THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

In the matter between

Case No: 19960/2014

OWALE MAYEMBA — **APPLICANT**

and

CHAIRPERSON OF STANDING COMMITTEE FOR REFUGEE AFFAIRS — **FIRST RESPONDENT**

REFUGEE STATUS DETERMINATION OFFICER — **SECOND RESPONDENT**

MINISTER OF HOME AFFAIRS — **THIRD RESPONDENT**

DIRECTOR-GENERAL OF DEPARTMENT OF HOME AFFAIRS — **FOURTH RESPONDENT**

Coram: ROGERS J

Heard: **26 MAY 2015**

Delivered: **10 JUNE 2015**

JUDGMENT

ROGERS J:

Introduction

[1] On 15 June 2011 the applicant ('Mayemba') made application at the Refugee Reception Office in Musina for asylum in terms of s 21 of the Refugees Act 130 of 1998 ('the Act'). On 22 June 2011 he returned to Musina for an interview with a Refugee Status Determination Officer ('RSDO'). The RSDO, one Davhana Norman ('Norman'), rejected his application in terms of s 24(3)(b) as 'manifestly unfounded'. On 9 November 2011 the Standing Committee for Refugee Affairs ('the Committee') confirmed this decision in terms of s 25(3)(a).

[2] Mayemba says that he learnt of these decisions in May 2014 when visiting Customs House in Cape Town for purposes of renewing his temporary asylum seeker permit in terms of s 22. After receiving advice from a friend, he made an appointment with the UCT Refugee Clinic ('the Clinic ') on the first available date, being in July 2014. The Clinic made investigations. On 6 November 2014 the present application was issued. Part A sought urgent interim relief which was resolved by agreement. Part B seeks the reviewing and setting aside of Norman's decision of 22 June 2011 and the Committee's decision of 9 November 2011 and a declaration that Mayemba is a refugee entitled to asylum in South Africa. Ms de la Hunt appeared for Mayemba and Ms Slingers for the respondents.

Facts – Mayemba's flight to South Africa

[3] Mayemba's account of his history in the DRC and arrival in South Africa is briefly as follows. He was born on 10 October 1989 and is now 25. He grew up with his parents in the town of Fizi in the South Kivu province of the DRC. (The northern part of South Kivu borders on Burundi to the east. The southern part of South Kivu, where Fizi is situated, has Lake Tanganyika as its eastern boundary.) It is common cause that in recent years South Kivu has been wracked by civil war which has seriously disturbed and disrupted public order. Mayemba was compelled, due to

political unrest, to write his final school examinations in another district – this was in June 2009. Civil unrest grew worse as a result of which he was unable to enrol for tertiary education.

[4] His father was an active and high-profile member of the MLC,[1] as a result of which he was persecuted by the government and arrested and interrogated by the police. (Although in his founding affidavit he said that his father was 'frequently' arrested, in the replying affidavit he said his father was arrested for about a month during 2010.)

[5] During 2010 the civil war intensified and rebel attacks became more frequent. Their home was attacked one night while Mayemba was visiting friends. Upon his return he found the house vandalised and his parents and brother gone. Most of the villagers fled during the night. Mayemba stayed for a few weeks with a friend who lived about half an hour away. He tried without success to locate his family by placing an advertisement on the local radio station and through the Catholic Church.

[6] Mayemba was afraid that he would be conscripted by one of the rebel groups which were intensifying their recruiting of young men in the area. He did not personally know anyone who had been forcibly recruited but reports of attacks by rebels, where young men were captured, were commonplace. Because he did not want to be a rebel soldier and because he feared death if he refused to join, he fled to Kinsagani in the Orientale province in the Eastern DRC where he had a paternal aunt. He lived there for about two months. (Kinsagani lies to the north west of South Kivu. From South Kivu one would reach Kinsagani, which is Orientale's largest city, by passing through the provinces of Maniema or North Kivu. Orientale's eastern border is with Uganda.)

