Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case number: 13131/2015

Before: The Hon. Mr Justice Binns-Ward

Hearing: 10 November 2015
Judgment delivered: 18 November 2015

In the matter between:

KENNEDY TSHIYOMBO Applicant

and

THE MEMBERS OF THE REFUGEE

APPEAL BOARD First to Fourth Respondents

AND FOUR OTHERS Fifth to Eighth Respondents

JUDGMENT

BINNS-WARD J:

[1] The applicant has applied, in terms of Part B of his notice of motion, for orders reviewing and setting aside the decision by the refugee status determination officer rejecting his application for refugee status as unfounded and the subsequent decision of the Refugee Appeal Board refusing his appeal against that determination. He also seeks consequential relief by way of an order declaring that he is a refugee who is entitled to asylum in the

Republic of South Africa, as contemplated by s 3 of the Refugees Act 130 of 1998 ('the Act'), together with a direction to the acting manager of the Cape Town refugee reception office (the sixth respondent) to issue to him a written recognition of refugee status in terms of s 27(a) of the Act,[1] read with regulation 15(1) of the general regulations made thereunder.[2] The relief applied for in terms of Part B of the notice of motion follows on that sought earlier, on grounds of urgency, in terms of Part A thereof. Pursuant to the hearing of the application for urgent relief before Dlodlo J on 5 August 2015, certain interim relief was granted to the applicant. The interim relief included a direction to the sixth respondent to issue a temporary asylum seeker permit to the applicant that would permit him to remain lawfully in this country pending the determination of the relief sought in terms of Part B of the notice of motion.

[2] The order made by Dlodlo J also provided a timetable for the further conduct of the matter concerning the judicial review sought by the applicant in terms of Part B of the application. The respondents were, in addition, directed (in terms of paragraph (a) of the order) to file the administrative record of proceedings in terms of rule 53(1)(b) of the Uniform Rules by 31 August 2015[3] and to deliver their answering affidavits, if any, on or before 28 September 2015. According to the tenor of the order, it was made after hearing counsel for the applicant and 'by agreement between the parties'. The implication was that notwithstanding that the respondents had not delivered a notice of opposition in terms of rule 6(5)(d), they were party to obtaining the order as if they had done so.

[3] As matters transpired, the respondents failed to comply with those agreed procedural directions. There was no indication on file that the order had been served on the respondents, but service was probably, quite reasonably in the circumstances, considered unnecessary in the context of their legal representative having agreed to it, and no doubt being in possession of a copy. If they had subsequently decided on reflection, as they were entitled to, not to deliver opposing papers, or to abide the decision of the court, it would have been an act of

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[1] Section 27(a) of the Act provides: '*A refugee-*

(a) *is entitled to a formal written recognition of refugee status in the prescribed form*'.

[2] Published under GN R366 in *Government Gazette* 21075 of 6 April 2000, as amended by GN R938 published in *Government Gazette* 21573 of 15 September 2000. Regulation 15 provides for a system in terms of which a refugee's status as such falls to be reconsidered at two year intervals unless it is determined by the Standing Committee for Refugee Affairs established in terms of s 9 of the Act that the refugee will remain a refugee for the foreseeable future, in which case the refugee becomes entitled to apply for an immigration permit.

[3] In *Jockey Club of South Africa v Forbes* 1993 (1) SA 649 (A), at 660F, Kriegler AJA observed that when an applicant institutes review proceedings by availing of the provisions of rule 53, the relevant functionary is '*obliged* [in terms of rule 53(1)(b)] *to forward the record to the Registrar*'. (My underlining.) In the current case the obligation was buttressed by the terms of a court order.

basic courtesy in the circumstances described to have caused an appropriate notice to that effect to be delivered. However, when the review application came before me on 10 November 2015 pursuant to the relevant provision in the order made by Dlodlo J, there had been no movement in the court file whatsoever, save for the filing of heads of argument by the applicant's counsel.

[4] The absence of any supplementary founding affidavit by the applicant in terms of rule 53(4) suggested on the face of the matter that the respondents had also failed to file the record of proceedings, as directed in the order made by Dlodlo J. That the record was material for the purposes of the applicant's review application followed from various averments in his founding affidavit. So, for example, he had complained that the respondents had 'refused to supply [his] legal representatives with copies of [his] B1-1590 applications',[4] and that the refugee status determination officer (the fifth respondent) 'had refused to supply [his] legal representatives with his interview notes',[5] and that '[t]he first to fourth respondents unfairly had regard to documents which had been requested by [his] legal representative, but which were withheld by them'.[6] It was confirmed at the hearing, in circumstances to be described presently, that the respondents had indeed failed to comply with paragraph (a) of the order made by Dlodlo J.

[5] The relief sought in terms of Part A of the application had not concerned the members of the Refugee Appeal Board, who had been cited as the first to fourth respondents, respectively. It was not apparent from the court file whether service had been effected on them; nor was it apparent whether the respondents had been legally represented when the order made by Dlodlo J was taken 'by agreement between the parties'. Upon enquiry at the commencement of the hearing, I was informed by Ms *Harvey*, who appeared for the applicant, that Mr Kondlo, the assistant state attorney, had appeared on behalf of the respondents at the hearing before Dlodlo J. As mentioned, there was nothing in the file to indicate that the State Attorney's office had come on record for the respondents. There was also nothing to show that the State Attorney, having first appeared for the respondents, had subsequently withdrawn as their representative. In circumstances in which it therefore fell reasonably to be inferred that the State Attorney continued to represent the respondents it was

[4] Para 46 of the founding affidavit. A B1-1590 form is the document that is completed at the stage that an applicant for asylum is interviewed by a refugee reception officer, as provided in terms of s 21 of the Act. The refugee reception officer is required in terms of s 21(2)(d) of the Act to submit the form, which makes up part of the application for refugee status, to the refugee status determination officer.
[5] Para 47 of the founding affidavit.
[6] Para 48 of the founding affidavit.

entirely unsatisfactory that no-one had been instructed by that office to appear for them - if only to explain the *prima facie* contemptuous non-compliance with paragraph (a) of the order by Dlodlo J, to which the assistant state attorney, presumably upon the instructions of his clients, had agreed. I therefore stood the matter down so that Mr Kondlo could be called to appear to account for the situation. I was also loath to proceed with the matter in the unexplained absence of the respondents' legal representative after I had ascertained that they were indeed represented.

