IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 10971/2013

DATE: 8 NOVEMBER 2013

In the matter between:

FELIX ONASISI MUBALA Applicant

and

THE CHAIRPERSON OF THE STANDING COMMITTEE FOR REFUGEE AFFAIRS 1st Respondent

THE REFUGEE STATUS DETERMINATION OFFICER 2nd Respondent

THE MINISTER OF HOME AFFAIRS 3rd Respondent

THE DIRECTOR GENERAL OF THE DEPARTMENT OF HOME AFFAIRS 4th Respondent

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J U D G M E N T

FOURIE, J:

In this matter the applicant seeks an order reviewing and setting aside decisions of the first and second respondents, rejecting his application for refugee status and asylum as manifestly unfounded, in terms of the provisions of the Refugees Act 130 of 1998 ("the Act"). He also seeks ancillary and declaratory relief as appears from Part B of his notice of

motion.

On 24 July 2013 the matter became before Oliver, AJ who granted certain interim relief by agreement between the parties. In particular the applicant was issued with a temporary asylum seeker permit in terms of Section 22 of the Act and the review application was postponed for hearing on the semi-urgent role on 29 October 2013.

A time table was agreed upon by the parties and in terms thereof the court directed the filing of papers as follows:

(a) Respondents' answering affidavits, if any, must be filed on or before 23 August 2013.

(b) The applicant's replying affidavit, if any, must be filed on or before 6 September 2013.

(c) The applicant's head of argument must be filed on or before 4 October 2013.

(d) The respondents' head of argument must be filed on or before 11 October 2013.

Respondents failed to file their answering affidavits by 23 August 2013. Applicant complied with the time table by filing his heads of argument timeously. Applicant attended to the pagination and indexing of the court file and prepared the

requisite practice note, indicating that the matter was presumably unopposed as respondents have failed to file opposing papers.

However on 24 October 2013, three court days before the hearing, the respondents filed their opposing affidavits. This was some two months after the date set by the court. Applicant responded by filing a replying affidavit on 28 October 2013. Applicant also filed his heads of argument timeously.

As mentioned earlier, the date set for the filing of respondents' heads of argument was 11 October 2013 but no heads were forthcoming until approximately 9.00 a.m. on the day of the hearing, when respondents' heads were delivered to my Registrar. In their answering affidavits, respondents seek condonation for the late filing thereof as well as the late filing of the heads of argument.

The factual basis upon which condonation is sought is stated as follows at page 88 of the paginated papers:

> "I ask the court to condone the late filing of this affidavit and accompanying affidavit of Karl Sloth-Nielson as well as the respondents' heads of argument. The problem encountered by the

department in this matter is that the department has not been able to find any of the contents of its file. I can only assume that the documents have been misfiled since they were furnished to the applicant's legal representatives. The relevant officials have continued to search for the file contents since the launch of this matter. Eventually since the date for the court hearing was looming, it was decided to oppose the matter based on the documents annexed to the applicant's founding affidavit. The State attorney has also, I am advised, always assured the applicant's legal representatives of the respondents' intention to oppose this matter. Furthermore, in terms of the court order dated 24 July 2013, the applicant was issued with a temporary asylum seeker permit in terms of Section 22 of the Refugees Act thus regulating his stay in South Africa pending the finalisation of the review application in these proceedings. I therefore request that the court condone the late filing of the answering papers as it was not malicious or in bad faith on the part of the respondents".

In terms of Rule 27 the court may, upon good cause shown, condone any non-compliance with the rules of court and extend the time limit in which any step had to be taken in terms of the rules. Similarly, a court has this power in respect of non-compliance with a court order, in terms of its inherent jurisdiction to regulate its own proceedings. Good cause requires a satisfactory explanation for the delay to be given and that grounds be set out showing that a *bona fide* defence exists.

What respondents are therefore required to show to persuade the court to grant them condonation for the late filing of their opposing papers and heads of argument, is that there is a satisfactory explanation for their delay. The explanation provided by respondents, in my view, falls woefully short of a reasonable or satisfactory explanation. All that is really said is that the department has not been able to find any of the contents of its file as it has presumably been misfiled.

No detail is given as to when and how this misfiling could have taken place and what steps were taken to recover the contents of the file, nor is it explained why no steps were taken to approach the court for an extension of the time to file the opposing papers. In fact, the explanation has no merit, particularly, in view of the fact that the content of the relevant

file has been annexed to applicant's founding papers.

There was no need for respondents to go searching for the alleged missing contents of the file. They could have prepared their answering affidavits on the strength of the annexures to applicant's founding affidavit. Further, no explanation at all is given for the delay in filing respondents' heads of argument. In fact, it rather seems to me that respondents chose to wilfully or, at least recklessly, disregard the terms of the order made by Oliver, AJ.

This appears from the State attorney's letter dated 6 September 2013 addressed to applicant's attorneys some 10 court days after the answering affidavits had to be filed. At that late stage the respondents had not yet provided the State attorney with instructions to enable her to prepare answering papers. A supine attitude of this nature cannot be tolerated. Court orders and, more so, orders made by consent, are to be strictly obeyed. If not, the legal process will fall into disrepute. It appears to me that, on this basis alone, the application for condonation is doomed to failure.

I did, however, request the parties at the hearing to address me on the merits of the review application and I now proceed consider same. I should say that I have come to a firm

conclusion as to the order which should be made in this matter in respect of the merits but, due to time constraints I intend furnishing only brief reasons for the order. I do, however, accept that any person interested in this judgment is fully aware of the respective allegations of the parties as they emanate from the pleadings before the court.

