IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, DURBAN

CASE NO: 5027/2012

In the matter between:

CHRISTIAN BOKETSA BOLANGA	APPLICANT
and	
REFUGEE STATUS DETERMINATION OFFICER	1ST RESPONDENT
M.D MOROBE N.O	2ND RESPONDENT
MINISTER OF HOME AFFAIRS	3RD RESPONDENT
DIRECTOR GENERAL, HOME AFFAIRS	4TH RESPONDENT
REFUGEE APPEAL BOARD	5TH RESPONDENT
STANDING COMMITTEE ON REFUGEES	6TH RESPONDENT

ORDER

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1. The decisions of the first and fifth respondents on 17 October 2006 and 21 July 2011, dismissing the applicant's application for refugee status and asylum and his subsequent appeal against such dismissal, respectively, are reviewed and set aside.

2. It is declared that the applicant is a refugee entitled to asylum in the Republic of South Africa in terms of section 3 of the Refugees Act 130 of 1998.

3. The third respondent is directed to issue to the applicant written recognition of refugee status in terms of section 27(a) of the Refugees Act within ten days of the date of this order.

4. The third respondent is ordered to pay the costs of this application.

JUDGMENT

PENZHORN AJ:

[1] The applicant is a citizen of Democratic Republic of Congo (DRC) and is currently in South Africa on a temporary asylum seekers permit. He seeks the following relief:

> "1. The decision of the RAB of 21 July 2011 rejecting the applicant's appeal against the decision of the RSDO is reviewed and set aside;
>
> 2. The decision of the RSDO rejecting the applicant's application for refugee status and asylum is reviewed and set aside;

3. It is declared that the applicant is a refugee who is entitled to asylum in South Africa as contemplated by sections 2 and 3 of the Refugees Act 130 of 1998;

4. The Minister of Home Affairs is directed to issue permanent residence permits to the Applicant, his wife and this three children, described more fully in the Founding Affidavit annexed hereto;

5. Those of the Respondents who oppose this application are to pay the Applicant's costs of the application."

[2] The applicant arrived in South Africa on 25 January 2005 with his wife and two year old son. On 27 January 2005, that is more than ten years ago, he lodged an application for asylum with the Refugee Reception Office in Durban.

[3] The application was rejected by the first respondent, the Refugee Status Determination Officer ("the RSDO"), on 17 October 2006, that is almost two years later, and this decision was communicated to the applicant on 20 November 2006.

[4] The applicant lodged an appeal against this decision and this appeal was heard by the fifth respondent, the Refugee Appeal Board ("the RAB"), on 20 November 2007, which reached a decision on 21 July 2011 and the decision was handed to the applicant on 11 January 2012, that is more than four years after the appeal was heard.

[5] The present application to review and set aside the decisions of the RSDO and the RAB was filed in May 2012. A notice of opposition was filed, on behalf of the third respondent only, on 29 August 2012.

[6] Notice in terms of Rule 30A was given to the respondents on 31 January 2014 to furnish the record of proceedings before the RSDO and the RAB in terms of Rule 53. To date no such records have been filed. In fact, to date no opposing and/or responding papers of any kind have been filed. All I have before me from any of the respondents is the notice of opposition filed on behalf of the third respondent.

[7] When the matter was called before me in motion court on 13 February, at the request of counsel for the third respondent and in the light of the aforegoing facts, I stood the matter down in order for him to take instructions. When the matter was then called later he indicated to me that all the responsible officials dealing with this matter were in meetings and could not be reached. I then indicated to both counsel that unless I heard from them by the end of the day I would proceed to give judgment. I did not and this is then the judgment.

[8] The applicant's grounds of review are the following:

a. The RAB was not properly constituted when it heard the appeal in that it did not consist of the required three persons as required by section 13(1) of the Refugees Act;

b. the RSDO and the RAB erred in failing to take into account relevant factors when coming to their respective decisions;

c. the applicant was not afforded a fair hearing before either the RSDO or the RAB;

d. the decisions of the RSDO and the RAB were not rationally connected to the material which was before them; and

e. the decision of the RAB was inconsistent with previous decisions which had been made by it, and was accordingly arbitrary in the circumstances.