[6] Before the matter was stood down I had remarked to Ms *Harvey* that it was my *prima facie* view that the absence of the administrative record might well prejudice the applicant's ability to obtain the substitutive determination by the court of his refugee status that he was seeking by way of consequential relief. Whereas it has been observed that the provision of the administrative record in the judicial review process is a procedure designed primarily for the benefit of applicants, and thus something that may be waived by them,[7] it has also been recognised that the absence of the record can, depending on the circumstances, prejudice an applicant's ability to obtain the particular relief that it seeks.[8] I would suggest that the absence of a record might be particularly prejudicial when a substitutive decision is sought from the court consequent upon the exercise by it of its review powers. Questions such as bias, incompetence, foregone conclusion and the like, which are often pivotal to deciding whether to grant such exceptional relief, are matters on which a court would often be reluctant to reach a conclusion without insight into the relevant parts of the administrative record. Quite apart from that consideration, in the current case, as I have described, it was in fact part of the applicant's case in the review that he had been prejudicially deprived of access to documentation that was relevant to the preparation of his case. The decision by his legal representatives not to have insisted on compliance by the respondents with rule 53(1)(b) was on the face of it therefore somewhat puzzling. It was, however, put in a more understandable light by the further information provided in the circumstances I shall now describe.

[7] The applicant's attorney, who is attached to the Refugee Rights Clinic at the University of Cape Town, took advantage of the standing down of the matter to await Mr Kondlo's attendance to depose to an affidavit to address the concern I had expressed about service on the first to fourth respondents and to confirm the advices I had received from

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[7] See *Mothaung v Mukubela and Another, NNO; Motaung v Mothiba, NO* 1975 (1) SA 618 (O), at 625-626.
[8] See *SACCAWU and Others v President, Industrial Tribunal, and Another* 2001 (2) SA 277 (SCA), at para 7.

counsel from the bar that the respondents had indeed been legally represented when the order was taken before Dlodlo J.

[8] The further information provided by the applicant's attorney in respect of service was not entirely satisfactory. It appeared from the sheriff's return that the application had been served on an employee of the Refugee Appeal Board at the Board's office in Pretoria on 4 August 2015. There had been no service on the first to fourth respondents individually. Indeed, the sheriff's return was especially endorsed to indicate that only one set of papers had been provided for service on the first to fourth respondents. It also bears mention that the applicant's papers were somewhat inconsistent in respect of the joinder of the Appeal Board: The Appeal Board was cited as the first respondent in the header to the founding documents, while its chairperson was named individually as the first respondent in the body of the founding affidavit. I was nevertheless willing to accept that effective service on the members of the Appeal Board had occurred because Mr Kondlo confirmed that he acted for all of the respondents. (As all of the respondents are state functionaries cited in their capacities as such, the applicant would, in fact, have been well advised to have utilised the provisions of rule 4(9) of the Uniform Rules and served the papers on the State Attorney. Papers were actually served on the State Attorney by the applicant's attorney on 14 July 2015, but according to her affidavit of service that had been only for the purpose of service on the seventh and eighth respondents.[9] A copy of the papers was also served by the applicant's attorney on the provincial manager of the Department of Home Affairs at Cape Town on 14 July and on the procedural line manager for the Cape Town Refugee Office – the person allegedly responsible for 'the control and supervision of the fifth respondent' – on 20 July 2015.)

[9] In dealing with my query concerning the respondents' legal representation, the applicant's attorney reiterated counsel's advices that Mr Kondlo had been present at the hearing before Dlodlo J on 5 August 2015 and had confirmed, when agreeing to the order made on that date, that he represented all of the respondents. Addressing the respondents' failure to have complied with paragraph (a) of the order or to have delivered answering papers, the applicant's attorney averred that she had written to Mr Kondlo in that connection on 12 October - in the form of an email to which a letter, dated 9 October, had been attached - and again on 3 November. She stated that Mr Kondlo had not replied in writing, but had

[9] The seventh and eighth respondents were the Minister of Home Affairs and the Director-General of the Department of Home Affairs, respectively.

informed her telephonically that the respondents had failed to respond to his requests for instructions. When he eventually appeared, Mr Kondlo confirmed that this had been the position. He was unable to explain, however, why he had not formally withdrawn as attorney, as perhaps he would have been advised to have done in such circumstances. That would have enabled the applicant's attorneys to deal directly with the respondents in respect of the non-production of the record. It would also have made it understandable to the court why no-one had appeared for the respondents when the matter was called. It is not acceptable for an attorney to appear for a client at a hearing and then simply not arrive at the resumption without giving notice to the court and the other parties of his withdrawal.[10] Attorneys in the office of the State Attorney are in no different position to their colleagues in private practice in this respect. Mr Kondlo appeared to recognise as much and apologised for his failure to comply with his duty.

[10] It seems that it is also necessary to point out that when the State Attorney's office receives instructions to act in any instituted proceedings, it must formally place itself on record in terms of the applicable rule of court by delivering the appropriate notice. As noted, the papers had been served at the State Attorney's office three weeks before the hearing before Dlodlo J on 5 August, so there had been ample time for the State Attorney to deliver such notice. Undocumented 'guest appearances' are not only impermissible; they are also unprofessional.

[11] The correspondence addressed by the applicant's attorney to the State Attorney was illuminating, even if depressing. Her letter dated 9 October was a lengthy missive; its length probably a reflection of considerable frustration. It is convenient for present purposes to quote the first one and a half pages:

> Dear Sir
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> As you know, we represent Mr Tshiyombo. You will recall that on 5 August 2015 we took a Court Order by agreement, in terms of which Mr Tshiyombo was granted a temporary asylum seeker permit pending the outcome of judicial review.
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> The further terms of the Order, which we stress was taken by agreement, set out a timetable for the further conduct of the matter.

[10] The failure by attorneys to properly comply with this duty has been described in a number of reported judgments as a '*gross discourtesy and a neglect of their duties as officers of the court*'; see *S v Ndima* 1977 (3) SA 1095 (N), at 1097B-D, and *MacDonald t/a Happy Days Café v Neethling* 1990 (4) SA 30 (N), the latter judgment having been referred to with approval in *Makuwa v Poslson* 2007 (3) SA 84 (T), at para 11. See also *Transorient Freight Transporters Corporation v Eurocargo Co-Ordinators (Pty) Ltd* 1984 (3) SA 542 (W), at 546B, where in the context of emphasising the need for attorneys who withdraw during proceedings to comply punctiliously with rule 16, Flemming J remarked '*The position of an attorney clearly creates obligations not only towards his own client but also towards the Court and to some extent to the opposite party*'.

The Respondents have still not filed the Rule 53 Record, which has effectively caused the matter to come to a standstill, the dates for the filing of further pleadings having passed as a result.

