRICA
[CAPE OF GOOD HOPE PROVINCIAL DIVISION]**

CASE NO: 1486/02

In the matter between:

MURIEL MILLIE WATCHENKA

First Applicant

CAPE TOWN REFUGEE CENTRE

Second Applicant

and

THE MINISTER OF HOME AFFAIRS

First Respondent

**THE DIRECTOR GENERAL,
DEPARTMENT OF HOME AFFAIRS**

Second Respondent

**THE CHAIRPERSON STANDING
COMMITTEE OF REFUGEE AFFAIRS**

Third Respondent

JUDGMENT DELIVERED ON 15 NOVEMBER 2002

H.J. ERASMUS, J

On 28 February 2002 the applicants brought an urgent application in which

they sought an order in the following terms:

- i) Condoning the Applicants' non-compliance with the Rules of Court and granting leave for this application to be heard as a matter of urgency.
- ii) Declaring that the prohibition on work and study contained in Annexure 3 read with Regulation 7(1) of the regulations made by First Respondent in terms of Section 38 of the Refugees Act 130 of 1998 is unconstitutional.
- iii) Directing the Respondents:-
 - a) to permit First Applicant to be employed pending the finalisation of her application for asylum made on 7 February 2002 in terms of Section 21 of the Refugees Act 130 of 1998.
 - b) to permit First Applicant's son, Sipho Ezekiel Mlagisi to pursue his studies pending the finalisation of First Applicant's (and his) application for asylum made on 7 February 2002.
 - c) Granting the Applicants further or alternative relief.

- d) Ordering any Respondent who opposes this application to pay the costs thereof.

The matter was by agreement between the parties postponed to 4 June 2002 and thereafter to 14 August 2002. The matter was argued before me on 14 and 15 August 2002. Mr Katz appeared for the applicants and Mr Jacobs for the respondents. I am indebted to counsel for their comprehensive and helpful arguments.

Parties and locus standi

The first applicant is Muriel Millie Watchenuka, a Zimbabwean national. The second applicant is the Cape Town Refugee Centre, a voluntary association which provides assistance to asylum seekers in need.

The first respondent is the Minister of the Department of Home Affairs (“the Minister”) who is the Minister responsible for the administration of the Refugees Act 130 of 1998. The second respondent is the Director General of the Department of Home Affairs, and the third respondent is the chairperson of the Standing Committee for Refugee Affairs, a committee established in terms of section 9 of the Refugees Act 130 of 1998.

In their papers, the respondents asserted that the applicants do not have the capacity to launch the application and that they are accordingly not entitled to the relief sought. At the hearing, the respondents did not persist with the objection to the applicants’ *locus standi*.

The Refugees Act 130 of 1998

Introduction

Prior to the Refugees Act 130 of 1998 coming into force, foreign nationals who made application for asylum and refugee status in South Africa were dealt with in terms of the provisions of the Aliens Control Act 96 of 1991.

The Refugees Act 130 of 1998 (“the Act”) was, according to its long title and preamble, promulgated to give effect to international legal instruments, principles and standards relating to refugees and to provide for the reception into South Africa of asylum seekers. In 1995 South Africa became party to the 1951 United Nations Convention Relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees and the 1969 Organisation of African Unity Convention Concerning the Specific Aspects of Refugee Problems in Africa.

The Act was assented to on 20 November 1998 and was put into effect as from 1 April 2000 (Proclamation No 22 of 2000, *Government Gazette* No 21075 of 6 April 2000).

Definitions

Section 1 of the Act contains a number of definitions which are important within the present context.

Asylum means refugee status recognised in terms of the Act.

The Act draws a clear distinction between those who are applying for asylum and those who have been granted asylum and affords different rights to each of them. An **asylum seeker** is defined as “a person who is seeking recognition as a refugee in the Republic”, and a **refugee** “means any person who has been granted asylum in terms of the Act.”

Refugee Status

Refugee status is provided for in section 3 of the Act. The section provides as follows:

“Subject to Chapter 3, a person qualifies for refugee status for the purposes of this Act if that person –

- a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or

- b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere; or
- c) is a dependant of a person contemplated in paragraph (a) or (b).”

Application for asylum

Chapter 3 (sections 21—24) of the Act deals with applications for asylum. Section 21(1) provides that an application for asylum must be made in person in accordance with prescribed procedures to a Refugee Reception Officer at any Refugee Reception Office. Pending the outcome of the application, the Refugee Reception Officer issues the applicant with an asylum seeker permit in terms of the provisions of section 22 of the Act. Subsections (1) and (3) of section 22 provide as follows:

- “(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) 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.”