[9] The history of the matter as set out in the applicant's founding affidavit, which is not disputed on the papers before me, is as follows (and here I largely repeat the applicant's own words as they appear in his affidavit):

[9.1] He fled to South Africa from the Democratic Republic of Congo ("the DRC") because he had experienced, and feared that he would continue to experience, persecution at the hands of both the majority and opposition political parties. He believes that he will continue to face such persecution if he were to be forced to return to the DRC.

[9.2] He and his wife come from the district of Zongo in the Equateur province of the DRC.

[9.3] His persecution began in late 2000 in Zongo, where he lived with his wife and small baby. He was at that time pastor of his own church in

Zongo, and preached to the people, and in particular to the rebels, not to fight. His messages of peace came to the attention of Jean-Pierre Bemba, the head of the Movement for the Liberation of Congo ("the MLC"), which was at that time a rebel group, and who objected to his pacifistic stance.

[9.4] Over a period of six months, he was repeatedly beaten and tortured by the MLC rebels in an attempt to force him to stop preaching. These beatings took place with a variety of objects, including sticks, guns and hammers. Towards the end of this period, the rebels forces also targeted his wife and she was also beaten and tortured, and he was arrested and imprisoned for ten days.

[9.5] When he was released he and his wife and their small baby tried to escape the rebel forces by moving to the city of Mbandaka which is about 400km from Zongo, also in the Equateur province. They travelled by foot and hitched lifts.

[9.6] In Mbandaka, because he had fled Bemba's rebel forces, it was assumed that he supported the ruling party, the People's Party for Reconstruction and Democracy ("the PPRD"), under Joseph Kabila. In fact he supported neither party. He was asked to work for the PPRD and to become a recruiter and to use his pastoral ministry to encourage those who followed him to join the PPRD. He refused to do so.

[9.7] As a result of his refusal he was accused of being a spy for Bemba, and the PPRD came to his house a number of times over the next two weeks and beat both him and his wife. After about six weeks in Mbandaka he was arrested and imprisoned for five days.

[9.8] The travel from Zongo to Mbandaka had taken its toll on their baby who had fallen ill, and who died while he was in prison. He was released from prison in order to attend the funeral, and used this opportunity to escape the PPRD forces.

[9.9] He and his wife then travelled to Kinshasa, where he knew a fellow pastor. Kinshasa was a stronghold of the ruling party and the fellow pastor, being afraid, told him that he could not hide him and his wife as it was too dangerous.

[9.10] Thus, after two days, they fled the capital to the province of Kasai where they hid in a small village called Katalai for about three years.

[9.11] The PPRD did not give up on their search for him despite their movements and the lapse of time. His mother in law, who had remained in Mbandaku, then became the target of the PPRD and they harrassed her, beating, raping and torturing her on a number of occasions in order to find out where he was. His mother in law managed to contact him and told him to flee because she feared for their lives.

[9.12] They did not know what to do. They had no money and no possessions. While they were hiding in Kasai, his wife became pregnant in early 2004, which created a further obstacle to travelling.

[9.13] He was informed in late 2004 that his mother in law had been killed by the PPRD forces, and this prompted them to flee from the DRC. Their child, a son, was born on 29 October 2004, and they left the DRC in early January 2005, when their son was old enough to travel. They travelled to Lumbashi, where they waited for two days, and then hid in a truck that brought them to South Africa.

[10] The applicant goes on to say that he fears that both the MLC and the PPRD still have reason to wish to harm his family and himself should they return to the DRC, as demostrated by their attacks on his mother in law, and that the PPRD in particular would not have forgotten his refusal to join their party as a recruiter, or his sermons and messages against their violent tactics.

[11] The reasons for rejecting his application for asylum by the RSDO appear from its decision of 20 November 2006, annexure CB2 to the founding affidavit, and these can be summarised as follows:

(a) It found that the applicant had not exhibited a well-founded fear of persecution;

(b) that the reason for his leaving the DRC was that he was deserting the army, alternatively refusing to perform compulsory military service;

(c) that *en route* to South Africa the applicant passed through other countries where he could have sought refuge;

(d) that there was no evidence of any systematic history and/or occurrence of human rights abuse in his case; and

(e) that there was no indication that he was individually sought by the government (of the DRC).

