IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE, PORT ELIZABETH

NOT REPORTABLE

Case No.: 3338/2012

Date Heard: 19 April 2013

Date Delivered: 20 June 2013

In the matter between:

SOMALI ASSOCIATION OF SOUTH AFRICA EASTERN CAPE (SASA EC)	First Applicant
PROJECT FOR CONFLICT RESOLUTION AND DEVELOPMENT	Second Applicant
and	
MINISTER OF HOME AFFAIRS	First Respondent
DIRECTOR-GENERAL: DEPARTMENT OF HOME AFFAIRS	Second Respondent
CHIEF DIRECTOR ASYLUM SEEKER MANAGEMENT	Third Respondent
STANDING COMMITTEE FOR REFUGEE AFFAIRS	Fourth Respondent
MINISTER OF PUBLIC WORKS	Fifth Respondent

JUDGMENT

EKSTEEN J:

[1] The applicants seek to review and set aside the decision by the first to third respondents to close the Port Elizabeth Refugee Reception Office (herein referred to

as "PE RRO"). The first applicant is the Somali Association of South Africa, Eastern Cape. It is a voluntary association which acts as a representative of Somalis in the Eastern Cape. The second applicant is the Project for Conflict Resolution and Development, a non-governmental organisation which provides support services to migrants, asylum seekers and refugees in the Eastern Cape. The first respondent is the Minister of Home Affairs (herein referred to as "the Minister"), the second respondent is the Director-General of the Department of Home Affairs (herein referred to as "the DHA"). The third respondent is the Chief Director of the Asylum Seeker-Management Directorate, an official in the Department of Home Affairs who is responsible for the overall management of the Refugee Protection Systems. The fourth respondent is the Standing Committee for Refugee Affairs (herein referred to as "the SCRA"), established in terms of section 9(1) of the Refugees Act, 130 of 1998 (herein referred to "the Act"). The fifth respondent is the Minister of Public Works.

[2] Prior to October 2011 there was established in Port Elizabeth a fully operational Refugee Reception Office (RRO). On 20 October 2011, without any prior warning, a notice was displayed outside the gate of the PE RRO advising that services for new applicants would cease with effect from 21 October 2011. This occurred pursuant to a decision ("the first closure decision") taken by the first to third respondents. These events prompted the applicants to launch an application ("the first Somali application") in this court in which it sought urgent interdictory relief (Part A of the Notice of Motion) and final review relief (Part B of the Notice of Motion). The urgent interdictory relief was granted by Beshe J on 13 December 2011. The application for Part B of the Notice of Motion was opposed and fully argued before

Pickering J. On 16 February 2012 Pickering J held in favour of the applicants and made an order in the following terms:

> "1. The decision of the first to third respondents to close the Port Elizabeth Refugee Reception Office without having in place an alternative Refugee Reception Office within the Nelson Mandela Bay Municipality is declared to be unlawful and is reviewed and set aside.
>
> 2. The first to third respondents are directed forthwith to open and maintain a fully functional Refugee Reception Office to provide services to asylum-seekers and refugees, including new applicants for asylum, in the Nelson Mandela Bay Municipality.
>
> 3. The first and third respondents are jointly and severally directed to pay the applicants' costs, including the costs of two counsel."

(See ***Somali Association for South Africa and Another v Minister of Home Affairs and Others*** 2012 (5) SA 634 (ECP) at 641E-H.)

[3] On 14 May 2012, Pickering J refused an application for leave to appeal against this order and granted an order in terms of the provisions of Rule 49(11) of the Uniform Rules of Court that the first to third respondents give effect to paragraph 2 of his order pending any further appeal process. A petition seeking leave to appeal to the Supreme Court of Appeal was duly filed and was refused on 28 August 2012. Notwithstanding these events, the PE RRO remained closed for new applicants and the position still remains so.

[4] The first Somali application attacked the lawfulness of the first closure decision on three grounds, namely:

(a) that the decision was taken without consultation with the SCRA as required by section 8(1) of the Act;

(b) that there was no proper public consultation or opportunity for representations afforded to those affected by the decision; and

(c) that the decision was irrational, unreasonable and based on irrelevant considerations.

[5] In reviewing and setting aside the first closure decision Pickering J held that it was unlawful by virtue of the failure of the second respondent to consult with the SCRA. Pickering J decided the matter on this ground alone and declined accordingly to address the further grounds of review raised in the application. He further held that it would be inappropriate to refer the matter back to the second respondent and that it was for the second respondent to decide whether or not he wished to take the matter further, bearing in mind, if he does so, what had been stated in the judgment.

[6] On 30 May 2012 the second respondent met with the SCRA. Mr Mkuseli Apleni, the incumbent in the office of the second respondent, states that on this occasion he did consult with the SCRA and a new decision ("the second closure decision") was duly taken in compliance with the provisions of section 8(1) of the Act. The relief granted by Pickering J, so it is contended, had accordingly been overtaken by events and had been superseded by a new legitimate decision. In the event the second respondent did not reopen a fully functional PE RRO. This, in turn prompted the present application, which seeks to review and set aside the second closure decision taken on 30 May 2012.

[7] The application came before me on 19 April 2013. I reserved judgment. Thereafter, on 30 April 2013 the respondent filed a "supplementary note" setting out further written argument. The applicants duly replied thereto on 3 May 2013.

The legal framework

[8] Section 8 of the Act provides for the establishment of RROs as follows:

> "(1) The Director-General may establish as many Refugee Reception Offices in the Republic as he or she, after consultation with the Standing Committee, regards as necessary for the purposes of this Act.
>
> (2) Each Refugee Reception Office must consist of at least one Refugee Reception Officer and one Refugee Status Determination Officer who must-
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> (a) be officers of the Department, designated by the Director-General for a term of office determined by the Director-General; and
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> (b) have such qualifications, experience and knowledge of refugee matters as makes them capable of performing their functions.
>
> (3) The Director-General must, with the approval of the Standing Committee, ensure that each officer appointed under this section receives the additional training necessary to enable such officer to perform his or her functions properly."

[9] The SCRA is established in terms of section 9 of the Act which enjoins them to be independent and to act without any bias. The composition of the SCRA is regulated by section 10 of the Act which requires its Chair Person and Members to be appointed with due regard to their "experience, qualifications and expertise" and their "ability to perform the functions of their office properly".

[10] Section 11(b) of the Act empowers the SCRA to regulate and supervise the work of the RRO while section 11(d) requires it to advise the Minister or the Director-General on any matter referred to it.

[11] The RROs provide the administrative machinery under the Act. Section 21-24 provides for applications for asylum. In terms of section 21(1) of the Act an application for asylum (section 21(1) application) must be made to an RRO and must be made in person. When this has occurred the Refugee Reception Officer is obliged to issue to the applicant an asylum seeker permit (a section 22 permit) which entitles him to sojourn in the Republic of South Africa temporarily pending the outcome of his section 21(1) application, on certain conditions.

[12] These provisions are of critical importance to the asylum seeker. Until he or she has been issued with a section 22 permit any foreigner who has entered South Africa in conflict with section 9(4) of the Immigration Act, 13 of 2002 is an illegal foreigner and liable to apprehension, detention and deportation. (Compare ***Kiliko and Others v Minister of Home Affairs and Others*** 2006 (4) SA 114 (C) at para [27]; ***Arse v Minister of Home Affairs and Others*** 2010 (7) BCLR 640 (SCA) at para [22].)

[13] Once a section 22 permit has been issued an asylum seeker may be required to make a series of further visits to the RRO. While the process proceeds he must obtain an extension of his section 22 permit from time to time. (See section 22(3) of the Act read with regulation 7(1)(b) and (c) of the Regulations under the Act dated

15 September 2000); he must attend at the RRO to be interviewed by the Status Determination Officer (see section 24(1) and (2) read with regulation 3(2)(b) and 10(1)-(5)); he must present himself to receive the decision of the Status Determination Officer (see section 24(3) of the Act read with regulation 10(6) and 12(2)); he may be required to appear before the SCRA for purposes of any review of a decision of the Status Determination Officer (see section 25(2)(d)); and he may be required to appear at the hearing of an appeal before the Refugee Appeal Board (see section 26(e) of the Act). This process, the experience in this Court shows, could take years.