[7] Mayemba's aunt's husband was not prepared to harbour him indefinitely, so he returned to Fizi to look for his family and see whether the conflict had been resolved. He stayed there for only a few days. Circumstances remained chaotic and violent. (He says, on advice from the Clinic, that this is well-documented. For

[1] Mouvement pour da Liberation du Congo.

example, at the beginning of January 2011 FARDC soldiers (the DRC army) took part in mass revenge rapes in Fizi. In mid-February 2011 villagers in the Fizi region were attacked and raped by armed men who appeared to be from the FDLR (rebels from Rwanda).)

[8] A friend advised him to go to Bujumbura in Burundi where he remained for about four months washing cars. While he was there he heard that he could seek asylum in South Africa. He made the journey by truck, entering South Africa through Beit Bridge.

[9] He says the primary reason he fled was the ongoing civil war in South Kivu which seriously disturbed the peace there. A secondary reason was that as a young man he was particularly susceptible to being forcibly recruited as a rebel soldier.

The facts – the application for asylum

[10] Mayemba's account of the process followed in his application for asylum is the following. At the time he arrived in South Africa he could speak Lingala, Swahili and French. He did not yet speak or write English.

[11] He was assisted in completing the asylum application dated 5 June 2011 by a Somali interpreter who could speak Swahili. Because the interpreter's dialect differed from his, it was difficult to communicate effectively. Mayemba conveyed the essence of why he fled the DRC. He cannot say whether the interpreter correctly wrote down what he said. Most of the form was completed by the interpreter, the rest by Mayemba under the interpreter's direction. At no stage did he talk to a Refugee Reception Officer ('RRO'). He received no explanation regarding the asylum process.

[12] When he returned to the Refugee Reception Office on 22 June 2011, he was handed a copy of the RSDO's decision rejecting his application as manifestly unfounded. No interview with a RSDO took place. He does not know whether the person who handed him the decision was an RSDO. He was not asked any questions and there was no hearing.

[13] On the same day he was given a s 22 permit valid for six months. (This was presumably to allow time for the Committee to review the RSDO's decision in terms of s 25.) Because the asylum process had not been explained to him, he was not aware that the process followed in his case was irregular and unfair.

[14] He only learnt during May 2014 of the Committee's decision dated 9 November 2011. The Committee did not seek further information from him or hold a hearing.

[15] I should mention that Mayemba and the Clinic only obtained the application of 15 June 2011 and the RSDO's 'interview notes' of 22 June 2011 after the application was delivered and pursuant to the furnishing by the respondents of the record. Mayemba made a supplementary founding affidavit dealing with these documents.

The respondents' version

[16] The respondents in the nature of things cannot be expected to have personal knowledge of Mayemba's history in the DRC. They question certain of his allegations on the basis of what he allegedly said in his application for asylum and in his alleged interview with the RSDO. They also criticise the lack of detail in his founding papers.

[17] The respondents do not contest that South Kivu has suffered serious disturbance and serious disruption of public order in recent years on account of civil war. They do not say that events of the kind described by Mayemba have not occurred. However, and based on statements allegedly made by Mayemba in the asylum process, they say he is an economic migrant, that he left the DRC because there were no jobs there and that he hoped to get work in South Africa.

[18] In regard to the asylum process, Norman states that in making an application for asylum an asylum seeker is assisted by an RRO who explains the process and determines whether the applicant requires the assistance of an interpreter. This is what 'normally' happens but he cannot specifically say what happened in

Mayemba's case on 15 June 2011. (It is difficult to identify the name of the RRO from his/her signature on the application form. Presumably the respondents would have been able to identify him/her. No affidavit by the RRO in question was filed.)

[19] In regard to Norman's decision as an RSDO, he says that he does not have an independent recollection but that he has never made a decision on an asylum application without interviewing the applicant. His interview notes show that an interview was held. The interview notes reflect that he asked Mayemba whether his only reason for coming to South Africa was to seek employment, to which he responded yes.