[12] It is clear from the founding affidavit that the applicant disputes each of these findings.

[13] The RAB dismissed the applicant's appeal in terms of its decision of 21 July 2011, annexure CB3 to the founding papers, from which it will be seen that it did so for basically three reasons, they being:

(a) It found that his political profile was such that he could not be regarded as a threat to the government or the MLC and that he was therefore "unlikely" to be targeted by the authorities or the MLC (at page 4 of its reasons);

(b) that he had not submitted evidence of his political opinion and had not convinced the RAB of the authenticity of his claims to a political opinion that may have resulted in persecution (at page 5); and

(c) that the fact that his family and himself had remained in Kasai and "Lubumbashi" for a total of four year since the persecution started before leaving the country "undermines any claim of persecution on return" or demonstrates a "lack of interest by alleged persecutors" (at page 5).

[14] The first ground of review deals with the RAB not being properly constituted.

[15] It will be seen from annexure CB3 that the applicant's appeal was heard by one member only of the RAB, MD Morobe. Section 13(1) of the Refugees Act 130 of 1998 ("the Act") deals with the composition of the RAB and requires that it consists of "a chairperson and at least two other members". See in this regard Harerimana v Refugee Appeal Board 2014 (5) SA 550 (WCC) at p 555J - 556E.

[16] It is accordingly clear that the "Appeal Board" was not properly constituted when it heard and dismissed the applicant's appeal and for this reason alone the decision is reviewable.

[17] The second ground of review deals with the alleged failure on the part of both the RSDO and RAB to take into account relevant factors when coming to their respective decisions.

[18] Here it is stated by the applicant in his founding affidavit that both bodies failed to take into account relevant recent country reports on the DRC, which describe the prevailing situation in the DRC in detail and which clearly indicate that it would not be safe for the applicant and his family to return to their home country. In this regard the RAB made the following finding:

> "In reaching its decision the Board has thoroughly assessed the claim and has had due regard to the objective background information on the appellant's country of origin."

[19] The RAB does not explain however which "objective background information" was taken into account. It also does not indicate which of that "objective background information" supports the decision to refuse the appeal and which of that information goes against it. The RAB in fact does not really deal with the current situation in the DRC.

[20] The RAB also found the following:

> "It is the finding of the Board that the appellant's testimony did little to convince the board of the authenticity of its claims to a political opinion that may result in persecution."

[21] This is disputed by the applicant in his founding affidavit and he claims that he did indeed relate to the RAB the facts upon which he basis his claim of persecution, namely his opposition to the violent tactics of the PPRD and the MLC, in particular

his refusal to join the ranks of the PPRD while he was in Mbandaka, which was the basis for his political persecution. He states that the second respondent, who presided at his appeal, did not ask him to explain the circumstances under which he was able to remain in the DRC for four years from when the persecution started until he fled the country. Despite this the RAB made the finding that the fact that he was able to remain there for four years "undermines any claim of persecution on return" or demonstrates a "lack of interest by alleged persecutors".

[22] The applicant goes on to say that had the RAB asked him why he had spent that length of time in the DRC before fleeing, he would have explained the following, and here I quote from paragraph 49 of his founding affidavit:

> "Our decision to flee the DRC was made as a last resort only after we had made every attempt to survive in our home country. During the four years before we fled the DRC, my family and I attempted to live in various cities and towns and to avoid the attention of the MLC and PPRD, but found that persecution was widespread, and that we were not safe in any of these places. During those four years, the political unrest only worsened, and our persecution continued. Thus, after the birth of our son in October 2004, we fled the DRC."

[23] On the applicant's version, which is not disputed by the second respondent, he was not asked at his appeal hearing why he was able to spend all this time in the DRC in circumstances where he claims to have been persecuted. Here it must be

remembered that the applicant was unrepresented and also that there was clearly a language problem, which I will deal with later.

[24] Before making such a finding then it was clearly incumbent upon the second respondent to afford the applicant an opportunity to explain himself. On his version she did not do so and in the absence of a record of proceedings contradicting the applicant or an affidavit by the second respondent, I must accept that this is indeed what transpired at the hearing.

[25] The third ground of review involves the language barrier between the applicant and the officials dealing with his application.