[14] Once he has been recognised as a refugee, his refugee status must be reviewed every two years in terms of regulation 15(2). On each such an occasion too he is required to present himself in person.

Grounds of review

[15] It is not in dispute that the second closure decision is subject to judicial review. The applicants contend, however, that the decision constitutes administrative action as defined in the Promotion of Administrative Justice Act, 3 of 2000 (PAJA) and that the provisions of PAJA accordingly apply. The respondents on the other hand strenuously resist this assertion and argue that the decision is reviewable only under the principle of legality.

[16] The applicants have raised essentially the same three grounds of review as were raised in the first Somali application.

[17] First, they contend that the second closure decision was taken without proper consultation with the SCRA as is required by section 8(1) of the Act. In this regard the applicants' contend (a) that the second respondent had already taken a firm decision to close the PE RRO prior to the meeting of 30 May 2012; and (b), in any event, the events which occurred at the meeting, either on their own or viewed together with earlier events did not constitute "consultation" as envisaged in section 8(1) of the Act.

[18] Mr **Budlender**, on behalf of the applicants, argued, for these reasons, that the decision falls to be set aside in that a mandatory and material procedure or condition prescribed by statute has not been complied with. It is not in dispute that the first ground of review, relating, as it does, to an alleged failure to comply with a mandatory or material procedure or condition prescribed by statute, is unaffected by the debate as to whether the decision constitutes administrative action or not. In the event that the decision is found to be "administrative action" then the applicants contend that it falls to be set aside in terms of section 6(2)(b) of PAJA.

[19] Second, the applicants allege that no proper public consultation occurred with, nor was any meaningful opportunity given for representations by persons affected by the decision. It is accordingly contended that the second closure decision falls to be reviewed and set aside as procedurally unfair in terms of section 6(2)(c) of PAJA. The applicants contend that even if the decision does not constitute "administrative action" for purposes of PAJA, they are entitled to succeed on this ground by virtue of the principle of legality. By contrast the respondents, whilst conceding that the decision of the second respondent is subject to review under the principle of legality

contend that under the principle of legality no consultation beyond that envisaged by section 8(1) was required.

[20] Third, the applicants contend that the second closure decision was irrational and unreasonable and based on irrelevant considerations and on a failure to take account of relevant considerations and accordingly falls to be reviewed and set aside in terms of section 6(2)(e)(iii), 6(2)(f), 6(2)(h) and 6(2)(i) of PAJA. Again the applicants contend that even if the provisions of PAJA do not apply they are entitled to succeed on this ground too by virtue of the principle of legality.

Factual background

[21] In mid 2011 there were six RROs in South Africa, two in Pretoria, one being at Marabastad and a second named the Tswane Interim Refugee Reception Office, one at Crown Mines in Johannesburg and one each in Cape Town, Durban and Musina. All of these offices, save for Musina, were situated in Metropolitan areas where refugees may live and work after entry into the Republic of South Africa. This accords with the draft white paper on Refugee Affairs published on 19 June 1998 which states:

> "The government acknowledges that full protection of refugees requires the attainment of a degree of self-sufficiency and local integration within the host community for the duration of their exile. In fact, it is only by becoming self-sufficient that refugees can lead a productive life, which would make them assets to the host country and facilitate their integration within the local community. Furthermore, allowing refugees to use their skills or develop new ones while in exile will facilitate meaningful reintegration in their countries of origin when they are able to return.

> Given the high unemployment and limited resources available to nationals, the government lacks concrete means to enable self-sufficiency for refugees. However, it may positively contribute to the attainment of this goal through the creation of an enabling environment."

[22] Each of these RROs were established in terms of the provisions of section 8(1) of the Act. Each was accordingly deemed necessary for purposes of the Act at the time of their establishment. Since May 2011 three RROs, those situated at Crown Mines (31 May 2011), Port Elizabeth (21 October 2011) and Cape Town (29 June 2012) have been closed.

[23] The PE RRO was established in 2000 and was situated at 5 Sidon Street, North End, Port Elizabeth. Whilst there is some dispute on the papers as to the exact number of new applicants served by this office, it is clear that a significant number of individuals sought assistance there. This is borne out by the fact that certain business owners in the vicinity of the PE RRO launched an application in this court for an order that the first respondent and the landlord of the premises occupied by the PE RRO take steps to abate the nuisance created by the large numbers of persons visiting the PE RRO (see ***Stuart Graham NO and Others v The Minister of Home Affairs and Others***, Eastern Cape High Court, Port Elizabeth, case no. 2016/2008).

[24] In June 2011 a meeting of stakeholders was called by employees of the second respondent working at the PE RRO. The attendees were informed that the lease of the PE RRO premises was due to expire on 30 November 2011 and that the Department was in the process of finding alternative office space. The attendees

were advised of three potential sites in Port Elizabeth to which the PE RRO may be moved. They were invited to visit these sites and to provide their views as to the suitability thereof for purposes of an RRO. On 17 October 2011 the stakeholders were again invited to a meeting, however, the meeting was cancelled by one Baxter, an employee of the second respondent at the PE RRO. No reason was advanced for the cancellation. Thereafter, on 20 October 2011 a notice was posted on the gate outside the PE RRO which stated that services for new applicants would cease on the following day, 21 October 2011.

[25] In an attempt to resolve the immediate situation an urgent meeting was arranged on 20 October 2011, apparently at the instance of stakeholders, with Ms Sonto Lusu, the Acting Provincial Manager for the DHA in the Eastern Cape. At this meeting Ms Lusu announced, for the first time, that the PE RRO would close permanently on 30 November 2011. Stakeholders were provided with a copy of a directive from the second respondent dated 7 October 2011 confirming the permanent closure of the PE RRO.

[26] At this meeting stakeholders voiced their concern about the closure of the office, particularly under such short notice and sought an extension of the closure date in order to engage with the DHA about the decision. Ms Lusu was adamant that the dates would stand but she nevertheless undertook to discuss it with the second respondent and to revert to stakeholders by noon on the following day. On 21 October 2011 attorneys at the Nelson Mandela Metropolitan University (NMMU) Refugee Rights Centre were telephonically advised by Ms Lusu that the decision as contained in the letter of the second respondent was "cast in stone".

Notwithstanding this communication, the applicants nevertheless continued to endeavour to engage with the DHA about the decision, but to no avail.

[27] On 16 November 2011 the NMMU Refugee Rights Centre attended a stakeholders meeting in Grahamstown where one Lucas, the Centre Manager, informed the attendees that the PE RRO was closing permanently. This prompted the launching of the first Somali application.

[28] On 16 January 2012, prior to the judgment by Pickering J, the third respondent sent an internal memorandum to the Chief Director: Property and Infrastructure Management of the DHA requesting the identification of a border post location for an interim RRO at Lebombo or in KwaZulu-Natal in order to replace the PE RRO. I pause to mention that the second respondent, in his opposing affidavit, states in no uncertain terms that the third respondent had acted at all times in terms of and under his instructions insofar as she ensured that decisions taken by him were given effect to.

[29] It appears from this internal memorandum that a meeting had been held on 11 January 2012 at which the Deputy Minister of the DHA had directed that "due to the closure of the Port Elizabeth office" an interim RRO should be opened close to the border "as a matter of urgency". It records too that a needs assessment for the relocation of the PE RRO had been approved by the second respondent in 2011 and that funds for the relocation would be obtained "from the savings from the lease agreement for the Port Elizabeth Office".