It is our experience that the Respondents' conduct in this regard is a strategy designed to frustrate and defeat our efforts to assist our clients and to exhaust our financial and personal resources. The pattern is as follows:

1. The Refugee Office Manager refuses to issue a temporary asylum seeker permit to the refugee whose case is going on judicial review without an Order of Court and a letter from the State Attorney;
2. The law clinic is accordingly compelled to incur considerable expense in bringing an urgent application to the Western Cape High Court for a temporary asylum seeker permit, pending the outcome of the review;
3. The asylum seeker is, as a consequence, forced to endure a period of weeks or even months during which his or her personal security, and that of his or her family, are unnecessarily placed in jeopardy, because, being undocumented pending the outcome of the urgent application, he or she is vulnerable to arrest and cannot legally continue in employment;
4. On the day of the urgent application the State Attorney invariably asks that the matter be settled and we take a Court Order by agreement, often without the Respondents tendering costs;
5. The State Attorney also usually agrees to a timetable for the further conduct of the matter, encompassing extended time periods which are advantageous to the Respondents (because they contemplate longer periods than those provided for in the Rules of Court) for the filing of the Record and further papers;
6. The Respondents then fail to file the Record, the State Attorney appears unable to persuade them to do so, and progress in the matter is accordingly blocked;
7. The law clinic then spends considerable time and resources attempting to persuade the State Attorney to progress the matter, contempt of court proceedings are expensive and have in any case proven ineffective.

In a few review applications the law clinic has followed the Rule 6 application procedure, and has not called upon the Respondents to file the Rule 53 Record. The thinking in those cases was that the refugee could attach available papers which, in our experience, constitute the Record that is habitually kept by the Department of Home Affairs, to his founding affidavit and that the Respondents could provide further relevant papers when they answer. This approach has been criticised in some cases by counsel for the Respondents who express the view that the law clinic is obliged to follow the Rule 53 procedure in judicial review proceedings. At the same time, the Refugee Office has become less willing to supply the law clinic with the contents of the refugee's file, making it difficult to properly articulate the review grounds in the founding affidavit.

Mr Tshiyombo's judicial review has been set down for argument, by agreement with the State Attorney representing the Respondents, on 10 November 2015. Despite our emails (copies attached) there has been no compliance with the Timetable set out in the Court Order. Our client is prejudiced by any further delay in the finalisation of this matter.

[12] I enquired of Mr Kondlo whether he would seek an opportunity to respond to the applicant's attorney's affidavit. He informed me that he would not. I know from experience that, as its name signifies, the UCT Refugee Rights Clinic acts for the applicants in a great many cases of this type, which come before the court regularly. It all too frequently happens in these matters that the respondents in the relevant section of the Department of Home Affairs do not comply with their aforementioned obligation in terms rule 53(1)(b) to produce the record; note, for example the remark by Bozalek J in *Katsshingu v Chairperson of Standing Committee for Refugees Affairs and Others* [2011] ZAWCHC 480 (2 November 2011) at p.13 '*secondly a perusal of the brief record <u>eventually prised out</u> of the respondents reveals…*' (my underlining). Earlier in the judgment, the learned judge had made the following observations and remarks, which have a familiar ring in the context of the difficulties in the current case:

> Set down at the same time as this [review] application, was a related application for contempt arising out of the respondents' failure to furnish the record of proceedings timeously in terms of Rule of Court 53. Those proceedings have, however, been postponed. The main application was launched in early September 2010. Notwithstanding this and the respondents' ongoing opposition, by the time the matter was argued on 25 October 2011, the respondents had failed to file any heads of argument or any opposing affidavits, with the result that the issues fall to be determined on the applicant's version alone.
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> The only explanation offered for this somewhat extraordinary state of affairs is that all along the said respondents had not opposed the primary relief sought on behalf of the applicant, which is still not opposed. However, this statement is belied by the notice of opposition and furthermore, there is no explanation why this alleged concession by the respondents to most of the relief sought by the applicant is nowhere reflected in the papers.
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> This situation in which no opposing affidavits are filed, despite the application being opposed, is one which this court has previously encountered in matters in which the third respondent [the Minister of Home Affairs] and officials of that department were brought to court. It reflects, in my view, a disturbing tendency to oppose litigation up till the door of the court, but without ever putting a version before the court. The implications of such an approach, particularly as regards the use of public funds and the office of the state attorney, are a matter of concern and indicate the need of the courts to be vigilant to ensure that such action does not become a norm and go unchecked.

[13] In *Radjabu v Chairperson of the Standing Committee for Refugee Affairs and Others* [2015] 1 All SA 100 (WCC), a matter in which the respondents opposed in part the relief sought by the applicant on review, the record was produced only after the court (in the circumstances described in para 16 of the judgment) insisted on its production. The respondents' failure to comply with rule 53(1)(b) in that matter was subsequently addressed by the then acting manager of the Cape Town Refugee Reception Office – the predecessor in

office of the sixth respondent in the current matter – in an affidavit. The explanation offered was dealt with by the court at para 29-30 of the judgment as follows:

> [29] He [the acting manager] explained the failure of the respondents to timeously produce the administrative record as required in terms of rule 53. It would appear that the Department's officials are reliant on prompting from the State Attorney in this regard. The implication in the answering affidavit is that the attorney in the State Attorney's office dealing with the current matter had been under the misapprehension that an extract from the administrative record provided to the applicant's legal representatives before the institution of the judicial review proceedings had comprised the entire record. Mr Mathebula's affidavit was supported by a confirmatory affidavit from an attorney in the office of the State Attorney, Cape Town. I must say that there is no excuse for any such misapprehension by the attorney of record of the respondents because it was obvious that the documents provided by some unknown person before the institution of proceedings could not have comprised the entire record. The failure to provide the full record timeously is to be deprecated. According to the applicant's attorney, who is engaged in many similar cases, it has been a commonly encountered omission in such matters. So much so, that the University of Cape Town Law Clinic has taken to instituting review applications in matters such as this availing of rule 6, rather than the ordinarily indicated rule 53.
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> [30] I have taken note of Mr Mathebula's explanation. He was not the incumbent of his current position during the period that non-compliance by his office with its obligations to provide the administrative records for judicial review purposes appears to have been endemic. He has given the court to understand that the problem will not continue under his management of the Cape Town office. It is to be hoped that this undertaking will be reflected in reality. It does not seem to me that the reaction to the historic problem by the Law Clinic in the use of rule 6 instead of rule 53 is well-advised. A court will in most cases be severely handicapped from dealing properly with the judicial review of an administrative decision in the absence of the administrative record of decision. In the event that the failure by an administrative authority to produce such records when required is an entrenched course of conduct, it is a matter that should be addressed by obtaining appropriate directions from the court and by reporting the conduct to the Public Protector and the Public Service Commission.

[14] If I had the time to look for them I could probably find other judgments in which similar remarks were made.[11] It is plain that there is a systematic dysfunctionality in the relevant branch of the Department of Home Affairs, which has resulted in its persistent failure or inability over a period of several years, and notwithstanding repeated judicial admonitions, to comply with its legal obligations in matters in which its decisions are taken

[11] *Radjabu* was a judgment that I gave in September 2014 and the judgment in *Katsshingu* came to my notice having been cited in Ms *Harvey*'s heads of argument in another connection. Another judgment in point that I stumbled upon in the course of preparing this judgment is *Mubala v Chairperson of the Standing Committee for Refugee Affairs and Others* [2013] ZAWCHC 208 (8 November 2013). The problem is not confined to the Western Cape; cf. *Bolanga v Refugee Status Determination Officer and others* [2015] ZAKZDHC 13 (24 February 2015) (another case cited in the applicant's heads of argument), at para 5-7 and 54.

on judicial review. The consequences prejudice not only the proper administration of justice, but also the effective administration of the Refugees Act. Courts are frequently called upon to make, and it would appear from the cases cited to me by Ms *Harvey*,[12] frequently do make substitutive decisions determining the refugee status of applicants in judicial review matters. This might be just and equitable in given cases, but it is far from ideal.