[26] Here the applicant states that when he arrived in South Africa in January 2005 he did not speak any English. When he attended the reception office in Durban he was given a nine page form to fill in dealing with "Eligibility Determination Form of Asylum Seekers". The form was in English. He was not offered the services of an interpreter. Also when he returned to the reception office a second time, although he brought a friend with him who understood more English than he did, he was not offered an interpreter and again there were difficulties in recording what he said. He was also not afforded an interpreter when appearing before the RSDO and also before the RAB. He does say that when his appeal was heard on 20 November 2007 he understood more English than he did in 2005, but he was "by no means fluent and I did not understand all of the questions that were put to me by the Second Respondent. Again I was not given the option of using an interpreter."

[27] This seems to be in clear contravention of section 34 of the Act which requires:

> "When considering an application, the Refugee Status Determination Officer must have due regard for the rights set out in section 33 of the Constitution and in particular ensure that the applicant fully understands the procedures, his or her rights and responsibilities and the evidence presented."

[28] Clearly this also applies to an appeal before the RAB, when an appellant appears in person.

[29] Here Regulations 4 and 5 of the regulations pursuant to the Act provide inter alia that a refugee reception officer must ensure that an applicant is provided with adequate interpretation and, where this is "not practicable", that the applicant can be required to provide his own interpretation, but must be given at least seven days advance notice that he or she is required to bring an interpreter to the interview. According to the applicant he was neither offered the services of an interpreter nor told to bring one with him.

[30] It seems obvious that where there is a language difficulty at a hearing before a body such as the RSDO or the RAB, to the extent that the applicant does not fully understand the proceedings or he is not properly understood, which is the case here on the applicant's version, such a hearing can clearly not be said to be fair. Again, in the absence of a record of proceedings or an opposing affidavit, I must accept what is stated by the applicant in this regard.

[31] The fourth ground of review deals with the alleged failure by the RAB to properly apply the law.

In this regard the RAB made the following finding:

> "The appellant fears that he will be persecuted upon his return to his country for reason of his political opinion.
>
> However, the Board finds that the appellant's political profile was such that he could not be regarded as a threat to the government or the MLC. He is therefore unlikely to be targeted by the authorities or the MLC." (my underlining)

[32] But this is not the test. The test is whether there is a "reasonable possibility of persecution" which must be considered in all the circumstances of the case. See Tantoush v Refugee Appeal Board and Others 2008 (1) SA 232 (TPD) paragraph [97] at p 266B.

[33] The RAB also made the following finding:

> "It is also interesting that he was able to remain in Kasai and Lubumbashi for a total of four years before leaving the country. During this time nothing happened to him. This factor alone does not incline the Board to find that he may have been at risk of imminent harm." (my underlining)

[34] The question is not whether the risk of harm is imminent but rather whether it is real.

[35] I have already dealt with the applicant's complaint relating to language difficulty when presenting his case. Once there is such a problem, it is not really helpful for the RAB to make the following finding in regard to the applicant's testimony:

> "It is the finding of the Board that the appellant's testimony did little to convince the Board of the authenticity of his claims to a political opinion that may result in persecution."

[36] On the evidence before me the applicant's claim of persecution must be accepted as genuine. The RAB has chosen not to place the record of proceedings before the court to indicate in what manner, if any, the applicant may have been less than convincing. It has also chosen not to question anything he says in his founding affidavit, either on the basis that it is at odds with what he had said before either the RAB or the RSDO, or that for any other reason it should not be believed.

[37] The fifth ground of review complains of the RAB being inconsistent with previous decisions made by it in similar circumstances.

[38] In this regard the applicant refers to recent cases before the RAB, including one relating to one Tressor Mongali Matolelo, in which the RAB apparently found that the DRC was in fact in such a state of disturbance and disruption as to prohibit the return of asylum seekers to that country.

[39] Here it is again unhelpful that the RAB did not respond to this. In addition, this is also the effect of the applicant's evidence now before me.