[30] On 17 February 2012, the day after the judgment by Pickering J, the third respondent presented the DHA Executive Committee with a draft process plan for the establishment of a new RRO at the Lebombo border post to replace the closed PE RRO. The presentation indicates that the PE RRO was considered to be "closed" and "defunct" by the DHA. It proposed that the new Lebombo RRO would be operational by 1 April 2012 and that the staff required for the Lebombo RRO "would be aligned to the non-operational Port Elizabeth RRO". The budget for the Lebombo RRO, so it appears from the presentation, would be in line with the Port Elizabeth budget.

[31] On the same day the Chief Director: Property and Facilities Management in the DHA addressed two letters to the office of the Director-General of the Department of Public Works advising that a vacant site had been identified at the Lebombo port of entry and requesting the assistance of the Department of Public Works "with the implementation of this urgent and important project". The Department of Public Works formally recommended the Lebombo site to the DHA on 13 April 2012.

[32] On 24 May 2012, after the Rule 49(11) order had been handed down by Pickering J, the Chief Director: Property and Facility Management of the DHA, Mr Vukani Nxasana emailed the chief architect of the Department of Public Works working on the Lebombo project, Ms Sushma Patel. The email records, *inter alia*, that:

> "[The] main concern [of the Director-General of the Department of Home Affairs] is that Home Affairs has to demonstrate to the courts (PE and Cape Town) that reception centres will be opened soon. To that end, it would be appreciated if you could provide a high level analysis of the two options ... we will then have to present these to the DG and move forward."

[33] I pause to mention that it is common cause that at the time of argument of this matter before me on 19 April 2013, no new RRO had been established, whether at Lebombo or elsewhere.

[34] It is common cause too that a fully functional RRO to provide services for asylum seekers and refugees, including new applicants for asylum, in the Nelson Mandela Bay Municipality, was not re-established pursuant to the order made by Pickering J. The second respondent contends that he has now, pursuant to the judgment of Pickering J and on 30 May 2012, met and consulted with the SCRA and he has taken a fresh decision in the light of his consultation, to close the PE RRO for new applicants. In these circumstances, so the second respondent contends, the order made by Pickering J in the first Somali application has now been overtaken by events and accordingly no new section 21(1) applications have been or will be processed in the PE RRO.

[35] It is against this background that the meeting occurred on 30 May 2012. At this meeting the second respondent met with the SCRA, which at that time comprised Mr K Slot-Nielson as Chairperson and Ms J Mungwena. The minutes of the meeting reflect that three matters were discussed: the closure of the PE RRO,

the closure of the Cape Town RRO, and the opening of the new RRO at Lebombo in Mpumalanga.

[36] The minutes of this meeting were duly typed and were signed by the second respondent on 1 June 2012. Mr Slot-Nielson, the Chairman of the SCRA thereafter, on 12 June 2012, addressed a letter to the second respondent in which he confirmed that the minutes of the meeting dated 1 June 2012 correctly reflects the consultation which the second respondent had had with the SCRA on 30 May 2012.

[37] In respect of the PE RRO the minutes record as follows:

> "Closure of PE Refugee Reception Office
>
> 1. The closure of the Port Elizabeth Office was necessitated by the lease agreement that was lapsing, which had been preceded by a Court order that had been granted in favour of the Landlord directing the Department to take measure to abate the nuisance created by asylum seekers. The landlord indicated that he was no longer willing to renew the lease.
>
> 2. Due to various challenges that were received by the Department all over the country in relation to the nuisance factor, the Department noted a trend of many court challenges against its operations in Metropolitan areas and is of the view that Refugee Offices are not suitable for such Metropolitan areas. Furthermore, the procuring of alternative accommodation for another RRO in Port Elizabeth will not take less than 18 months, if not longer.
>
> 3. Due to the above, as well as a policy shift that was discussed at cabinet level to move RROs closer to ports of entry, it has been decided that the Port Elizabeth office must be closed." *(Sic)*

[38] The minutes thereafter deal with discussions relating to the closure of the Cape Town RRO and the opening of the new Lebombo RRO. The final paragraph of the minutes record:

> "13. The Standing Committee approved the decision to closure of [*sic*] the Port Elizabeth and Cape Town Refugee Reception Offices and further approved the establishment of the Lebombo Refugee Reception Office."

[39] This final paragraph is emphatically confirmed in the letter by Sloth-Nielsen on 12 June 2012 to which I have referred above. Sloth-Nielsen records in this letter:

> "The Standing Committee for Refugee Affairs, after consultation with you on 30 May 2012 and consideration of the reasons advanced by the Department, approves the decision to close the Port Elizabeth and Cape Town Refugee Reception Offices and approves the decision to establish a Refugee Reception Office at Lebombo."

[40] At approximately this time the applicants addressed several letters to the respondents regarding the failure to comply with the order of Pickering J. In the interim a petition to the Supreme Court of Appeal (SCA) for leave to appeal against the judgment of Pickering J was pending. On 28 August 2012 the SCA dismissed the petition for leave to appeal. This was again followed by further letters by the applicants on 31 August 2012 and 6 September 2012 enquiring how the respondents planned to comply with the order of Pickering J. On 16 September 2012 the Provincial Manager: Eastern Cape of the DHA, Mr Mabulu, notified the applicant and other stakeholders that the second respondent had met with the SCRA on 30 May 2012 and that the SCRA had "consented" to the closure of the PE RRO. He advised, accordingly, that the PE RRO would remain closed. This was confirmed by

two letters dated 21 September 2012 in which the State Attorney and the second respondent respectively advised the applicants' attorneys that the failure of the second respondent to consult with the SCRA had "been rectified" and that a new decision had been taken by the respondent to close the PE RRO.

[41] On 26 July 2012 the Deputy Director-General of the DHA convened a meeting with stakeholders in Port Elizabeth at which he informed the applicants, and other stakeholders, of the second closure decision taken and the reasons for it. It is not in dispute that no opportunity was given at this meeting to make representations against the closure and that the Deputy Director-General was not receptive to any such suggestion.

[42] The present application was accordingly launched on 20 November 2012.

Nature of decision and its effect

[43] The legal framework applicable to the application for refugee status is discussed earlier in this judgment. What clearly emerges from it is that an applicant for asylum is required to attend at a RRO repeatedly over an extended period for various purposes until his application is finalised.

[44] It is not in dispute that the decision in issue was to close the PE RRO to new applicants, i.e. to terminate all services to new section 21(1) applicants at the PE RRO. All services remained fully functional in respect of applicants who had made their section 21(1) application prior to 21 October 2011 and these applications will be processed to their finality in the PE RRO, which is currently housed in a temporary

annex to the offices of the DHA. Once these applications have been finalised the PE RRO will be completely closed.

[45] It emerges from the minutes of the meeting with stakeholders called by the DHA on 26 July 2012, after the final decision had been taken, that the first applicant had advised in October 2011 that approximately 300 new applicants were already in the Port Elizabeth area on 21 October 2011 when services were terminated for new applicants at the PE RRO. It was further recorded in these minutes that new applicants had been brought to the PE RRO to make their applications pursuant to the order granted by Pickering J in the first Somali application. These minutes were annexed to the respondents' answering affidavit. I think that it can accordingly be accepted that at the time that the second closure decision was taken, and in the period leading up to 30 May 2012, there were at least a number of aspiring applicants present in the Port Elizabeth area.

[46] All these new applicants, together with any future arrivals who might choose to live in the Eastern Cape are affected by the decision. With the closure of the RROs in Cape Town and Port Elizabeth the nearest RRO at which they would be able to call to make their applications and all their subsequent attendances is in Durban, approximately 900km from Port Elizabeth.