The decision regarding the application for asylum is taken by the Refugee Status Determination Officer. Chapter 4 (sections 25—26) makes provision for reviews and appeals concerning that decision.

A person who is successful in his asylum seeker application and is granted asylum, is entitled to seek employment and is entitled to the same basic health services and primary education which the inhabitants of South Africa receive from time to time (section 27 (f) and (g) of the Act).

Standing Committee for Refugee Affairs

Section 9 of the Act provides for the establishment of a Standing Committee for Refugee Affairs. It provides as follows:

- “(1) There is hereby established a Standing Committee for Refugees Affairs.
- (2) The Standing Committee must function without any bias and must be independent.
- (3) The headquarters of the Standing Committee must be determined by the Minister.”

In terms of section 10 of the Act, composition of the Standing Committee is as follows:

- “(1) The Standing Committee must consist of –
 - a) a chairperson; and
 - b) such number of other members as the Minister may determine, having regard to the likely volume of work to be performed by the Committee.
- (2) The chairperson and other members of the Standing Committee must be appointed by the Minister with due regard to their experience, qualifications and expertise, as well as their ability to perform the functions of their office properly.
- (3) A person may not be appointed as a member of the Standing Committee if he or she –
 - a) is not a South African citizen;
 - b) has been sentenced to imprisonment without the option of a fine during the preceding four years.
- (4) At least one of the members of the Standing Committee must be legally qualified.”

The powers and duties of Standing Committee are set out in section 11 of

the Act, as follows:

“The Standing Committee –

- a) may formulate and implement procedures for the granting of asylum;
- b) may regulate and supervise the work of the Refugee Reception Offices;
- c) may liaise with representatives of the UNHCR or any non-governmental organisation;
- d) must advise the Minister or Director-General on any matter referred to it by the Minister or Director-General;
- e) must review decisions by Refugee Status Determination Officers in respect of manifestly unfounded applications;
- f) must decide any matter of law referred to it by a Refugee Status Determination Officer;
- g) must monitor the decisions of the Refugee Status Determination officers; and
- h) must determine the conditions relating to study or work in the Republic under which any asylum seeker permit

may be issued.”

Regulations

In terms of section 38 of the Act, the Minister may make regulations pertaining to various issues relating to applications for asylum and asylum seekers. Thus he is in subsection (1) empowered to make regulations relating to, *inter alia* –

- a) a large-scale influx of asylum seekers into the Republic;
.....
- e) the conditions of sojourn in the Republic of an asylum seeker, while his or her application is under consideration.

Subsection (2) provides that a regulation under subsection (1)(a) may only be made in consultation with the Premier of any province into which the influx takes place.

Refugee Regulations (Forms and Procedure) 2000

The Minister, acting in terms of section 38 of the Act, made regulations that are contained in a schedule to Government Notice No R366 dated 6 April 2000 in *Government Gazette* No 21075. These regulations are known as the Refugee Regulations (Forms and Procedure) 2000.

Regulation 7 provides for an asylum seeker permit as contemplated by section 22 of the Act. Annexure 3 contains a model asylum seeker temporary

permit that a Refugee Reception Officer must issue to asylum seekers as contemplated by section 22 of the Act. The permit contains, *inter alia*, sections headed “A. Personal particulars of Holder” and “B. Conditions”.

Under the heading “B. Conditions” are ten different items dealing with various matters such as the place at which the permit holder may reside temporarily and when the permit holder is required to leave South Africa. Item 9 under this heading contains the following:

“Other conditions ... EMPLOYMENT AND STUDY PROHIBITED”

Accordingly, a permit issued in terms of section 22 must contain the condition that employment and study is prohibited despite the fact that permission has been granted to the permit holder to remain in South Africa. This is so because of regulation 7(1)(a) which provides that a permit in terms of section 22 must be in the form and contain substantially the information prescribed in Annexure 3 (which contains the prohibition) to the regulations. It is this prohibition on work and study which the applicants seek to be declared unconstitutional.

The contentions of the parties

The applicants advance three grounds for their contention that the prohibition of work and study contained in the regulations made by the Minister is unconstitutional:

- a) The condition is invalid because the Minister imposed the condition (prohibition) without having regard to any determination made by the Standing Committee.
- b) The members of the Standing Committee were appointed unlawfully and accordingly any determination made by it is unlawful and

unconstitutional.

- c) The prohibition violates an asylum seeker's constitutional rights.

Failure to have regard to determinations made by the Standing Committee.