[15] The Act contemplates a system in which applications for refugee status are vetted inquisitorially. Refugee reception officers are permitted, indeed expected, to ensure that the allegations that an applicant relies on in support of the application are adequately set out, and may carry out such enquiry as they deem necessary in order to verify the information in the application.[13] Refugee status determination officers may request further information and, where appropriate, consult with or seek information from a UNHCR[14] representative.[15] The statutory appellate tribunals, namely the Standing Committee for Refugee Affairs and the Refugee Appeal Board, have similar powers and responsibilities of enquiry, including the power to request input from a UNHCR representative. Appropriate investigation and enquiry in any given case might well expose an apparently plausible application for refugee status to actually be unmeritorious, or *vice versa*. The on-going influx of refugees into this country is of such magnitude that it would be logistically impossible to thoroughly investigate every application, but one would imagine that persons whose work it is to deal with such applications daily would develop a knack of identifying the matters that warrant digging into. The inquisitorial, investigative and consultative amenities of which the statutory functionaries are expected to avail in determining the position of an applicant for refugee status are not available to the courts, which decide judicial review applications in an adversarial process on the evidence which the parties see fit to adduce. A failure to place the administrative record before the court could easily result in a court inappropriately giving substitutive relief.

[16] So, in *Radjabu*, for example, it was only when the record was, as my brother Bozalek aptly expressed, 'prised out' of the Department, that various inconsistencies in the applicant's statements in support of his application for refugee status came to light, which the court was not equipped to resolve, and which it therefore recognised required further investigation

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[12] *Bolanga v Refugee Status Determination Officer and others* supra, *Harerimana v Chairperson, Refugee Appeal Board and Others* 2014 (5) SA 550 (WCC), *Katsshingu v Chairperson of Standing Committee for Refugees Affairs and Others* [2011] ZAWCHC 480 (2 November 2011) and *Katabana v Chairperson of Standing Committee for Refugee Affairs and Others* [2012] ZAGPPHC 362 (14 December 2012). See further the other judgments mentioned in note 4 and at para 34 of *Radjabu* supra.

[13] See s 21(2) of the Act.

[14] United Nations High Commissioner for Refugees.

[15] See s 24(1) of the Act.

before a decision on the status application could properly be made. It accordingly declined to make the substitutive order pressed for by the applicant's counsel. Without the administrative record the court might have been persuaded to make a substitutive decision according the applicant refugee status when he might actually not have been entitled to it.

[17] The point I seek to illustrate is that the Department's systemic failure to comply with its procedural obligations in judicial review applications of this nature is liable to subvert the proper administration of the Act. And it is a matter for serious concern that the subversion is being perpetrated by the very functionaries who are employed to administer it.

[18] The respondents' failure to comply with rule 53(1)(b) prejudices the administration of justice because it tends to impinge adversely on the applicants' constitutional right to a determination of their suits by the application of law in a fair hearing. More prosaically, it tends also to increase the cost of litigation – in many cases at the expense of the taxpayer and thus, society as a whole. In the current case the failure by the respondents to comply with their obligation in terms of the rules of court and the order made on 5 August 2015 necessitated the applicant's attorney attending, albeit to no effect, on the aforementioned correspondence and telephone calls with the State Attorney's office. It also resulted in the matter unnecessarily being heard in the Fourth Division of this court (in which unopposed matters are heard only exceptionally). Had the respondents timeously indicated through their attorney that it was not their intention to oppose the application, as their failure to deliver answering affidavits is liable to suggest, the applicant could have arranged with the Judge President, as is customary in unopposed review applications in which the papers are not voluminous, for the matter to have been heard in the Third Division (the unopposed matters motion court). Quite apart from the costs considerations, to which I shall come next, the hearing of the matter in the Fourth Division in the circumstances described has meant that an effectively unopposed matter has taken up a day slot on the Fourth Division roll that could have been allocated to other litigants waiting in the queue for setdown dates for the hearing of their *bona fide* opposed matters.

[19] Counsel appearing in matters in the Fourth Division are reserved by the day. They are also required to file heads of argument (10 days before the hearing for applicants and five days for respondents). Counsel appearing in matters in the Third Division are not ordinarily reserved for the day, and there is no prescribed requirement that they file heads of argument. There is thus ordinarily a significant margin between the preparation and appearance fees entailed in a matter heard in the Fourth Division and one disposed of in the Third Division.

On the face of it the additional costs have been incurred as a consequence of the delinquency of the respondents, or at least some of them,[16] in disregarding their obligations in terms of the rules of court and the terms of a court order to which they agreed, and by ignoring requests by their appointed legal representative for instructions. It seems to me *prima facie* that the guilty parties should be individually liable to pay the additional costs that have been incurred in consequence of the aforementioned misconduct. An order will therefore be made that will afford the first to sixth respondents an opportunity to show cause why they should not be ordered to pay the additional costs occasioned by the hearing of the application in the Fourth Division *de bonis propriis* and on the scale as between attorney and client.

[20] I apprehend, however, that penalising individual functionaries, while it might be appropriate in the particular case, will not address the systemic problem of which this case is but another instance. Previous judgments have warned that the virtually institutionalised disregard for the rules and practices of the court by functionaries in these refugee status decision judicial reviews cannot be allowed to become the norm. Undertakings have been given that the problems will be addressed. All to no effect thus far. The prejudicial effects of this dysfunctionality have been described. Something more effective needs to be done to deal with it. Chapter 9 of the Constitution, and more particularly ss 181 and 182, provides for a Public Protector, who has the power, as regulated by national legislation,[17] amongst other matters, to investigate any conduct in the public administration that is alleged to be improper or to result in any impropriety or prejudice, to report thereon, and to take appropriate remedial action. The orders to be made might thus also incorporate a direction to the Registrar to refer a copy of this judgment to the Public Protector for her to consider an investigation, which might conduce more effectively than the courts' admonitions to appropriate remedial action. I shall defer a decision in that respect until the respondents have been afforded an opportunity to make any representations they may wish to make in that regard.