[47] Rogers J, in considering the effect of the closure of the Cape Town RRO, which also occurred pursuant to the meeting on 30 May 2012 stated:

> "Thousands of asylum seekers will either have to abandon the idea of residing in the Cape Town area while their asylum applications are assessed or they will need to spend time and money to travel on a number of occasions to RROs in the north of the country. If they have work in Cape Town, they may lose it because of the need to take off three or four days for each attendance at an RRO. If they have dependents, they would need to leave them in the care of others or travel with them. It appears from the DG's answering affidavit that he intended his decision to be a discouragement to asylum seekers to reside in Cape Town over the period during which their application are assessed (we know that this period may last many months and even years)."

(See ***Scalabrini Centre, Cape Town and 8 Others v The Minister of Home Affairs and 4 Others*** 2013 (3) SA 531 (WCC) at p. 565 para [110].) (I shall refer to this matter herein as "***Scalabrini***") The same consequences flow for asylum seekers who choose to live in the Port Elizabeth area.

[48] There was some debate on the papers as to whether a new applicant, having made an application in, say Pretoria, could obtain a transfer of his file to the PE RRO so as to have the remainder of the process completed and the repeated personal attendances made at Port Elizabeth. If this were so it would, of course, alleviate the plight of new applicants in the Port Elizabeth area. The second respondent states, however:

> "Where, ..., the Refugee Reception Office is closed and existing applicants are given service until such time as their applications are finalised, it is virtually impossible to take on new files that were originally registered at other Refugee Reception Offices. If the Department were to accept such files, it would be tantamount to keeping the PE RRO as a Refugee Reception Office open. It would also become easier for those who wish to keep that office open to encourage applicants to register their files at another Refugee Reception Office

then request a transfer of that file to Port Elizabeth, thus defeating the object of closing the services provided to new applicants."

[49] In summary the second closure decision taken has the result:

(a) that persons who did not lodge their section 21 applications at the PE RRO prior to 21 October 2011 have to present their section 21 applications, obtain their section 22 permits, get their section 22 permits extended, and ultimately have their asylum applications adjudicated at an RRO other than Port Elizabeth;

(b) that the eventual factual position, once the temporary Port Elizabeth facility has finally disposed of applications lodged on or before 20 October 2011, will be that no Refugee Reception Services will be offered in Port Elizabeth.

Application of PAJA

[50] Whether or not PAJA finds application to the decision of the second respondent has bearing on the second and third grounds of review.

[51] As stated above, the Cape Town RRO was closed in 2012 pursuant to a decision taken at the same meeting on 30 May 2012. The closure of the Cape Town RRO was challenged in ***Scalabrini***. Whilst the facts relating to the closure of the Cape Town RRO may differ from those which apply in this case, essentially the same grounds of review were raised in ***Scalabrini*** and the same legal issues arose for decision. Rogers J resolved these issues in favour of the applicants. Mr **Albertus SC**, on behalf of the respondents, argues that I should find that Rogers J erred in various respects in the conclusions to which he came in ***Scalabrini***. I shall therefore refer extensively to the judgment in ***Scalabrini*** below.

[52] Administrative action is defined in section 1 of PAJA as follows:

> "'**administrative action**' means any decision taken, or any failure to take a decision, by-
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> (a) an organ of state, when-
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> (i) exercising a power in terms of the Constitution or a provincial constitution; or
>
> (ii) exercising a public power or performing a public function in terms of any legislation; or
>
> (b) ...
>
> which adversely affects the rights of any person and which has a direct, external legal effect, but does not include-
>
> (aa) the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79(1) and (4), 84(2)(a), (b),(c),(d),(f),(g),(h),(i) and (k), 85(2)(b), (c),(d) and (e), 91(2),(3),(4) and (5), 92(3), 93, 97, 98, 99 and 100 of the Constitution ..."

[53] When the matter was argued before me both parties focused their argument on whether or not the decision "adversely affects the rights of any person". This argument was raised before Davis J during argument on Part A of the Notice of Motion (for urgent interdictory relief) in ***Scalabrini*** and before Rogers J when hearing Part B (for final review relief). Davis J concluded that the decision by the second respondent to close the Cape Town RRO constituted administrative action within the meaning of PAJA. Rogers J, in his judgment, dealing with Part B of the Notice of Motion in ***Scalabrini***, summarised the reasoning of Davis J at p. 551 para [65] as follows:

> "He held that the closure decision was 'administrative action'. He referred to two competing views on the concept of adverse effect of rights, namely [a] action which determines rights (the determination theory); or [b] action which takes away or deprives persons of rights (the deprivation theory). He said that the respondents' argument rested on the deprivation theory. With reference to Hoexter *Administrative Law in South Africa* 2nd Ed at 222 and paras 43 and 45 of the judgment *in Joseph v The City Council of Johannesburg* 2010 (4) SA 55 (CC), Davis J expressed a preference for what may be styled a flexible determination theory. On the basis of this test, he found that the closure decision materially and adversely affected the rights of asylum seekers who wished to make use of an RRO in Cape Town."

[54] Rogers J was not persuaded that the reasoning of Davis J was necessarily the answer to the decision in ***Scalabrini***. He nevertheless came to the same conclusion, albeit for different reasons, namely that the decision to close the Cape Town RRO did constitute administrative action within the definition contained in section 1 of PAJA. At p. 552 para [68] of the judgment he reasoned thus:

> "Prior to the closure decision new asylum seekers had the right to make their section 21 applications at RROs in Cape Town, Pretoria, Durban and Musina. In terms of s 21(1) a new asylum seeker could present himself at any of these four RROs. The effect of the closure decision is that new asylum seekers can now only present their s 21 applications at one of three RROs. Their right, viewed in the abstract, to make a s 21(1) application at 'any' RRO remains, but the substantive content of that right has changed for the worse, since it no longer encompasses an entitlement to make a s 21 application in Cape Town. I thus consider that the right which s 21(1) confers on new asylum seekers, while it has not been taken away, has been adversely affected by the closure decision."

[55] Mr **Albertus** urged me to hold that both Rogers J and Davis J were incorrect in the conclusion to which they came. He argues that Rogers J incorrectly regarded the "substantive content" of the right as having changed for the worse. The right in

question, so the argument goes, is the right to apply at "any" extant RRO. This right remains, not in abstract, but as a matter of fact. Moreover Mr **Albertus** argues that the analysis by Rogers J does not have regard to the fact that new asylum seekers who are not yet in South Africa, do not have any legal right or entitlement to apply to an RRO.

[56] The argument cannot be upheld. Firstly, in the present matter as I have pointed out above, there were a number of asylum seekers present in Port Elizabeth with the intention of making an application at the time the first closure decision was taken. The papers reveal too that after the order of Pickering J was made in the first Somali application, new asylum seekers came forward in order to make their applications pursuant to the court order. I consider that the "substantive content" of their right to apply has indeed changed for the worse for the reasons set out by Rogers J. In any event, I think the argument takes too narrow a view of the definition in PAJA. I find myself in agreement with Rogers J that the "substantive content" of the rights of any new asylum seekers have changed for the worse.

[57] In the supplementary heads filed after the matter had been argued Mr **Albertus** focuses the attention not on the definition of "administrative action", which is a decision taken or a failure to take a decision, but on the definition of a "decision" as contained in PAJA. "Decision" is defined in PAJA to mean:

> "any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to-
> (a)-(f) ...

(g) doing or refusing to do any other act or thing of an administrative nature."

[58] The argument was touched upon, albeit in a different context, in argument before me where it was argued on behalf of the respondents that section 8(1) of the Act confers upon the second respondent a discretion. The decision which he is required to take, so the argument ran, involved a multiplicity of considerations and the weighing up of competing interests and values. It is accordingly policy laden and polycentric in nature and involves considerations pertaining to the best application, operation and dissemination of public resources and questions of social policy.