Three provisions of the Act deal with conditions of sojourn of asylum seekers in the Republic. Section 38(e) empowers the Minister in general terms to make regulations relating to the conditions of sojourn in the Republic of an asylum seeker. Section 22(1) of the Act vests the power to determine the conditions of sojourn contained in an asylum seeker permit in the Standing Committee. Section 11(h) provides in explicit terms that the Standing Committee must determine the conditions relating to study or work in the Republic under which any asylum seeker permit may be issued.

It is a well-known principle that “a statute ought to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant” (*per* Cockburn J in *The Queen v Bishop of Oxford* (1879) 4 QB 245 at 261, cited with approval in *Attorney-General, Transvaal v Additional Magistrate for Johannesburg* 1924 AD 421 at 436 and *S v Weinberg* 1979 (3) SA 89 (A) at 98E). Meaning must be attributed to each of the three sections on the basis that the legislature does not intend to enact purposeless provisions that have no effective or practical meaning.

In terms of the Act, the Standing Committee **determines** the conditions of sojourn contained in an asylum seeker permit, and the Standing Committee **must determine** conditions relating to study or work in the Republic under which any asylum seeker permit may be issued. Though the legislature has in general terms given the Minister the power to make regulations relating to the conditions of sojourn of an asylum seeker, the Minister cannot make regulations dealing with conditions of sojourn contained in an asylum seeker

permit without having regard to the determination made by the Standing Committee. Similarly, the Minister cannot make regulations about conditions relating to study and work in the Republic under which any asylum seeker permit may be issued without having regard to the determination made by the Standing Committee. If section 38(e) of the Act were to mean that the Minister is empowered to make regulations relating to the conditions of sojourn contained in an asylum seeker permit and relating to study or work in the Republic without having regard to any determination made by the Standing Committee, the phrase “determined by the Standing Committee” in section 22(1) and the provisions of section 11(h) would be meaningless and redundant.

From the foregoing it follows that if the Minister makes regulations relating to conditions on matters provided for in sections 22(1) and 11(h) without reference to a determination made by the Standing Committee, or if such determination is made after the making of the regulations, the regulations would be *ultra vires* and accordingly inconsistent with the Constitution and invalid (*Pharmaceutical Manufacturers Association of SA and Others: In re Ex Parte Application of the President of South Africa and Others* 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para [20], [33], [44], [50]).

The Minister made the regulations containing the condition in issue on 6 April 2000 (see above under the head Refugee Regulations (Forms and Procedure) 2000). On 15 September 2000 the Minister made a further regulation (regulation 19) dealing with “Transitional Arrangements” (Government Notice No R938 dated 15 September 2000 in *Government Gazette* No 21573). The transitional arrangements contained in regulation 19 are designed to deal with a backlog in outstanding asylum applications which had been received under the Aliens Control Act 96 of 1991. The backlog procedure was compiled by the Standing Committee. It was specifically provided that:

“The provisions of these procedures will apply only to applications which were outstanding as at April 2000. The cut-off date for consideration of such applications will be March 2001, after which all applications will be considered in terms of the Refugees Act 130 of 1998.

Similarly, the present concession allowing asylum seekers to work and study will not apply to asylum applications received after March 2000.”

At a meeting of the Standing Committee held on 18 September 2000, it was resolved that –

“in order to streamline the procedure in accordance with the Refugees Act on 180 days, it must ensure that:

1. All people who were granted employment or study in terms of the previous Section 41 should continue to enjoy those rights.
2. Those who are applying in terms of the new Act and given Section 22 permits:- the permit should read “Employment or Study prohibited”.

The Minister made the regulations which include the prohibition on work and study without regard to any determination made by the Standing Committee. At the time when the regulations were made the Standing Committee had, in fact, not made any determination. The Standing Committee only made its determination some five months after the regulations had been made.

In view of the foregoing, the applicants are entitled to an order declaring the prohibition on work and study contained in the regulations to be *ultra vires* and accordingly inconsistent with the Constitution and invalid.

The composition of the Standing Committee

The second ground on which the applicants attack the validity of the condition is that the members of the Standing Committee were appointed unlawfully and accordingly any determination made by it is unlawful and unconstitutional. In this regard the applicants rely on the proposition that and act by an improperly constituted tribunal is *ultra vires* the tribunal so constituted and is invalid. The provisions of a statute as to the constitution of a board or similar body must be strictly complied with (see LA Rose-Innes *Judicial Review of Administrative Tribunals in South Africa* (1963) at 120).

The exercise of a power or duty of the Standing Committee granted to it by the provisions of the Act is, therefore, valid and lawful only if the establishment of the Standing Committee satisfies the requirements of sections 9 and 10.