[20] The chairperson of the Committee says in his affidavit that, based on the documentation received by the Committee, Mayemba did not qualify for asylum as he was not a 'refugee' within the meaning of s 3(a) or s 3(b) of the Act. The chairperson says that the Committee is not obliged to have a hearing before upholding a decision of the RSDO. He adds that if the process was flawed, this has not prejudiced Mayemba, because – having regard to the information in the founding papers – the application for asylum would in any event have failed. This is because, in the absence of greater particularity, Mayemba has not established his entitlement to asylum (ie a reasonable possibility of persecution) and because he has not shown that he could not safely live in Kinsagani.

Evaluation – process

[21] In my view Mayemba has established that the process followed in his case was materially flawed, both at the RRO stage and the RSDO stage. These irregularities fatally taint the Committee's decision because the Committee relied on the integrity of the earlier processes.

[22] There is no direct evidence challenging Mayemba's version of what happened on 15 June 2011. The respondents could have identified and filed an affidavit by the RRO in question. This they did not do. The fact that a particular process is 'normally' followed does not mean that it was followed in this case.

[23] There are various features of the application form which lend credence to what Mayemba says. The form records that he was assisted by an interpreter identified only as 'Ali'. Some of the information recorded in the form, on matters in regard to which Mayemba would have had no reason to lie, is manifestly incorrect, for example the town where he was born (Uvira instead of Fizi), his ethnic group (Mufulero – an ethnic group unknown to him – instead of Mwenga), his marital status (married instead of single), the supposed name of his wife and son (the named people are in fact his sister and her child) and that he had qualified and worked as a teacher for six years from 2000 to 2006 (he had not been able to enrol for tertiary education and was only 11 years old in 2000). This shows a serious breakdown in communication in the completion of the application form, owing to inadequate interpretation.

[24] Furthermore, it is clear, as Mayemba pointed out in his supplementary founding affidavit, that three different handwritings appear on the form, whereas according to him he signed it at a time when only he and the interpreter had written on the form. In the important questions relating to the merits of the asylum application, there are three different handwritings, containing the following statements: 'I came here to look for work since there is no work in Congo' (handwriting 1); 'Also, I ran away for my safety' ('handwriting 2), 'I ran away to look for better life' (handwriting 1); 'If I return to my country I can be killed to because I will not be safe' (*sic*, handwriting 3). Handwriting 1 appears to be that of the RRO, because it corresponds with the handwriting in para 9 which is for official use and contains the RRO's preliminary comment ('economic reason'). It thus seems that the answers adverse to Mayemba's asylum application were answers written out by the RRO, in circumstances where according to Mayemba he never spoke with the RRO. He alleges in his supplementary answering affidavit that he never made the statements apparently written out in the RRO's handwriting.

[25] The RRO is obliged by s 21(1)(b) to ensure that the application form is properly completed. Where necessary, the RRO must assist the applicant. In terms of regulation 4(1)(a) the RRO must ensure that the applicant is provided with adequate interpretation in accordance with regulation 5. Regulation 5(1) provides that where practicable and necessary the Department will provide 'competent

interpretation for the applicant at all stages of the asylum process'. Where this is not practicable, the applicant in terms of regulation 5(2) will have to provide an interpreter but he/she must then be given at least seven days' advance notice to bring an interpreter.

[26] In my view, the RRO failed to provide Mayemba with a competent interpreter. It is clear that there was a breakdown in communication between Mayemba and the Department's interpreter owing to differences in dialect. The extent of the errors in the form is such that the interpretation cannot be regarded as having been competent. If the Department did not have an interpreter who could properly assist Mayemba, the regulation 5(2) procedure should have been followed.

[27] Furthermore, the RRO in my view did not comply with his duty to ensure that the application form was properly completed. While some of the errors may not have been self-evident to the RRO, the information about Mayemba's qualification and employment as a teacher was obviously irreconcilable with his recorded date of birth. Critical information regarding the merits of the asylum application were completed in different hands and this was not clarified.

[28] In regard to the RSDO's decision of 22 June 2011, s 24(2) provides that the RSDO must have due regard to the rights set out in s 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'. Regulation 10(1) requires the RSDO to conduct 'a non-adversarial hearing to elicit information bearing on the applicant's eligibility for refugee status'. The obligations imposed by s 24(2) are repeated. An applicant bears the burden of proving that he is a refugee (regulation 11(1)) but in the absence of documentary evidence an applicant's credible testimony may suffice (regulation 11(2)). Regulation 5, in regard to interpretation, is applicable to the proceedings of the RSDO.