[59] Expanding on this argument considerable reliance is placed in the supplementary heads on the judgment in ***Sokhela v The MEC for Agriculture and Environmental Affairs (KwaZulu-Natal) and Others*** 2010 (5) SA 574 (KZP). In ***Sokhela*** Wallis J, as he then was, discussed the issue at length and said at p. 604 para [60]:

"[60] The question whether action taken by a public official or authority is administrative is central to the enquiry. The focus of the enquiry is primarily upon the nature of the power being exercised, rather than the identity of the person or body exercising the power. ... As the judgment in *Grey's Marine* makes clear, it is a requirement, flowing from the definition of 'decision' in PAJA, that the decision be one of an administrative nature. ... The boundaries between administrative action and other forms of conduct by organs of State will often be difficult to draw, and this must be done carefully on a case-by-case basis, having regard to the provisions of the Constitution and the need for an efficient, equitable and ethical public administration."

[60] Later at p. 605 para [61] he stated:

> "The inclusion, of the requirement that the decision be of an administrative nature, demands that a detailed analysis be undertaken of the nature of the public power or public function in question, to determine its true character. This serves in turn to demonstrate that the exceptions contained in the definition of administrative action are not a closed list, nor are cases falling outside those exceptions to be looked at on the basis that, if they are not *eiusdem generis* with the exceptions, they are automatically to be treated as constituting administrative action."

[61] It was observed in ***President of the Republic of South Africa and Others v South African Rugby Football Union and Others*** 2000 (1) SA 1 (CC) (SARFU) that there exists an continuum of government action with matters closely related to policy on one end, and administrative matters relating to the implementation of legislation on the other. Wallis J, however, correctly, pointed out in ***Sokhela*** that the implementation of legislation may take different forms, some will constitute administrative action and be subject to judicial review under PAJA, whilst others may not. He went on to say at 611 para [72]:

> "[72] In *SARFU* the Constitutional Court drew a distinction between the role of government, and particularly the executive, in formulating policy, and its role in the implementation of legislation. The latter it regarded as an administrative responsibility that will 'ordinarily' constitute administrative action. However, that general proposition must be subjected to close scrutiny in a practical situation. Much will depend upon the nature of the legislation."

[62] Wallis J drew a distinction between instances where actions taken under legislation amount to establishing of structures necessary for the functioning of the legislation on the one hand, which may not amount to an action of an administrative

nature, and the day to day implementation of the legislation on the other, which would. (See ***Sokhela*** p. 611-612 para [73].) Reliant on the aforegoing, it is argued that the discretion conferred in section 8(1) of the Act, empowers the second respondent to establish structures for the administration of the Act and accordingly, whilst the day to day decisions taken by these structures may constitute administrative action the decision taken by the second respondent pursuant to the provisions of section 8(1) would not be administrative action.

[63] What emerges from the aforegoing authorities is that each matter is to be determined on its own facts and that the facts of each matter should be carefully scrutinised in order to determine whether or not the particular decision constitutes a decision of an administrative nature. The mere fact that a decision involves discretion, entails the formulation of policy, and has political implications, does not necessarily preclude the decision from being an administrative act.

[64] In the present matter the second respondent in his answering affidavit states that the government is currently undertaking a policy review of immigration and migratory patterns. He states that it is their intention to publish a working document on this ongoing exercise sometime during 2013 and that the objective thereof is ultimately to release a revised policy document. He goes on to state:

> "I wish to emphasise, however, that Government's ongoing policy refinement must be distinguished from the policy imperatives of the Department, that is, policies in the narrow sense of implementing strategic decisions taken in the discharge of statutory and constitutional mandates."

[65] The distinction is significant. The decision is not one involving the formulation of government policy, but one which relates to the implementation of legislation in the discharge of his statutory mandate. The distinction which he draws was recognised by O'Regan J in ***Permanent Secretary, Department of Education and Welfare, Eastern Cape and Another v Ed-U-College (PE)(Section 21) Inc*** 2001 (2) SA 1 (CC) and her pronouncement at p. 14 para [18] is apposite:

> "Policy may be formulated by the Executive outside of a legislative framework. For example, the Executive may determine a policy on road and rail transportation or on tertiary education. The formulation of such policy involves a political decision and will generally not constitute administrative action. However, policy may also be formulated in a narrower sense where a member of the Executive is implementing legislation. The formulation of policy in the exercise of such powers may often constitute administrative action."

Compare also ***Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal*** 1999 (2) SA 91 (CC) and ***Minister of Health and Another NO v New Clicks South Africa (Pty) Limited and Others (Treatment Action Campaign and Another as Amici Curiae)*** 2006 (2) SA 311 (CC).

[66] On a consideration of the authorities where decisions of this nature have been considered it appears to me that there is a distinction drawn between decisions which establish or determine the structure of a legislative institution, on the one hand, and a decision to close existing institutions or disestablish structures, on the other. Thus in the SARFU matter *supra*, the appointment of a commission of enquiry was considered to be executive action and not administrative action. In ***Mazibuko***

and Others v The City of Johannesburg and Others 2010 (4) SA 1 (CC) the adoption of a new water policy by the ***Johannesburg City Council*** was considered to be executive action and not administrative action. By contrast in ***Premier, Mpumalanga***, *supra,* the withdrawal of bursaries and funding was held to constitute administrative action and not executive action and in ***Janse van Rensburg and Another v The Minister of Trade and Industry and Another NNO*** 2001 (1) SA 29 (CC) the Minister's decision to stay or prevent a certain business practice was considered to be administrative action and not executive action.

[67] The application of this distinction was well illustrated in ***Joseph and Others v City Council of Johannesburg and Others*** 2010 (4) SA 55 (CC) where it was held that although residents had no unconditional right to receive electricity from the city, once the city was in fact providing electricity in fulfilment of its duties to provide public services, a decision by the municipality to terminate such services constituted administrative action. It is further instructive that Wallis J in ***Sokhela*** *supra,* considered that the Minister's appointment of members of a conservation board would constitute executive action, however, he found that the dismissal or the suspension of members constituted administrative action.

[68] Reverting to the facts of the present matter, section 8(1) of the Act confers upon the second respondent a circumscribed discretion. He is entitled to establish as many RROs in the Republic as he, after consultation with the SCRA regards as necessary for purposes of the Act. The decision, as I have held above, can only validly be taken after consultation with the SCRA. The standing of the SCRA in the legal framework and the qualifications of its members is discussed earlier in this

judgment. They are an independent statutory body who are required to advise the Minister and the second respondent. The decision which the second respondent takes pursuant to the provisions of section 8(1) is accordingly one which is concerned with and informed by practical considerations required to meet the objects of the Act. Of course it will have regard to the prevailing migratory patterns frequently adopted by refugees, the vulnerability of refugees and their requirements and the practical difficulties associated with the location of offices. That, in my view does not render it an executive decision.

[69] The structure of the Act and the powers conferred upon the second respondent are in my view further indicative thereof that the discretion which the second respondent is empowered to exercise is an administrative one. The responsibility for the administration of the Act is imposed upon the Minister (section 6(2)). The Minister is further empowered to: (a) appoint or remove members of the SCRA (section 10 and section 17); (b) to declare categories of persons refugees, conditionally or unconditionally (section 35(1)); (c) to designate areas, centres or places for the temporary reception and accommodation of asylum seekers or refugees who have entered the Republic on a large scale pending the regularisation of their status (section 35(2)); and (d) to make regulations on a range of matters (section 38). By contrast the powers imposed upon the second respondent are limited and relate to operational issues only. They include: (a) designating officers of the DHA to perform the administrative work of the SCRA (section 20); (b) cancelling permits that were issued under the Aliens Control Act, 1991, and which have become null and void (section 22(2)); and (c) ensuring the appropriate training of staff appointed under the Act (section 8(3) and 39). I think that these provisions

are indicative thereof that the discretions imposed upon the second respondent in the structure of the Act are intended to be of an administrative nature. The limitations placed upon his discretion in terms of section 8(1) are indicative thereof that his decision is to be informed primarily by practical issues and, to a limited extent, by "policy ... formulated in a narrower sense" in implementing legislation. (Compare ***Ed-U-College*** *supra* at p. 14 para [18].)