Section 9(2) of the Act requires the Standing Committee to be independent and to perform its functions without any bias. Section 10(2) of the Act provides that the Minister must appoint the chairperson and members of the Standing Committee with “due regard” to their ability to perform their functions properly.

According to the minutes of the meeting of the Standing Committee held on 18 September 2000, the chairperson of the Standing Committee was Adv JE Leshabane, and the members were Dr M Machele and Mr P Lechaba. Dr Machele is the Deputy Director of Refugee Affairs based in the Department of Home Affairs and the deponent, on behalf of all three respondents, to the opposing affidavit in these proceedings. In her replying affidavit, the first applicant alleges that the other members of the Standing Committee are also employees of the First and Second Respondents.

Baxter *Administrative Law* (1984) points out that while there is

“no clear single principle which seems to have governed the legislative choice of tribunals rather than ministers or departmental officials for certain decisional functions”,

an important consideration in this regard is --

“the desirability of an impartial decision free from the considerations of policy which departmental officials and ministers are (rightly) interested in propagating but which engender so-called ‘departmental bias’. This is particularly important where rights are at stake or where a decision could have drastic consequences for individuals.”

In *New National Party of South Africa v Government of the Republic of South Africa* 1999 (3) SA 191 (CC); 1999 (5) BCLR 489 (CC) at par [162] O'Regan J emphasised the importance of independent institutions as a structural component of our constitutional democracy, and stressed that other organs of State are obliged to assist and protect these institutions to protect their independence, impartiality, dignity and effectiveness.

The applicants say that Government employees, and especially functionaries employed by the Department of Home Affairs, cannot perform their functions independently and without bias. It is, therefore, inappropriate for a Deputy Director of Refugee Affairs, or any other employee in the First Respondent's Department, to be a member of the Standing Committee. In

the circumstances, the Standing Committee cannot be regarded as independent, and any decision taken by such Standing Committee is unlawful and should be set aside.

Moreover, in terms of section 11 of the Act, included in the powers and duties of the Standing Committee, is the obligation to advise the Minister or Director-General on any matter referred to it by the Minister or Director-General, and the power to review certain decisions of Refugee Status Determination Officers. The object of the legislature seems to have been to provide the Minister and the Director-General with a source of independent advice, and to have decisions of Refugee Status Determination Officers reviewed by an independent tribunal. A committee consisting of employees of the Department of Home Affairs can hardly be a source of independent advice, nor constitute an independent review tribunal.

In this matter, as has been shown above, the Minister made the regulations which include the prohibition on work and study without regard to any determination made by the Standing Committee. For that reason alone the applicants are entitled to the order they seek. The determination subsequently made by the Standing Committee does not affect the issue. It is, accordingly, not necessary in these proceedings to make a finding that the members of the Standing Committee were appointed unlawfully, and that its determination was for that reasons unlawful and unconstitutional and thus invalid.

Violation of asylum seeker's constitutional rights

The third ground on which the applicants attack the validity of the prohibition is that it infringes or threatens rights protected in sections 9 (Equality), section 10 (Human Dignity), section 11 (Life) and section 33 (Just Administrative Action) of the Constitution. It was argued that while it may well be that foreign nationals do not have the right to freedom of trade, occupation or profession provided for in section 22 of the Constitution, the rights to life, dignity, equality and administrative justice do apply to foreign nationals who are "persons".

In view of my finding that the regulation in question falls to be set aside on the first ground advanced by the applicants, it is not necessary to enter into the issues raised under this head and the accompanying limitations analysis.

Conclusion

The following order is made:

1. The prohibition on work and study contained in Item 9 under the heading “B. Conditions” of Annexure 3 read with Regulation 7(1) of the regulations made by First Respondent in terms of Section 38 of the Refugees Act 130 of 1998 (contained in Government Notice No R366 dated 6 April 2000 in *Government Gazette* No 21075) is declared to be inconsistent with the Constitution of the Republic of South Africa Act 108 of 1996 and invalid.
2. The respondents are directed:-
 - a) to permit First Applicant to be employed pending the finalisation of her application for asylum made on 7 February 2002 in terms of Section 21 of the Refugees Act 130 of 1998.
 - b) to permit First Applicant’s son, Sipho Ezekiel Mlagisi to pursue his studies pending the finalisation of First

Applicant's (and his) application for asylum made on 7 February 2002.

3. The respondents are ordered to pay the applicants' costs jointly and severally, the one paying the other to be absolved.

HJ ERASMUS, J