[29] Norman says, fairly enough, that he does not have an independent recollection of the interview. His version is thus based on the process he says he 'invariably' follows together with his 'interview notes'. However, at least in this particular instance I am satisfied that he could not have followed his usual process

and that there is no genuine dispute of fact on that point. The interview notes (except for Mayemba's signature and the name and surname printed above it) are in Norman's handwriting. There is nothing in the interview notes which could not simply have been transposed from the application form. In other words, there is no information proving that an interview must have taken place. That information was merely transposed from the application form is the inescapable inference from the fact that some of the information in the interview notes repeats obvious errors from the application form, namely that Mayemba was born in Uvira and that he was married and had children. The reason given for seeking asylum is recorded in the interview notes as: 'I left my country because they are no jobs and I came to look for jobs in South Africa. Is that all, for reason you to leave your country? Yes'. The first sentence is simply a paraphrase of what was written, in the RRO's handwriting, in the application form.

[30] There is no indication that the RSDO interrogated the statements in the application form to the effect that Mayemba fled the DRC for his safety and feared that if he returned he would be killed. I think I may assume that RSDOs would be aware, in the light of reports from organisations such as the UNHCR, Human Rights Watch and Amnesty International, of the plausibility of such a claim and of the serious disturbances and disruption in the Eastern DRC.

[31] An RSDO conducting the non-adversarial hearing prescribed by regulation 10(1) may not legitimately refrain from asking questions in the hope that the applicant will not say enough to justify the granting of asylum. The RSDO must properly and in good faith elicit information bearing on the applicant's eligibility (cf *Radjabu v Chairperson of Standing Committee for Refugee Affairs & Others* [2015] 1 All SA 100 (WCC) paras 23-24). This does not mean that the RSDO must prompt the applicant to make statements bringing himself within the definition of a 'refugee' (ie put words in his mouth). The RSDO must, however, probe allegations which are suggestive of an entitlement to asylum. In the present case, this would have required Norman to elicit further information about the statements in the application form that Mayemba ran away from the DRC for his safety and feared that if he returned he would be killed. If Mayemba made statements to the effect that he was looking for a better life in South Africa and hoped to find work here, the inter-

relationship between those statements and his concerns for his safety should have been interrogated. A person who leaves his country because he is unsafe there and fears for his life may, consistently with such a fear, say that he hopes to find a better life in South Africa and get a job. The RSDO's recommendation to the Committee made no mention of the statements made by Mayemba that he fled the DRC for his safety and feared that he would be killed if he returned.

[32] Significantly, where an interpreter is utilised, the standard RSDO interview form requires details to be inserted of the interpreter's name and his/her organisation and makes provision for the interpreter to sign. This part of the document was, in Mayemba's case, left blank. One can safely say that even if Norman interviewed Mayemba, no interpreter was present. Mayemba could not speak English. This omission, pointed out in the supplementary founding affidavit, received no satisfactory response from the respondents. The absence of an interpreter when one is required was described in *Katsshingu v Chairperson of Standing Committee for Refugee Affairs & Others* [2011] ZAWCHC 480 page 12 as an 'egregious shortcoming' (see also *Akanakimana v Chairperson of Standing Committee for Refugee Affairs & Others* [2015] ZAWCHC 17 para 13; *M v Minister of Home Affairs & Others* [2014] ZAGPPHC 649 paras 101-102).

[33] I am thus satisfied that the RSDO failed to comply with his duties in terms of s 24(2) and regulations 5 and 10(1).

[34] It is unnecessary, in the circumstances, to decide whether the Committee was duty bound, in the particular circumstances of the case, to exercise its statutory powers under s 25(2) to obtain further information and invite Mayemba to appear. The fact of the matter is that the Committee relied on information which, because of defects in the earlier stages of the process, was unreliable and incomplete. Its decision must fall with that of the RSDO. I should say, though, that if the Committee was furnished with Mayemba's application, it should have realised that the RSDO's determination that Mayemba left the DRC solely for economic reasons was not consistent with the application and warranted further enquiry.