[70] Finally in the exercise of his discretion the second respondent deemed it necessary in 2000 to establish an RRO in Port Elizabeth. The service has been offered at Port Elizabeth over this period and support services, including the establishment of the applicants, have arisen around Port Elizabeth in that time. Numerous applicants for refugee status had made their way to Port Elizabeth in order to make an application in terms of section 21(1) at the time that the decision was taken and many others were likely to do so in future. Where the decision involves the closure of the RRO, as opposed to the establishment of an RRO, then, in view of the decisions to which I have referred above, I think that it does constitute administrative action. The argument advanced for the respondents in the supplementary heads cannot therefore be sustained.

First ground of review

[71] Section 8(1) of the Act provides for the second respondent to establish RROs. The parties are agreed that it is a necessary implication in section 8(1) that it also empowers the second respondent to disestablish or close an RRO and in such a case , as is the case of the establishment of an RRO, he is required to consult with the SCRA prior to taking such a decision. (See ***Somali Association for South***

Africa, Eastern Cape and Another v Minister of Home Affairs and Others *supra* at p. 639G-I.) The first question for decision is whether the second respondent did consult the SCRA prior to the second closure decision.

[72] The application in ***Scalabrini*** was brought in two parts. In Part A of the Notice of Motion ***Scalabrini*** sought urgent interim interdictory relief and in Part B final review relief. The application was opposed, *inter alia*, by the first and second respondents herein. They filed answering papers in respect of the Part A relief on 27 June 2012. Those answering papers also contained the bulk of their response to the Part B relief. Replying papers were filed on 9 July 2012. The Part A relief was argued before Davis J on 19 July 2012. He delivered a reasoned judgment on 25 July 2012. He ordered that pending the final determination of the Part B relief the respondents were to ensure that an RRO remained open and fully functional within the Cape Town Metropolitan Municipality at which new applicants for asylum could make application for asylum and be issued with permits in terms of section 22 of the Act. (These facts in respect of the Part A relief emerge from the judgment of Rogers J in ***Scalabrini***, *supra*.)

[73] In respect of the Part B relief, the respondents filed the record contemplated in Rule 53(1), following which supplementary founding, answering and replying papers were delivered. The Part B relief was argued before Rogers J on 7 February 2013 and he delivered judgment on 19 March 2013.

[74] As stated previously the decision in issue relating to the closure of the Cape Town RRO was taken at the same meeting, on 30 May 2012 as the second closure

decision in this matter. Both Davis J and Rogers J concluded in respect of the closure of the Cape Town RRO that the meeting did not constitute "consultation" with the SCRA as required by section 8(1) of the Act. Whilst the factual background in respect of the Cape Town RRO leading up to 30 May 2012 differ somewhat from the present the legal principles applicable are the same.

[75] Rogers J held at p. 553:

> "[71] Before considering what has been said about 'consultation' in other cases, the immediate statutory context must be mentioned. This is not a case where there must be consultation with a person who may be adversely affected by a proposed decision. The SCRA is a statutory body whose members the lawmaker intended to be possessed of experience, qualifications and expertise in the matters with which the Act is concerned (s 10(2)). The SCRA's functions under s 11 include the formulation and implementation of procedures for the granting of asylum and the regulation and supervision of the work of RROs. The requirement of consultation in s 8(1) was thus clearly imposed because the lawmaker expected that the SCRA would have important, valuable and potentially influential contributions to make regarding the need to establish or close RROs.
>
> [72] There are two points to emphasize from the cases: [a] At a substantive level, consultation entails a genuine invitation to give advice and a genuine receipt of that advice (see *R v Secretary of State for Social Services, Ex parte Association of Metropolitan Authorities* [1986] 1 All ER 164 (QB) at 167g-h; *Hayes & Another v Minister of Housing, Planning and Administration, Western Cape & Others* 1999 (4) SA 1229 (WC) at 1242c-f). Consultation is not to be treated perfunctorily or as a mere formality (*Port Louis Corporation v Attorney-General of Mauritius* [1965] AC 1111 (PC) at 1124d-f). This means *inter alia* that engagement after the decision-maker has already reached his decision or once his mind has already become 'unduly fixed' is not compatible with true consultation (*Sinfield & Others v London Transport Executor* [1970] 2 All ER 264 (CA) at 269c-e). [b] At the procedural level, consultation may be conducted in

> any appropriate way determined by the decision-maker unless a procedure is laid down in the legislation. However, the procedure must be one which enables consultation in the substantive sense to occur. This means that sufficient information must be supplied to the consulted party to enable it to tender helpful advice; sufficient time must be given to the consulted party to enable it to provide such advice; and sufficient time must be available to allow the advice to be considered (*Association of Metropolitan Authorities supra* at 167h-j; *Hayes supra* at 1242c-1243b)."

[76] I am in agreement with all these comments which find equal application to the facts of this matter. Pickering J, in the first Somali application, ruled, as set out earlier, that the second respondent had failed to consult with the SCRA. He stated that it was for the second respondent to decide whether he wished to take the matter further. Clearly the second respondent is entitled to commence afresh, bearing in mind the guidelines set out above in respect of the manner of consultation and to take a fresh decision. The applicants contend, however, that in the present case the second respondent did not commence afresh and that he had already taken a firm decision and made up his mind prior to the meeting of 30 May 2012. It is argued therefore that the meeting did not constitute consultation, as envisaged in the Act or in the cases to which reference is made above.

[77] In circumstances where a party complains that there has been a failure to consult, the court is required to examine the facts and circumstances of the particular case and to decide whether such a consultation was in fact held. (See ***Hospital Association of South Africa Ltd v Minister of Health and Another; ER 24 EMS (Pty) Ltd and Another v Minister of Health and Another; South African Private Practitioners Forum and Others v Director-General of Health and Others*** 2010

(10) BCLR 1047 (GNP) at p. 1054-1055 para [19].) It has also been held that the word "consultation" in itself does not presuppose or suggest a particular forum, procedure or duration for such discussion or debate. Nor does it imply that any particular formalities should be complied with or that any distinction is drawn between communications conveyed orally or in writing (see ***Maqoma v Sebe NO and Another*** 1987 (1) SA 483 (Ck) at 490C).

[78] It is accordingly necessary first to have regard to the factual history of the matter as set out earlier in this judgment. It reveals that on 20 October 2011 the first closure decision was announced. That, essentially, was the same decision which the respondents allege was taken afresh on 30 May 2012. On 21 October 2011, after allegedly consulting the second respondent, Ms Lusu reported that the decision was "cast in stone". Thereafter the further endeavours of the applicants to engage with the DHA on the issue were unsuccessful.

[79] The memorandum sent by the third respondent to the Chief Director: Property and Infrastructure Management of the DHA on 16 January 2012 makes it clear that the opening of the Lebombo Office was inextricably linked at this stage to the closure of the Port Elizabeth Office.

[80] On 16 February 2012 Pickering J ruled in the first Somali application that the first closure decision was unlawful. The second respondent now accepts the correctness of that finding. Nevertheless on 17 February 2012 the third respondent proceeded to the DHA Executive Committee with a draft process plan for the establishment of a new Refugee Reception Office at Lebombo. The presentation

[84] The second respondent in his affidavit has set out lengthy explanations in order to justify the decision and its rationality. He insists that notwithstanding what the minutes may record, the meeting of 30 May 2012 constituted substantial consultation where all the relevant issues were thoroughly discussed. He states that the members of the SCRA had been an integral part of the assessment of the difficulties at various RROs throughout the country for many months leading up to May 2012 and that they were accordingly well acquainted with the developments within the DHA and the thinking of the second respondent. They were therefore able to meaningfully engage with the issues at the meeting. Mr Sloth-Nielsen, the Chairman of the SCRA, confirms this position.