[21] Turning now to address the substantive issues in the review. The applicant has been in South Africa since 2006 or 2007 (the precise date of his entry into the country is not

[16] It is not clear at this stage who is to blame, as it would appear from the information given by Mr Kondlo from the bar that he dealt through an intermediary at the Department of Home Affairs, one Ms Banjamme, for the purpose of taking and requesting instructions. He did, however, also say that certain members of the Appeal Board and the sixth respondent had been furnished with copies of the order made on 5 August 2015.
[17] The Public Protector Act 23 of 1994, as amended.

disclosed on the papers).[18] According to his evidence, which is uncontroverted, he came here as a refugee from the violent and disorderly conditions prevailing in the eastern part of the Democratic Republic of the Congo. He described having been kidnapped and forcibly inducted into military forces in rebellion against the internationally recognised government of his country. Having been witness to atrocities carried out by those forces on the inhabitants of a village it had overrun, the applicant made his escape and managed, with the assistance of unspecified 'human rights organisations', to get himself to the capital, Kinshasa. He had not been there long when he was arrested for having been a member of the rebel force. It is not apparent on the papers how he came to be identified as such. He was held for a few days in a prison in Kinshasa before being transferred to the Kasapa Prison in Lumbumbashi in the south of the country near its border with Zambia. The applicant testified that '[i]t is well known that prisoners at Kasapa are tortured and killed using various methods'.[19] The applicant had been born in Lumbumbashi and had lived there until he completed his education, when he had moved to live with relatives on the maternal side of his family in the South Kivu Province in the east of the country. Having originated from that part of the country, he discovered that certain of the guards at the prison were acquaintances of his. They helped him to escape and he then made his way over the border into Zambia, whence he found transport on a truck headed through Zimbabwe to South Africa.

[22] The applicant was issued with a transit permit at the South African border post at Beit Bridge and travelled on to Johannesburg. After a few days in Johannesburg, he was advised by a friend to come to Cape Town to make application for asylum. He described the conditions at the refugee reception office here as 'chaotic and dangerous'.[20] After some months of waiting to obtain attention at the refugee reception office, he and a number of other applicants for refugee status were loaded onto busses and taken to the offices of the Department of Home Affairs in Barrack Street, where, with the help of another Congolese national whom he encountered there, he completed an application form and was issued with

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[18] The reasons furnished by the Refugee Appeal Board, which are discussed below, state that the applicant arrived in South Africa 'during January 2007'.

[19] The court has no judicial knowledge of Kasapa Prison or the conditions there, but the first to fifth respondents, who, as described above, have investigative powers and the opportunity to consult with UNHCR representatives to obtain information, have seen fit not to challenge the evidence.

[20] The challenging conditions at the refugee reception offices in Cape Town from time to time at the various addresses at which it has been housed over the years have been described in a number of judgments of this court; see *Kiliko and Others v Minister of Home Affairs and Others* 2006 (4) SA 114 (C); *Intercape Ferreira Mainliner (Pty) Ltd and Others v Minister of Home Affairs and Others* 2010 (5) SA 367 (WCC) and *410 Voortrekker Road Property Holdings CC v Minister of Home Affairs and Others* 2010 (8) BCLR 785 (WCC), [2010] 4 All SA 414.

an asylum seeker permit in terms of s 22 of the Act. He says that he did not receive any official assistance despite the fact that he did not have any English and was able to speak only Swahili and French and that he was not given a copy of the application form that he had filled in.

[23] It would appear that the applicant thereafter stayed in Cape Town for several years. He was reunited with his wife, who also seems to have made her way to Cape Town at about the same time. The couple have since had two children, the first born in 2007 and the second in 2013. No information has been given in the papers about the residence status of the applicant's wife.

[24] The applicant's asylum seeker permit was renewed from time to time. He was then requested to complete a fresh application for refugee status. Having done so, he was interviewed by a refugee status determination officer in terms of s 24 of the Act. His application was rejected as 'unfounded' in terms of s 24(3)(c) of the Act. The only record of the rejection of his application that the applicant has been able to tender is a copy of a torn scrap of paper, which, by its appearance, was part of a letter addressed to him by the Refugee Affairs section of the Department of Home Affairs' Cape Town office on 27 October 2008. According to the document, the applicant had lodged his application for asylum on 22 October 2008. It is evident from the remnant of the letter, attached as annexure KT4 to his founding affidavit, that the Department provided reasons for the rejection of the application. The reasons are not discernible however because that part of the letter has been torn off. The applicant has not explained in his founding affidavit why only part of the Department's letter has been attached to his papers. He also has not provided any indication of the nature of the reasons that were provided. One has to bear in mind, however, that the letter was in English, which the applicant did not speak.

[25] The applicant averred that he approached the UCT law clinic, which provided him with a letter to take to the refugee reception office. He thinks this may have been a 'letter of appeal'. A copy of the 'letter of appeal' was not included in the papers, and the failure to put the appeal document – if such it was - before the court was not explained. Whatever the position, he continued to renew his asylum seeker permit periodically until, in 2014, he was required to sign an unspecified document, apparently to confirm (the applicant used the word 'prove') that he had submitted an appeal. An appeal hearing followed in October 2014. An appeal in terms of s 26 of the Act is an appeal in the wide sense and allows a complete rehearing of the appellant's application for refugee status. The applicant was legally

represented at the appeal hearing. The applicant's appeal was dismissed and reasons were provided.

[26] A copy of the Refugee Appeal Board's reasons was attached to the applicant's founding papers. They refer in terms to 'Appellant's Notice of Appeal', dated 28 February 2014. The applicant has not disavowed in his affidavit having filed such a notice of appeal. It would presumably have been in the form prescribed in the Refugee Appeal Board Rules, 2013,[21] which provide expressly for the notice of appeal to be accompanied by an affidavit by the appellant setting out the reasons for the appeal. A copy of the notice of appeal and any accompanying affidavit was not placed before the court. Those documents would obviously have been part of the administrative record that should have been produced by the respondents. One would have thought though that the applicant's legal representative would have retained a copy.

[27] The summary of the applicant's claim given in the Appeal Board's reasons document is essentially consistent with that which he has given in his founding papers in the review application. The Board's reasons record, correctly, that the burden of proof was on the applicant to show that he is entitled to refugee status. They also state in that connection that '[t]*he appellant in casu needs to show that he/she* (sic) *left his/her* (sic) *country for specifically politically motivated reasons, should the appellant fail to show this, appellant's refugee claim will be rejected. Taking into account that refugee law is essentially a means of preventing the sending back of an individual to a state in which a risk of persecution on political grounds or opinion exists*'. Suffice it to say that insofar as the drafter of the Appeal Board's reasons was purporting to summarise the import of s 3(a) of the Act in regard to the qualifications for refugee status, the summary gives a misdirectedly narrow scope to the provision. It actually provides for refugee status to be afforded to any person who has a well-founded fear of persecution 'by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group'.

[28] Section 3 of the Act falls to be read with s 2, which incorporates the international law principle of *non-refoulement*.[22] Both provisions are to be construed generously in favour of

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[21] Form RAB (01).