Evaluation - merits

[35] The affidavits and argument covered the question whether Mayemba qualifies as a 'refugee' under ss 3(a) and (b) of the Act. As to para (a), Ms de la Hunt submitted that Mayemba had proved a well-founded fear of being persecuted by reason of his membership of a 'particular social group'. The 'social group' in question comprised young men in South Kivu and the fear of persecution was posed by the forced recruitment of young men as rebel soldiers. As to para (b), Ms de la Hunt submitted that Mayemba had proved that he left his place of habitual residence (Fizi) and sought refuge in South Africa owing to 'events seriously disturbing or disrupting public order' in a part of his country, namely South Kivu.

[36] The respondents, by contrast, contend that the applicant has not discharged the burden in either of these respects.

[37] It would only be necessary for me to evaluate the merits if I came to the conclusion (i) that this was an appropriate case (as Ms de la Hunt urged) to substitute the decision made by the RSDO and the Committee with a decision declaring Mayemba to be a refugee and entitled to asylum or (ii) that (as Ms Slingers submitted) the procedural defects did not prejudice Mayemba because, having regard to the fuller information supplied in his founding papers with the assistance of legal representation, he is not entitled to asylum.

[38] The power of substitution conferred by s 8(1)(c)(ii)(aa) is one to be exercised only in exceptional circumstances and when, upon a proper consideration of all the relevant facts, a court is persuaded that a decision to exercise a power should not be left to the designated functionary (*Gauteng Gambling Board v Silverstar Development Ltd & Others* 2005 (4) SA 67 (SCA) paras 28-29; *Radjaba* supra para 33). Circumstances which may favour substitution are where further delay would cause unjustifiable prejudice or the original decision-maker has exhibited bias or incompetence or the outcome is a foregone conclusion (*Tantoush v Refugee Appeal Board & Others* 2008 (1) SA 232 (T) paras 125-128).

[39] I do not think this is an exceptional case justifying an invocation of the court's power of substitution. There are several reasons for my conclusion.

[40] Firstly, there is not at the RRO and RSDO stages only one designated functionary. The Department employs a number of officials to perform these functions. Although Mayemba's case was not properly handled by the particular RRO and RSDO who dealt with him, his case would not, if remitted, necessarily be dealt with by those particular officials. Indeed, I think it highly desirable that the matter should be processed by other officials.

[41] If Mayemba's application were again determined by an RSDO to be 'manifestly unfounded' (defined in s 1 as meaning an application for asylum made on grounds other than those on which such an application may be made in terms of the Act), the Committee would have to take it under review in terms of s 25. In this respect, there is admittedly only one functionary, namely the Committee, though its membership may change from time to time. I think it is unfortunate that the Committee's chairperson should, in his answering affidavit, have expressed such a definite opinion on Mayemba's case for asylum. Nevertheless, I do not think I can say that the Committee, if the matter were again to come before it, would not exercise its review power honestly and properly. Furthermore, if the RSDO were again to reject Mayemba's application, it may well – based on the fuller information provided by Mayemba – do so on the basis that the application is 'unfounded' as contemplated in s 24(3)(c) rather than 'manifestly unfounded' as contemplated in s 24(3)(b). If that were the finding, the matter would not go to the Committee in terms of s 25. Instead, Mayemba would have a right of appeal to the Appeal Board in terms of s 26. The Appeal Board has not yet had occasion to consider his case.

[42] Second, there was no undue delay by the RSDO and Committee in dealing with Mayemba's application for asylum. The are no grounds for believing that a fresh consideration of his application will be unduly delayed.

[43] Third, the process conducted by an RSDO, although not adversarial, is one in which the veracity of what an applicant says can be tested. While an RSDO can be expected to have some institutional knowledge about the circumstances prevailing

in countries from which asylum seekers in South Africa typically come (including the DRC), the adjudication of an asylum application must nevertheless be individualised. Precisely because the RSDO and the Department cannot be expected to have personal knowledge of an applicant's history, one should not lightly deprive them of the opportunity of utilising the prescribed statutory process for eliciting full information and, if necessary, testing what the applicant says. The fact that the respondents in the present case have not been able to place much of what Mayemba says in issue does not mean that they should not have the opportunity of interrogating it by the appropriate procedure.