[85] In argument before me Mr **Albertus** urged me to accept the correctness of the version of events as set out in affidavits from the second respondent and Mr Sloth-Nielsen. In support of this submission he places reliance on the often quoted passage in ***Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Limited*** 1984 (3) SA 623 (A) at 634H-635C.

[86] In the present matter I think that the documentation which was compiled contemporaneously over a lengthy period by various officials of the DHA and which I have referred to above shows overwhelmingly that a firm decision ("cast in stone") had been taken in October 2011 and that neither the second respondent nor the DHA exhibited any intention thereafter to reconsider the decision, to receive new inputs and to rethink the matter with an open mind. The minutes of the meeting reflect, what in my view, constitutes an informative meeting where after the SCRA

merely concurred. Whilst it is true that minutes of meetings do not reflect everything that is said at a meeting, I think that the very purpose of preparing minutes of a meeting is to record the salient features of the discussions at the meeting. I think that the minutes of the meeting of 30 May 2012, confirmed by second respondent and Sloth-Nielsen, are incompatible with the account of the meeting now contended for by the respondents. In these circumstances I am of the view that the allegations of the second respondent and Mr Sloth-Nielsen in respect of the nature and effect of the meeting on 30 May 2012 is clearly untenable, and I am unable to find that a *bona fide* dispute is raised.

[87] In the ***Scalabrini*** matter where the facts relating to the closure of the Cape Town RRO were considered in the light of these minutes, Rogers J held at p. 554 para [74]-[75]:

> "[74] ... There is no indication in the minutes that the views of the SCRA were invited or that any discussion took place on the merits of the decision. The SCRA was not, in advance of the meeting, provided with information and afforded an opportunity to make further enquiries or to submit proposals. Either because the SCRA misconceived its functions and duties, or because the SCRA realised that the DHA had already made up its mind, the SCRA simply 'approved' the decision at the end of the meeting. Davis J said that the SCRA merely 'rubber-stamped' the DG's decision - an accurate conclusion in the circumstances.
>
> [75] It is simply not possible, in a matter of such importance and complexity, that genuine consultation could have occurred at a single meeting where the proposed course of action was announced. I find it inconceivable that the SCRA would not, in the process of genuine consultation, have debated the fairness and the wisdom of closing the CT RRO. History shows that thousands of asylum seekers wish to present their s 21 applications in Cape Town and to reside and

> work in Cape Town pending the adjudication of their applications. The SCRA, in a genuine process of consultation, would surely have wished to obtain clarity on what exactly the decision entailed."

[88] I agree with the conclusions stated in para [74] and the sentiments expressed in para [75]. I accordingly find, as Rogers J did, that the second respondent arrived at the meeting with the SCRA on 30 May 2012 with a fixed view and that at the end of the meeting the SCRA without further debate approved the decision. (See ***Scalabrini*** p. 555 para [77].)

[89] In these circumstances I find that the second respondent has not complied with the mandatory requirements of consultation in section 8(1) of the Act and his second closure decision is accordingly unlawful and liable to be set aside in terms of section 6(2)(b), 6(2)(f)(i) and 6(2)(i) of PAJA.

[90] I have recorded earlier that the first ground of review which concerns the non-compliance with a statutory requirement for making a valid closure decision is unaffected by whether or not the decision was "administrative action" as defined in PAJA. In the circumstances, even if I err in the conclusion to which I have come in respect of the applicability of PAJA the decision falls to be set aside.

[91] The respondents in argument before me, argue that the relief sought by the applicant requires this court to compel the first to third respondents, without delay, to ensure that an RRO remains open and fully functional to provide services to asylum seekers and refugees, including new applicants for asylum, in Nelson Mandela Bay Municipality. An order to this effect and a further order interfering with, or setting

aside the second respondent's decision, so the argument goes, would infringe upon the doctrine of separation of powers.

[92] I do not think that there is any merit in this submission. Section 8(1) of the Act requires the second respondent to consult with the SCRA prior to taking such a decision. Where he has failed to do so Pickering J, in the first Somali application, held that he had acted unlawfully in taking a decision without such consultation and set aside such decision. The necessary consequence thereof is that the *status quo ante* should be restored and that the PE RRO, which had legitimately been established, should be reopened. That is what Pickering J ordered. The Supreme Court of Appeal considered that there was no reasonable prospect of success on appeal against such an order. I have concluded that the second closure decision too is unlawful and falls to be set aside.

[93] This argument can accordingly not succeed. I pause to mention, however, that further extensive argument founded on the separation of powers was submitted in the supplementary written argument after the application had been heard. This argument strikes, however, at the question whether the Court should defer to, or respect, the decision of the respondents rather than to enquire into the rationality thereof itself. For the reasons which are set out later herein I do not think it necessary to resolve this question.

The second ground of review: Procedural fairness/public consultation

[94] The applicants contend that the second respondent was required to comply with his obligation of procedural fairness as set out in PAJA, alternatively, and in any

event, the principle of legality required the second respondent not to make a decision without consulting publicly, including the applicants. Both these matters were considered by Rogers J in ***Scalabrini***. He resolved both issues in favour of the applicants. Again Mr **Albertus** has urged me to find that Rogers J was incorrect in the conclusions to which he came.

(a) Section 4 of PAJA

Rogers J found that the provisions of section 4 find application. He held at p. 556 para [81]:

> "I have found that the closure decision was 'administrative action' which 'adversely' affected the rights of new asylum seekers who wished to apply for asylum in Cape Town and to remain in Cape Town pending the adjudication of their applications. The new asylum seekers in question, being a 'group or class of the public', fall within the definition of 'public' in s 1 of PAJA."

[95] Mr **Albertus** argues that if the affected persons (i.e. those members of the public whose rights must be adversely affected in order for section 4 of PAJA to apply) are not yet identifiable, how then is it possible to establish that they are members of the public or a class of the public? He argues that the persons affected by the decision to close the PE RRO are prospective asylum seekers who were not in the country at the time that the decision was made. They cannot therefore be regarded as members of the public or a class of the public. In these circumstances, so the argument goes, the decision did not affect members of the public.

[96] "Public" is defined in PAJA for the purposes of section 4, to include any group or class of the public. The purpose of the definition is to afford protection to, and to

confer the rights in section 4 on a more limited grouping within the wider public notwithstanding that the decision will not affect everybody in the wider public. It does not assist to define the wider public.

[97] The term "public" is utilised in a variety of contexts in the English language. In the context of PAJA I consider that it was intended to refer to the community at large and I can conceive of no reason why prospective applicants for refugee status, albeit that they are not in the country at the time when the decision is taken, should be excluded therefrom. I am accordingly unable to uphold the argument that Rogers J erred in this regard.

[98] Rogers J reasoned as follows at p. 557 para [84]-[86]:

> "[84] Mr *Budlender* accepted, I think, that it was not realistic to suppose that a new asylum seeker who might be adversely affected by the closure decision would have responded to a public invitation to make comment. His argument was that NGOs such as Scalabrini would have represented the interests of potential new asylum seekers. If a fair process as contemplated in s 4 is concerned with hearing only affected persons (either in person or through a representative), this would not be a sufficient answer. The closer decision did not adversely affect the rights of Scalabrini and the other NGOs, nor could they have claimed, in making representations on the proposed closure decision, to be agents of an identified group of new asylum seekers.
>
> [85] However, I think it is too narrow a view to say that s 4 confines the requirement of fair process to a process of hearing an extant and identifiable group of adversely affected people or their agents. The purpose of procedural fairness is ultimately to achieve outcomes which are just and fair and which are seen to have been arrived at in a just and fair way. Where administrative action is proposed which will adversely affect the public, there may often be an extant group of people who will be immediately affected, but often the proposed action

> will also have future effects on people who, at the time of the decision, are not yet in contemplation as persons who will be adversely affected. Often these 'future victims' of the proposed decision will be the more numerous group. While their identity will not be known (they themselves might not yet know that their circumstances will ever bring them within the purview of the proposed decision), we are fortunate to live in a society where there are many organisations which concern themselves with the public causes and with the welfare of others, and where there are altruistic individuals with the knowledge, experience and skill to make useful representations on matters affecting the public. If at all possible, s 4 of PAJA, which gives effect to the fundamental right to just administrative action in s 33 of the Constitution, should be interpreted in a way which requires the views of public-interest groups and individuals to be heard before action is taken which materially and adversely affects the public, even though the affected persons themselves might be unable to provide input and may not even yet be identifiable.
>
> [86] In my opinion, s 4 is capable of such an interpretation ..."