[22] Section 2 provides:

General prohibition of refusal of entry, expulsion, extradition or return to other country in certain circumstances

Notwithstanding any provision of this Act or any other law to the contrary, no person may be refused entry into the Republic, expelled, extradited or returned to any other country or be subject to any similar measure, if as a

persons seeking to qualify for asylum. That much follows from the statute's long title and preamble. The long title describes the statute as an Act to 'give effect within the Republic of South Africa to the relevant international legal instruments, principles and standards relating to refugees; to provide for the reception into South Africa of asylum seekers; to regulate applications for and recognition of refugee status; to provide for the rights and obligations flowing from such status; and to provide for matters connected therewith'. The preamble records that 'South Africa has acceded to the 1951 Convention Relating to Status of Refugees, the 1967 Protocol Relating to the Status of Refugees and the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa as well as other human rights instruments, and has in so doing, assumed certain obligations to receive and treat in its territory refugees in accordance with the standards and principles established in international law'. As noted in *Radjabu* supra, at para 4, s 2 of the Act is manifestly premised on the expressions of the *non-refoulement* principle in Article 33 of the 1951 Convention and the 1969 OAU Convention.[23] Section 6(1) of the Act expressly enjoins that the statute be interpreted and applied with due regard to various international instruments including the 1951 Convention and the 1969 OAU Convention.

[29] It is evident from the applicant's version of the facts that he fears persecution on account of his perceived association with the Nkundla rebel group. In my view, taking the generous approach to the interpretation of the legislation that is indicated, the perceived association could reasonably be characterised as either based on political opinion or membership of a particular social group. In its context, the term 'particular social group' seems to me to denote a section of society that is identifiable by the common characteristics

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result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where-

(a) he or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or

(b) his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or the whole of that country.

[23] Article 33 of the 1951 Convention provides: '*No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion*'. Article 11(3) pf the 1969 OAU Convention provides: '*No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2*'. Paragraph 2 of Article I of the OAU Convention provides: '*The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality*'.

of the persons comprising it or of the basis for their mutual coherence.[24] A rebel group would qualify as such. The basis for the existence of a group in rebellion against the established government of a country would in any event ordinarily be some form of dissenting political opinion. It would defeat the object of the statute were an applicant for asylum to be held to be disqualified because his well-founded fear of persecution was founded on his perceived political opinion or his perceived membership of a particular social group rather than his actual opinion or actual membership. Thus it did not matter for the purpose of his asylum application that the applicant did not share the political opinions of the rebel group or had not voluntarily been a member of it.

[30] Notwithstanding its flawed summary of the import of s 3(a) of the Act, the Appeal Board assumed in the applicant's favour on his version of the facts that he could notionally have qualified under the provision. It rejected his appeal on the basis of a number of adverse credibility findings and inferential conclusions. These were set out in the reasons document as follows:

> **FINDING:**
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> [12] In reaching its decision the Board has thoroughly assessed the appellant's claim and has had due regard to the objective background information on the appellant's country of origin. Human Rights Watch says Laurent Nkunda's troops have been implicated in numerous killings, torture and rapes.
>
> [13] In **Principles of International Refugee Law** the learned author Guy S. Goodwin-Gill states the following: "one of the hardest tasks in refugee determination, and one that is central to the process, is assessing the credibility of the applicant….The decision maker must assess not only the credibility of the applicant, but also the credibility of the story in itself…" This means that the Board must be convinced that the appellant is telling the truth before it can consider the principal issues.
>
> **CREDIBILITY**
>
> The Appeal Board accordingly assessed the credibility of the appellant's story and makes the following remarks in passing.
>
> [14] The Board would have given the appellant the benefit of the doubt if his case stopped where he managed to escape from the Kakwakunde village to Kinshasa. It was the appellant's case that he

[24] In *Mayemba v Chairperson of Standing Committee for Refugee Affairs and Others* [2015] ZAWCHC 86 (10 June 2015), it was argued that all young men in South Kivu who were vulnerable to forced recruitment into armed forces comprised '*a particular social group*' within the meaning of the provision (see para 35-37 of the judgment). That argument strikes me as ambitious because it seems to involve equating innate vulnerability to forced recruitment by virtue of age and gender with '*persecution*' within the meaning of s 3(a) of the Act, which I find problematic. I would have thought that young men who felt compelled to leave their homes due to such circumstances would find surer succour in s 3(b). Rogers J, however, found it unnecessary to decide the point in the context of his conclusion that the merits of that particular case fell to be assessed in a fresh application for refugee status, which he directed the applicant to submit for determination by a different refugee status determination officer.

joined the soldiers under duress & that he discovered the wrongfulness of the soldiers conduct when he saw the soldiers raping people.

[15] The fact that appellant was arrested in Kinshasa & subsequently transferred to a prison in Lubumbashi by virtue of being accused of being a Nkunda rebel means that the arresting authority had concrete evidence to secure appellant's arrest in Kinshasa. It is therefore highly improbable as alleged that appellant merely received training for a period of three months & that appellant was only involved in the once-off fighting in Kakwakunde village as alleged. A more probable inference to be drawn is that appellant was by choice a Nkunda rebel & that under the emblem of the Laurent Nkunda he was involved in gross human rights violations. The Board therefore rejects appellant's submission that he has a well-founded fear of being persecuted based on his membership of a particular group, meaning being considered a rebel.

[16] The Board also fails to understand why appellant did not remain to face a military trial whereby on his version he would've been given indemnity for his role in the attack on Kakwakunde village. Appellant was an adult at all material times.

[31] The basis for the inference by the Appeal Board that the applicant's arrest in Kinshasa and subsequent detention in Lumbumbashi meant that the arresting authority had 'concrete evidence' against him is not explained in the reasons. It was not in issue on the applicant's version that he had been a member of the Nkunda forces, albeit involuntarily. That would have been sufficient, by itself, to explain his arrest. The leap in the Appeal Board's reasoning by inferring from the mere fact of the applicant's arrest that it was 'highly improbable…that [he] merely received training for a period of three months [and] that [he] was only involved in the once-off fighting in Kakwakunde village' is illogical. Its illogicality is compounded by the further determination that his arrest made it more probable that he had been a willing member of the rebel group and involved in 'gross human rights violations'.

[32] If there were reason to believe that the applicant had been involved in gross human rights violations, he would be excluded from obtaining asylum in terms of s 4(1)(a) and/or (c) of the Act. Any relevant authority wishing on one of the exclusionary grounds in s 4 of the Act to deny refugee status to a person who would otherwise qualify for asylum must have a rational basis for believing that the exclusionary ground applies in the given case. It is apparent from the Appeal Board's reasons that it found that there was reason to believe – 'probable', as the Board put it - that the appellant was excluded from qualification in terms of s 4.[25] That conclusion appears to have been entirely speculative. There were no inherent

[25] Section 4 of the Act provides:
(1) A person does not qualify for refugee status for the purposes of this Act if there is reason to believe that he or she-
(a) has committed a crime against peace, a war crime or a crime against humanity, as defined in any international legal instrument dealing with any such crimes; or

probabilities to support the Board's finding and no indication that it was possessed of any information to contradict the applicant's version of the facts, which is irreconcilable with its finding. As it was, the Board expressed its conclusion without any reference to s 4; it recorded that it rejected the applicant's claim to have a well-founded fear of persecution because he had been a willing member of the rebel group and had probably participated in gross human rights violations. That, of course, is a non-sequitur in the context of the applicant's uncontroverted version of events.