[40] In his affidavit the applicant states that there "is overwhelming evidence that the country (the DRC) is in a sustained state of public disorder and disruption". In this regard he annexes the UNHCR 2010 Country Report and also excerpts from the "Third joint report of seven United Nations experts on the situation in the Democratic Republic of Congo" of 9 March 2011. Also a UNHCR article published in June 2012 entitled "Renewed clashes and insecurity causing displacement in Eastern DRC". These all speak of the unstable and indeed dangerous situation existing in the DRC. In the UNHCR report appears the following passage:

> "Violence in the eastern and western parts of the country characterised by atrocities committed by various armed groups, including sexual and gender based violence, has resulted in the displacement of more than 1.7 million people. The continuing instability hampered UNHCR's programmes by reducing access to certain areas."

The report continues, under the heading "favourable protection environment":

> "Through its protection monitoring mechanism, the office was able to record and report some 19900 violations of human rights related to sexual violence, arbitrary detention, abduction and the usurpation of land and property"

Under the heading “persons of concern” the report lists 2.3 million such persons in the DRC, comprising refugees, asylum seekers, IDP’s and returnees, either from the DRC itself or from neighbouring countries. Under the heading “constraints” the report states:

> “Rampant violence and continuing human rights violations remain major sources of concern, while access to affected populations was hampered by poor infrastructure… Moreover, weak administrative and judiciary structures make it difficult for people to seek justice.”

[41] All this again remains unanswered on the papers before me. In any event this information comes from reputable publications of which I am entitled to take cognisance. Here I note that the RAB itself quotes the UNHCR on page 5 of its reasons.

[42] It follows from the aforegoing that in my view the decisions of both the RSDO and the RAB must be reviewed and set aside.

[43] The question that then arises is whether the matter should be referred back to the RAB or RSDO to rehear the matter or to substitute my decision for that of the RAB and RSDO.

[44] The applicant’s personal circumstances appear from paragraph 75 of his affidavit which reads as follows:

"75. My wife (Nadine Ngandosuka) and I have lived in Durban for the past seven years. We both have steady jobs: I work at the Silversands Hotel, Durban, as a security guard and my wife works as a housekeeper at Arm International, a firm of immigration practitioners. I also continue to preach and have a small communal church, Assembly of God, situated at 23 Winder Street.

We have three children:

a. A son aged seven, born in DRC shortly before we departed to South Africa;
b. A daughter aged two years nine months, born in South Africa;
c. A daughter aged one year and six months, born in South Africa."

[45] In terms of section 8(1)(c)(ii)(aa) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) a court is given the power on review to substitute its decision for that of the body taken on review "in exceptional circumstances". In this regard Davis J states the following in Harerimana's case at pages 557H-558A:

"When a court sets aside a decision of a body such as the RAB, the default position must be to refer the matter back to the designated body to enable it to reconsider the issue and make a fresh decision. As Heher JA said in *Gauteng Gambling Board v*

Silverstar Development Ltd and Others 2005 (4) SA 67 (SCA) para 29:

> 'An administrative functionary that is vested by statute with the power to consider and approve an application is generally best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision. The court typically has none of these advantages and is required to recognise its own limitations.'

A court must show respect for a legislative design which creates a specialist body to deal with the task of making decisions of an administrative nature. Besides, review cannot simply be conflated into an appeal to usurp these decision-making powers, thereby expanding the powers of courts into areas which a legislative framework has expressly eschewed."

[46] In UWC v MEC for Health and Social Services 1998(3) SA 124 (C) Hlophe J (as he then was) provided guidelines in respect of determining whether a case was sufficiently exceptional for a court to substitute its own decision for that of the designated body or tribunal. The judgment reads as follows at page 131D-E:

> "Over the years South African Courts have recognised that in exceptional circumstances the Court will substitute its own decision for that of a functionary who has the discretion under the

> Act. Where the end result is in any event a foregone conclusion and it would merely be a waste of time to order the tribunal or functionary to reconsider the matter, the Courts have not hesitated to substitute their own decision for that of the functionary. … The Courts have also not hesitated to substitute their own decision for that of a functionary where further delay would cause unjustifiable prejudice to the applicant."

[47] Dealing with the first consideration, namely whether on the facts before me the result is a foregone conclusion, it seems to me that a clear case has been made out by the applicant for refugee status. Although the facts now before me may not have been placed before the RSDO and the RAB as fully and as clearly articulated as they are now before me, due perhaps to language difficulties and the applicant not being legally represented, I have no doubt that if they were to be placed before the RSDO or the RAB, and if considered properly, the conclusion that a compelling case for refugee status has been made out is all but inevitable.