[99] Mr **Albertus** argues that Rogers J erred in this regard in as much as section 4(3) of PAJA envisages a notice and common procedure in which the decision-maker must "take appropriate steps to communicate the administrative action to those likely to be materially and adversely affected by it and call for comment from them". He argues that public interest groups and other interested NGO's cannot be meaningfully interposed to represent and advance the interests of the potential asylum seekers at a public hearing without a proper mandate from those they purport to represent.

[100] The argument does not address the reasoned exposition of the purpose of procedural fairness, quoted above, which underlies the conclusion to which Rogers J came. PAJA was passed in order to give effect to section 33 of the Constitution. The consequence hereof is that PAJA should be interpreted generously and

purposively. Austere formalism in its interpretation should be avoided. (See ***JDJ Properties CC and Another v Umngeni Local Municipality and Another*** 2013 (2) SA 395 (SCA) at 402B-C.) Having considered the argument placed before me I am unpersuaded that Rogers J erred in this regard.

[101] Section 4(4)(a) of PAJA provides that if it is reasonable and justifiable in the circumstances, an administrator may depart from the requirements referred to in subsection (1)(a) to (e) and (2) and (3). The respondents contend, accordingly, that the second respondent was in any event entitled to depart from the procedure contemplated in section 4of PAJA.

[102] They argue that on 20 October 2011 an emergency meeting was convened at which the relevant stakeholders put forward their views in relation to the closure of the PE RRO. This, so the argument goes, may well not have satisfied the requirements of consultation in respect of the first closure decision however, by the time that the second closure decision was taken following consultation with the SCRA, it cannot be said that the second respondent had not been aware of the position and concerns of NGO's and stakeholders for they had expressed their views at the meeting of 20 October 2011.

[103] The meeting on 20 October 2011 was an emergency meeting called, it appears, at the instance of the applicants. The meeting was called to attempt to resolve the immediate situation and to seek an extension of the closing dates in order to be able to engage with the DHA about the decision. Their continued endeavours after 20 October 2011 to engage with the DHA were to no avail. It

seems to me, that on the undisputed facts, the meeting of 20 October 2011 could not have satisfied the requirement of consultation. It was directed primarily at extending the envisaged date of closure so as to afford the opportunity to engage. Their attempts to engage representatives of the DHA thereafter in connection with this issue did not bear fruit. Put differently, their endeavours to put forward their views and to make representations were refused.

[104] On the facts, accordingly, I hold that there was no public consultation. In the result I find that the decision to close the PE RRO is liable to be set aside in terms of the provisions of section 6(2)(c) of PAJA.

[105] In the event that I err in the conclusion to which I have come in respect of the application of PAJA, I consider hereafter the requirement of public consultation under the principle of legality.

(b) Public consultation as part of the legality principle

[106] On behalf of the respondents it is argued that under the principle of legality there was no obligation on the second respondent to consult anyone other than the SCRA in coming to his decision. Rogers J held in ***Scalabrini*** p. 559-561, with reference to ***Albutt v Centre for the Study of Violence and Reconciliation and Others*** 2010 (3) SA 293 (CC) and ***Democratic Alliance v President of South Africa and Others*** 2013 (1) SA 248 (CC) that in coming to a decision in respect of the closure of a RRO the second respondent was required to follow a process which is rationally connected to the attainment of that purpose. He held that the fact that section 8(1) imposes upon the second respondent an obligation to consult with the

SCRA does not mean that nothing else need be done. The second respondent could not achieve the statutory purpose, so Rogers J held, without obtaining the views of organisations representing the interests of asylum seekers.

[107] Again I am urged to find that Rogers J erred in ***Scalabrini*** in this regard. Respondents argue that the present matter is materially different from that in ***Albutt***. The purpose of the power in section 8(1) of the Act is to ensure that there are as many RROs in South Africa as the second respondent regards as necessary as for the purposes of the Act. The views of public interests groups representing asylum seekers, so the argument goes, may be helpful, but they are certainly not necessary to achieve this purpose.

[108] I think that this argument loses sight of the fact that the second closure decision relates not only to the number of RROs required but also to their location. In particular the present decision relates to the closure of an RRO where it had been previously been considered necessary for purposes of the Act to have an RRO in Port Elizabeth. As I have stated earlier considerable infrastructure and support systems have developed around the existing RRO and clearly the decision would affect asylum seekers. Without such consultation the second respondent could not have a proper perspective of the impact which his decision would have upon asylum seekers and this perspective, as Rogers J correctly held, would be "of obvious importance in reaching a rational conclusion" as to whether or not an RRO in Port Elizabeth was needed.

[109] In the circumstances I again find myself in agreement with the reasoning and conclusion of Rogers J in ***Scalabrini***. It follows that the second closure decision falls to be reviewed and set aside under the principle of legality too.

Conclusion

[110] In view of the conclusion to which I have come in respect of the first two grounds of review, I find that the second closure decision was unlawful and that it should be reviewed and set aside.

[111] Mr **Budlender** has urged me nevertheless to decide all the grounds of review raised. I think, however, that it is neither necessary nor desirable that I do so in circumstances where the first and second grounds are conclusive of the application.

[112] What remains for consideration is the form of the relief to be granted. The order sought in the Notice of Motion is similar to that granted by Pickering J in the first Somali application. In the papers in the present matter the second respondent contends, however, that the re-establishment of a fully functional RRO cannot be achieved overnight.

[113] In ***Scalabrini*** Rogers J ordered the re-establishment on a date some three months after judgment and made a further order that the second respondent deliver periodic reports of his progress in complying with the order. Mr **Budlender** asked that a similar order be made in this case. Mr **Albertus** did not resist this, provided of course that I conclude, as I now have, that the second closure decision should be set aside.

[114] In the result I make the following order:

1. The second respondent's decision, taken on 30 May 2012, to close the Port Elizabeth Refugee Reception Office to new applicants for asylum is declared unlawful and is set aside.

2. The first to third respondents are directed to ensure that by 1 October 2013 a Refugee Reception Office is open and fully functional within the Nelson Mandela Metropolitan Municipality at which new applicants for asylum can make applications for asylum in terms of section 21 of the Refugees Act 130 of 1998 and be issued with permits in terms of section 22 of the said Act.

3. During the week commencing Monday 24 June 2013, and again during the week commencing Monday 22 July 2013, the second respondent or his duly appointed representative shall furnish a written report to the applicants' attorneys summarising the steps taken by the Department of Home Affairs up to the date of the report to give effect to para (2) of this order; giving the second respondent's assessment as to whether he expects there to be compliance with the said para (2) by 1 October 2013; and, if the second respondent's assessment is that there will not be compliance by that date, giving the second respondent's best estimate of the date by which there will be compliance.

4. The first to third respondents are directed jointly and severally to pay the applicants' costs of suit, including the costs of two counsel.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Applicants:	Adv S Budlender and Adv J Bleazard instructed by Lawyers for Human Rights, Johannesburg Law Clinic c/o Refugee Rights Centre Nelson Mandela Metropolitan Municipality, Port Elizabeth
For 1st – 3rd Respondents:	Adv A Albertus SC, Adv G R Papier and Adv G G M Quixley instructed by State Attorney, Port Elizabeth