[33] The statement in paragraph [16] of the Board's reasons is also difficult to understand. It suggests that the appellant might reasonably have expected to have his version accepted in a fair judicial process in his home country. It ignores completely the applicant's evidence that he was detained in conditions in which he was subjected to gratuitous physical abuse and in a prison that was said to be notorious for the torture and killing of its inmates.

[34] In paragraph [18] of the reasons document the Appeal Board considered whether the applicant had shown that he had qualified for refugee status in terms of s 3(b) of the Act and concluded that he had not. It is not readily apparent why the Board undertook that exercise because his claim more evidently fell to be considered with reference to s 3(a), but it may be that his legal representative made submissions in support of the application on the basis of s 3(b) in the alternative. This might have been apparent had the record of proceedings been available. Section 3(b) provides for refugee status to be afforded to a person who 'owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere'.

[35] Paragraph [18] of the Appeal Board's reasons document goes as follows:

> [18] The Board having rejected appellant's version in terms of S3(a) of Act, 130 of 1998, will now proceed to deal with averments in terms of S3(b) …; more specifically that appellant's habitual residence is Sud-Kivu. Appellant & his legal representative failed to acknowledge Lumbumbashi as appellant's habitual residence and appellant & his legal representative failed to address the Board as to what prevents appellant from returning to Lumbumbashi as appellant was not compelled to leave Lumbumbashi; appellant unilaterally decided to leave Lumbumbashi to live by his uncle in Sud-Kivu.

(b) has committed a crime which is not of a political nature and which, if committed in the Republic, would be punishable by imprisonment; or

(c) has been guilty of acts contrary to the objects and principles of the United Nations Organisation or the Organisation of African Unity; or

(d) enjoys the protection of any other country in which he or she has taken residence.

> The Board finds that Lumbumbashi is relatively stable & that nothing prevents appellant from returning to Lumbumbashi. Appellant by choosing to flee his country instead of remaining and facing a military trial cannot use this arrest to justify not being able to return to Lumbumbashi and or Kinshasa.

[36] The content of paragraph [18] of the Board's reasons would indicate that the Board assessed the applicant's connection with Lumbumbashi without due regard to his evidence. According to the evidence noted in the Board's reasons, the applicant had left Lumbumbashi in 1998 or 1999 to live in South Kivu Province. He was returned there several years later by the DRC authorities only for the purpose of detention in the Kasapa Prison. As mentioned, his description of the circumstances of his detention was not consistent with any reasonable expectation of a fair trial. The notion that he should reasonably be expected to have returned from South Africa to Lumbumbashi is risible in the context of his version of the facts. If the Board was possessed of information that would cast doubt on the applicant's version, it did not disclose it in its reasons and, as described, there are no opposing affidavits.

[37] It is apparent from the Appeal Board's reasons – certainly when they are considered, as I have been obliged to, without reference to the record - that it approached the applicant's application sceptically. That is not the proper approach in such matters. In *Tantoush v Refugee Appeal Board and Others* 2008 (1) SA 232 (T), at para 196-197, Murphy J gave the following summary, premised on the guidelines in the UNHCR Handbook, of the manner in which the Appeal Board should proceed:

> 196. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should be given the benefit of the doubt.
>
> 197. The requirement of evidence should thus not be too strictly applied in view of the difficulty of proof inherent in the special situation in which an applicant for refugee status finds himself. Allowance for such possible lack of evidence does not, however, mean that unsupported statements must necessarily be accepted as true if they are inconsistent with the general account put forward by the applicant.

[38] Moreover, according to the uncontroverted allegations in the founding affidavit, the aforementioned inferences drawn by the Appeal Board were based on unfounded assumptions and opinions that were not put to the applicant or his legal representative during

the appeal hearing. Accepting the correctness of these allegations, as I must in the circumstances, enjoins the conclusion that the conduct of the appeal hearing was procedurally unfair.

[39] It follows that the applicant has succeeded in establishing a case for the review and setting aside of the Appeal Board's decision in terms of s 6(2)(c), 6(2)(f)(ii)(cc) and 6(2)(h) of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'). He has done so mainly on the basis of the Appeal Board's reasons rather than his own averments concerning the conduct of the appeal hearing, in which regard his founding affidavit was distinctly lacking. For example, his allegation that '[t]first to fourth respondents unfairly had regard to documents which had been requested by my legal representative, but which were withheld by them' was of little evidential value absent any identification of the nature of the documents concerned, details of the time and manner in which their production had been requested and the circumstances in which they had been withheld.

[40] The applicant also applied for the review and setting aside of the adverse determination made by the refugee status determination officer (the fifth respondent). Ms *Harvey* conceded that this was inappropriate, as the decision had been overtaken by the decision of the Appeal Board, which had occurred in the context of the required exhaustion by the applicant of his internal remedies. The question remains, however, whether the applicant is entitled to a declaration that the refugee status determination's decision or conduct had been inconsistent with the Constitution; see s 172 of the Constitution. In my judgment he is not. The relevant allegations by the applicant in his founding affidavit are bald and amount to little more than a statement of conclusions. The applicant appears to almost to have realised as much, pointing to the disadvantage he laboured under without access to the record and purporting to 'reserve [his] right to make further submissions', presumably after the administrative record had been produced. He chose to proceed with the application without availing of the mechanisms in the rules of court to enforce compliance by the respondents with their obligation to produce the record. In the result his case in this respect was inadequate.

[41] As mentioned the applicant has sought substitutive relief by way of an order declaring him to be 'a refugee who entitled to asylum in South Africa as contemplated by section 3 of the Refugees Act'.[26] That course, as s 8(1)(c)(ii)(aa) of PAJA confirms, is indicated only in

[26] Para 3 of Part B of the notice of motion.

exceptional circumstances. The prudent and proper course when an administrative decision is set aside on review is almost always to remit it to the administrative functionary for determination afresh. The relevant principles in determining whether the exceptional remedy of a judicially made substitutive determination should be granted were summarised, with reference to earlier authority, in *Gauteng Gambling Board v Silverstar Development Ltd and Others* 2005 (4) SA 67 (SCA), at para 28-29, and discussed more extensively in the recent judgment of the Constitutional Court in *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* [2015] ZACC 22 (26 June 2015), at para 34-55.