[48] This brings me to the second consideration, namely prejudice to the applicant resulting from a further delay in these proceedings.

[49] It has taken the applicant ten years to get this far, and had it not been for the fact that he has been legally represented for the last approximately three years, one wonders how much longer the process will have taken, that is if it would ever have reached this court at all.

[50] Why did it take the RSDO almost two years to deal with the applicant's application? And the RAB more than four years to come to a decision? Was it work pressure or simply administrative inefficiency? Here it is particularly regrettable that neither the RSDO nor the RAB have chosen to explain these delays.

[51] In the Harerimana case Davis J stated the following at page 560G:

> "This decision must surely be strengthened by the disturbing fact, unacceptable in these cases, that it was more than four years after his initial interview that applicant was ultimately notified that his claim for refugee status had been unsuccessful."

[52] On the facts before me I would substitute "unacceptable" with "deplorable".

[53] Here one shudders to think of the many thousands of refugees in similar situations in our country who have been or are being subjected to the same treatment as the applicant has been by those to whom the law has entrusted their fate. How many have waiting ten years, fifteen years perhaps, or have simply given up? How many have had access to lawyers?

[54] It is of course so that the matter was first placed before this court almost three years ago. The delay since then is clearly unsatisfactory. It was however partly due to the third respondent filing a notice to oppose, which was then not followed up by any opposing papers.

[55] Must I now refer the matter back to the RAB or the RSDO for the process to take another five years, six years, whatever? Clearly not.

[56] This leaves paragraph 4 of the relief sought, namely that the third respondent be directed to issue permanent residence permits to the applicant, his wife and three children. Here the applicant states the following in paragraphs 82, 83, 85 and 86 of his affidavit:

> "82. My application for asylum was first made on 23 January 2005. I received notice that my appeal had been refused on 11 January 2012 – almost seven full(y) years after I arrived in the country, and given until 22 February 2012 to leave the country.
>
> 83. While waiting for first the RSDO and then the Appeal Board to make their decisions, I have lived in South Africa with my family for seven years and two of my children were born in this country and know no other. I attended the Refugee Centre frequently, hoping that the Appeal Board decision would have been taken. I also attended in order to register the birth of my daughters in the file and to extent my asylum seeker and work permits.
>
> 85. It is submitted that, had the RSDO and the Refugee Appeal Board made their decisions correctly and within a reasonable time, my family and I would have been resident

in this country for long enough to earn our permanent residence permits (which are applicable to foreigners who have been residing in South Africa on the basis of their work permits for a minimum period of five years, along with their spouses and dependants).

86. In the current situation, the original RSDO decision was taken on 17 November 2006. Had this been correctly decided, my family and I would have by now qualified for our permanent residence permits and I humbly request this Honourable Court to make an order directing the Fourth Respondent to award us same."

[57] This issue, namely whether or not the applicant and his family should be granted permanent residence, was not however before either the RSDO or the RAB. It is then also not an issue before me and I accordingly cannot grant this relief.

[58] In this regard I trust however that the official or officials entrusted with deciding this issue will, when doing so, have regard to the facts set out in this judgment and more particularly the personal factors relating to the applicant and his family set out in paragraph [56] above.

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

[59.1] The decisions of the first and fifth respondents on 17 October 2006 and 21 July 2011, dismissing the applicant's application for refugee status

and asylum and his subsequent appeal against such dismissal, respectively, are reviewed and set aside.

[59.2] It is declared that the applicant is a refugee entitled to asylum in the Republic of South Africa in terms of section 3 of the Refugees Act 130 of 1998.

[59.3] The third respondent is directed to issue to the applicant written recognition of refugee status in terms of section 27(a) of the Refugees Act within ten days of the date of this order.

[59.4] The third respondent is ordered to pay the costs of this application.

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GH Penzhorn AJ

Judgment reserved	:	13 February 2015.
Judgment delivered	:	24 February 2015.
Counsel for Applicant	:	Adv. SF Pudifin – Jones
Instructed by	:	Neerajh Ghazi Attorneys Durban
Counsel for third Respondent	:	Mr Ngubane
Instructed by	:	Office of the State Attorney, Durban