[44] Fourth, four years have elapsed since the asylum application was made and decided. The adjudication of an asylum application is concerned with the current state of affairs in the country of origin (and see s 5 of the Act dealing with the cessation of refugee status). The circumstances in the relevant parts of the DRC may have undergone change. Ms de la Hunt during argument handed up current reports of the circumstances prevailing in the Eastern DRC. While the court may be entitled to receive such information informally (there was no objection by Ms Slingers), I think it preferable for such information in the first instance to be dealt with through the statutorily prescribed procedures of ss 21, 24, 25 and 26.

[45] The power of substitution conferred by s 8(1)(c)(ii)(aa) of PAJA involves a value judgment as to the existence of 'exceptional circumstances' and the exercise of a judicial discretion. Each case will depend on its own particular facts. For this reason I do not intend to deal at any length with the cases to which Ms de la Hunt referred me in which substituted decisions were made. Just by way of example, in one of those cases, *Katsshingu* supra, the respondents, although opposing the application, filed no answering affidavits and their resistance to substitution seems to have been confined to a submission that, before making an order, the court should request an affidavit from the UNHCR regarding the circumstances currently prevailing in North Kivu. In *Akanakimana* supra the court had the benefit of hearing oral evidence, including cross-examination of the asylum-seeker, and the RSDO's evidence was that on the facts now before the court he would have granted the asylum application.

[46] During argument the question arose whether, at least in regard to s 3(b), Mayemba's entitlement to asylum turned solely on a question of law, in which case substitution may have been regarded, by way of exception, as permissible. I invited counsel to file a supplementary note on this question. The point of law was whether, in terms of s 3(b), it is a bar to the granting of asylum that the applicant could have found refuge elsewhere in his own country, ie whether the internal flight alternative ('IFA') applies to s 3(b). In *Katabana v Refugee Appeal Board & Others* WCHC Case 25061/2012 Davis J said that the IFA does not apply to s 3(b) (page 8).[2] There are indications that the Committee holds a different view.

[47] In her supplementary note Ms de la Hunt submitted that the IFA form no part of s 3(b) because the section expressly contemplates that asylum may be granted despite the fact that the disturbance or disruption affects only part of the country of origin. Ms Slingers, on the other hand, submitted that the IFA is applicable because 'elsewhere' in s 3(b) should be understood as meaning 'another country' and because a person could not claim to have been compelled to seek refuge in another country if there was a place within his own country where he could reasonably have sought refuge.

[48] The factual assumptions which would make this the decisive legal question include the following: (i) that South Kivu is still subject to serious disturbance and disruption of public order; (ii) that Kinsagani, unlike South Kivu, has not suffered and is not now suffering serious disturbance or disruption of public order; (iii) that Mayemba's two-month's sojourn in Kinsagani with his paternal aunt shows that he could reasonably be expected to take refuge there. Counsel in their supplementary notes focused on the position which prevailed in 2011. It is not clear to me that both sides accept assumptions (i) and (ii) above and Mayemba does not accept assumption (iii). In his replying affidavit Mayemba says that at certain times one province or district has been peaceful, only later to be plunged into violence. A UNHCR Position of September 2014 states that 'numerous other armed groups pose a serious threat to civilians in the Kivus, Katanga, Orientale and Maniema

[2] This judgment is erroneously listed in the North Gauteng database of SAFLLI - [2012] ZAGPPHC 362.

provinces'.[3] Later in the same report the UNHCR says that the situation inter alia in 'parts' of Orientale 'remains fluid' and urges States not forcibly to return DRC nationals originating from these areas 'until the security and human rights situation has improved considerably'. Mayemba alleges that he has no means of supporting himself in Kinsagani and that it is not unreasonable for him to fear that it too might be subject to violence in the near future.