[42] The Constitutional Court emphasised that the term '*exceptional circumstances*' in s 8(1) of PAJA must be read contextually with the words '*just and equitable*' in the opening words of the subsection.[27] As Khampepe J stated at para 35, 'Simply put, an exceptional circumstances enquiry must take place in the context of what is just and equitable in the circumstances'. The notion of justness and equitability incorporates a notable degree of flexibility.[28]

[43] In the current matter I consider that the following characteristics of the case make it just and equitable that the exceptional remedy sought by the applicant be considered. The processing of his application for refugee status has taken an inordinate length of time. He had been in the country on an asylum seeker's permit for seven and a half years before the determination of his appeal. A delay of that length cannot be ascribed to the ordinary vicissitudes of litigation or bureaucracy. The respondents have put nothing before the court to explain or justify it. Constitutional principles enjoin administrative efficiency; not as an abstract norm, but for the benefit and protection of all of us who are unavoidably affected by various forms of administrative action to a greater or lesser degree. The principle is reflected in the preamble to PAJA itself, in acknowledgement of the prescript in s 33(3)(c) of the

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[27] The relevant provisions of s 8(1) of PAJA read as follows:

> *(1) The court or tribunal, in proceedings for judicial review in terms of section 6 (1), may grant any order that is just and equitable, including orders-*
> *(a) directing the administrator-*
> *(i) …; or*
> *(ii) …;*
> *(b) …;*
> *(c) setting aside the administrative action and-*
> *(i) remitting the matter for reconsideration by the administrator, with or without directions; or*
> *(ii) in exceptional cases-*
> *(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action;*

[28] *Trencon Construction* supra, at para 55.

Constitution.[29] It is also implicit in the basic values and principles governing public administration set forth in s 195 of the Constitution.

[44] The implications of the delay are that it was long enough for the applicant to establish roots in the country. Two children have been born to him and his wife during that period. The administration of the Refugees Act falls, according to its own precepts, to be imbued with a humanitarian approach. The adverse effect on the applicant's family's sense of security of further extending the delay in respect of determining their right to live here is obvious. The holder of an asylum seeker permit furthermore does not enjoy the access that a refugee does to travel documentation, health and education benefits and eventual qualification for permanent residence. In these circumstances it would be just and equitable for a substitutive order to be made if the requirements for granting such exceptional relief have been met. In short, an 'exceptional circumstances enquiry' is merited.

[45] At para 43-46 of its judgment in *Trencon Construction* the Constitutional Court reiterated the contextual pertinence of the separation of powers in terms of the Constitution and the concomitant duty on courts engaged in the consideration of a substitutive order in terms of s 8(1) of PAJA to have due regard to the principle of judicial deference to administrators in the sense explained in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 at para 46-48. In *Bato Star* loc. cit. the Court endorsed the approval by Schutz JA in the appeal court of the view expressed by Professor Cora Hoexter that that type of judicial deference '*is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinise administrative action, but by a careful weighing up of the need for – and the consequences of – judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal*'.[30] As Schutz JA explained, judicial deference in the relevant sense 'does not imply judicial timidity or an unreadiness to perform the judicial function'.[31] It thus does not mean, as the Constitutional Court indeed confirmed in *Trencon Construction*, that when a review court is in as good a position as the administrator to make the decision and the nature of the decision that should be made in the given circumstances is a foregone conclusion it

[29] Section 33(3)(c) of the Constitution requires the enactment of legislation to give effect to the rights to just administrative action in terms of s 33(1) and (2) and which must '*promote an efficient administration*'.
[30] Hoexter, *The Future of Judicial Review in South African Administrative Law* (2000) 117 SALJ 484 at 501-2.
[31] *Minister of Environmental Affairs and Tourism and others v Phambili Fisheries (Pty) Ltd and another* [2003] 2 All SA 616 (SCA), at para 47-50.

should refrain from taking the exceptional step of making a substitutive order if it is just and equitable in the circumstances to do so.

[46] The decision entailed in the current matter falls to be made by testing a given set of facts against the qualifying criteria prescribed in the Act. The court is as well qualified as the administrator to do that. The respondents have not availed of the opportunity to oppose the application and have not given any indication of the existence of any information that might give reason for further investigation of the applicant's version, or indeed of any wish to enquire into the matter further. In that respect the application is significantly different from many other similar matters in which the review is conceded, but a substitutive order is opposed.[32] On the basis of the uncontroverted version of the applicant it is a foregone conclusion that he should be given refugee status. In the peculiar circumstances, more particularly those discussed in paragraphs [43] and [44], above, as well as the nature of the entirely misdirected approach to the applicant's asylum application by the Appeal Board, it would not be fair to the applicant to remit the matter for reconsideration. In the event that the applicant's version should subsequently be shown to be false in any material respect, the Standing Committee established in terms of s 9 of the Refugees Act is empowered in terms of s 36 of the Act to withdraw his refugee status. A substitutive order thus holds no prejudice to the state.

[47] The following orders are made:

a) The decision of the Refugee Appeal Board dated 28 January 2015 dismissing the applicant's appeal against the decision by the fifth respondent in terms of section 24(3)(c) of the Refugees Act 130 of 1998 to reject the applicant's application for refugee status as 'unfounded' is reviewed and set aside.

b) In terms of section 8(1)(c)(ii)(aa) of the Promotion of Administration of Justice Act 3 of 2000, the aforementioned decision of the Refugee Appeal Board is hereby substituted with a decision setting aside the decision of the fifth respondent and substituting it with a decision in terms of section 24(3)(a) of the Refugees Act granting asylum to the applicant.

c) The sixth respondent is directed to issue the applicant with a formal written recognition of refugee status as provided in section 27(a) of the Refugees Act read with the provisions of regulation 15 of the Refugee Regulations (Forms and

[32] Cf. e.g. *Radjabu* supra and *Mayemba* supra.

Procedure), 2000 published in GN R366 in GG 21075 of 6 April 2000, as amended by GN R938 in GG 21573 of 15 September 2000, within 10 days of the service upon her of this Order.

d) The costs of the application shall stand over for determination on the return date of the orders set out in paragraphs (e) and (f), below.

e) The first, second, third, fourth, fifth and sixth respondents are hereby given notice to show cause on Thursday, 10 December 2015 at 10h00, or as soon thereafter as the matter be heard, why an order should not issue holding them, or any one or more of them, personally liable, on the scale as between attorney and client, for the additional costs incurred by the applicant as a consequence of this matter having had to be heard in the opposed motion court rather than in the unopposed motion court in the circumstances described in paragraphs [2]-[19] of the judgment, and they are directed to deliver any affidavits they may make in that regard before noon on Monday, 7 December 2015.

f) The respondents are hereby given notice to show cause on Thursday, 10 December 2015 at 10h00, or as soon thereafter as the matter may be heard, why the Registrar should not be directed to forward a copy of this judgment to the Public Protector for possible investigation as foreshadowed in paragraph [20] of the judgment, and they are directed to deliver any affidavits they may make in that regard before noon on Monday, 7 December 2015.

A.G. BINNS-WARD

Judge of the High Court