[49] I thus consider that it is preferable to leave, for fresh consideration by the RSDO and the Committee/Appeal Board, the factual and legal issues relating to the IFA, if and to the extent they arise. If Mayemba's case for asylum were to depend on s 3(b) and if the IFA were decisive of the outcome, the RSDO and Committee/Appeal Board would no doubt carefully consider the view expressed by Davis J in *Katabana.* Mayemba would have a right of review to this court if the RSDO and Committee/Appeal Board placed a wrong interpretation on s 3(b). The IFA question in s 3(b) is an important one with significant ramifications for asylum seekers on the one hand and this country on the other. It is a question which, particularly since a judge in this division has already expressed an opinion on it, may warrant consideration by a court comprising two or three judges.

[50] As to Ms Slinger's submission, following that of the Committee's chairperson, that Mayemba was not prejudiced by the procedural defects, the no-difference approach has been rejected in cases where natural justice requires that a person receive a hearing before an adverse decision is made (see, eg, *Traube & Others v Administrator Transvaal & Others* 1989 (1) SA 397 (W) at 403D-E; *Administrator Transvaal & Others v Zenzile & Others* 1991 (1) SA 21 (A) at 37D-F; *Minister of Defence and Military Veterans v Motau & Others* 2014 (5) SA 69 (CC) para 85; and see Baxter *Administrative Law* at 540-541). Mayemba was entitled to a proper and fair process in terms of ss 21, 24 and 25. The court should give no encouragement to the Department and its officials to short-change asylum seekers procedurally on the basis that the Department will be able at its leisure to fight out the merits of

[3] UNHCR Position on Returns to North Kivu, South Kivu and Adjacent Areas in the Democratic Republic of Congo affected by on-going conflict and violence in the region – update 1 dated September 2014. This was document 'A' of the six documents handed to me during argument by Ms de la Hunt.

asylum in court if the asylum seeker should have the capability, energy and resources to launch review proceedings.

[51] I do not wish to express an opinion on whether the allegations made by Mayemba are or are not sufficient to discharge the burden of showing an entitlement to asylum. Mayemba, who might be legally assisted in the further procedures before the RRO, RSDO and Committee/Appeal Board, may be able to supplement the information already supplied if the relevant functionaries consider that more detail is needed.

Conclusion

[52] Although, for reasons stated above, I do not intend to grant a substituted order declaring Mayemba to be entitled to asylum, it would be unfair to him if the matter were remitted in the true sense, ie for reconsideration of his application dated 15 July 2011. That application was, because of procedural defects in the process followed before the RRO, not a fair and accurate presentation of Mayemba's case for asylum. In the circumstances, he should be afforded an opportunity to present a fresh application in terms of s 21.

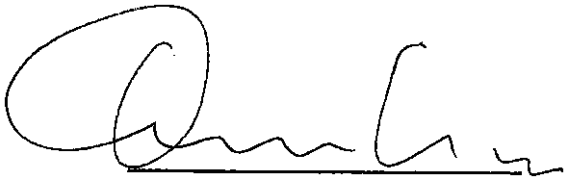
[53] I make the following order:

(a) The decision taken by the first respondent on or about 9 November 2011 and handed to the applicant on 14 May 2014, upholding the decision of the second respondent in (b) below, is reviewed and set aside.

(b) The decision of the second respondent, made on or about 22 June 2011, rejecting the applicant's application for refugee status and asylum as manifestly unfounded, is reviewed and set aside.

(c) The applicant shall, within one month of this court's order or within such further period as the parties may agree in writing or the court may direct, submit a fresh application for asylum in accordance with s 21 of the Refugees Act 130 of 1998 and the further provisions of ss 21 to 26 (as the case may be) of the Act shall apply to such fresh application.

(d) The applicant's costs shall be paid by the respondents jointly and severally, the one paying the other to be absolved.



ROGERS J

APPEARANCES

For Applicant	Ms V de la Hunt Instructed by University of Cape Town Refugee Rights Clinic Kramer School of Law Middle Campus, 1 Stanley Road Rondebosch
For Respondents	Ms H Slingers Instructed by State Attorney 4th Floor, 22 Long Street Cape Town