The material facts are largely common cause or at least not seriously in dispute. Also, details of the violence and the destabilisation in the Eastern Part of the Democratic Republic of the Congo ("the DRC"), is well documented as it has been ongoing for many years causing thousands of citizens to flee the DRC. In Van Gaderen N.O. v RAB and Others, an unreported judgment of the Transvaal Provincial Division under case number 30720/2006, delivered 19 June 2007, the court held that the DRC was a country in turmoil and that the Refugee Appeal Board erred in its finding that the situation in the DRC did not pose a danger to the applicants.

In November 2011 this court in Katshingu v Chairperson Standing Committee for Refugee Affairs and Others, an unreported judgment under case number 19726/2010, delivered 2 November 2012, considered reports regarding the social and political turmoil and refugee problem in the Eastern DRC, in granting an order according refugee status and asylum

to the applicant.

Also on 14 December 2012, Davis, J decided in Katabana v Chairperson Standing Committee for Refugee Affairs and Others, case number 25061/2011, that conditions in the DRC were obviously supportive of the applicant's claim for refugee status and that to return him to the DRC would "condemn him to an excruciating set of dangers". Currently it is common knowledge that, particularly in the Eastern part of the DRC, there is ongoing fighting between government forces and groups of rebels resulting in thousands of people being displaced and fearing for their lives.

It is also a well documented fact that South African troops have been dispatched to the Eastern DRC where they have joined troops from Tanzania and Malawi in the fight against the M23 rebels. It is not disputed that applicant, who is a citizen of the DRC, was compelled to flee his country of birth and that he travelled overland to finally reach South Africa where he applied for refugee status on 14 March 2011.

Despite regulations requiring his application to be finalised within 180 days, applicant was only interviewed by second respondent in terms of the Act, on 4 October 2012, when his application was rejected as manifestly unfounded. This

decision was upheld by first respondent on 13 November 2012.

Apart from procedural issues raised by applicant, it appears to me that the decision rejecting applicant's application as manifestly unfounded, as well as the subsequent endorsement, thereof, is the product of a failure by second and first respondents, respectively, to properly apply their minds to the relevant facts and circumstances.

In particular, in my view, the conclusion that applicant fled the DRC for family reasons and that he therefore has to leave South Africa and return to the DRC, is, in the peculiar circumstances of this matter, so unreasonable that no reasonable decision maker could have reached same.

The duty cast upon the South African authorities in terms of the Act, is to conduct an inquiry to determine the facts and circumstances which gave rise to an applicant leaving his country. Had a proper inquiry been conducted, it would have been established, as has been done by the Law Clinic acting on behalf of applicant in this matter, that he was obliged to flee the DRC, not by virtue of family problems, but in view of his life being threatened on account of events seriously disturbing or disrupting public order in the Eastern part of the DRC.

This is fully dealt with in his founding affidavit which *inter alia* shows that his father was killed by rebel factions and that his brother, like his father, was killed by rebel militia. His wife committed suicide after she had been gang raped by a group of rebel combatants. His life was further in danger by virtue of the fact that his mother is a Burundian citizen, which led to him being viewed with suspicion by the local population and he was apparently the subject of unfounded speculation, namely, that he was part of the rebel groups.

In these circumstances, applicant certainly qualified for refugee status in terms of Section 3(b) of the Act. Further, Section 2 of the Act entrenches the international law principle of non-refoulement. This means that South Africa may not return a refugee to a country where he or she faces a genuine risk of serious harm.

I have already referred to the decisions of our courts in which note had been taken of the dangerous conditions prevailing in the Eastern DRC. Applicant has also annexed Country Reports on Human Rights Practises, prepared by the USA Bureau of Democracy, which cover the 2011 year, recording the violence and destabilisation in the Eastern part of the DRC.

The most important human rights issues mentioned are armed conflict in the East, exacerbating an already precarious human rights situation, the lack of an independent and effective judiciary and impunity throughout the country for many serious abuses, including disappearances, torture, rape and arbitrary arrests.

It is trite law that, even where circumstances preventing return only arise after the person has left his or her country of origin, such a person is entitled to protection in his new country of residence. In the result, the return of the applicant to the DRC as envisaged in the notice addressed to him by the Cape Town Refugee reception office, dated 4 April 2013, would clearly be in contravention of the applicant's right to non-refoulement as embodied in Section 2 of the Act.

In these circumstances, I find that the impugned decisions are to be reviewed and set aside in terms of the provisions of Section 6(2)(h) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). Section 8(1)(c)(ii)(aa) of PAJA authorises a court in exceptional cases to substitute the administrative action which it has set aside. Applicant maintains that this is an exceptional case in which the court should substitute its own decision for that of the relevant functionaries.

Respondents, on the other hand, contend that there are no exceptional circumstances present, with the result that the matter should be referred back to the relevant respondents to exercise their statutory powers afresh. In my view, this is an exceptional case in which the court should substitute its decision rather than refer the matter back to the functionaries to consider same afresh. The main reasons for this decision are the following:

(a) This court is at least in as good a position as respondents to make the decision as to applicant's eligibility for refugee status and asylum. In fact, all the relevant material is now before the court, there being no suggestion that any additional factors may be relevant in the decision making process.

(b) The matter has now been delayed for more than two and half years with resultant prejudice to the applicant. He is prejudiced as the rights afforded to refugees are greater than the rights afforded to asylum seekers, including access to a South African travel document, basic primary health care and education and the possibility of permanent residence after five years. On the other hand, the respondents will suffer no prejudice if the court were to grant the

request for substitution.

(c) It also appears to be a foregone conclusion that, if the impugned decisions are set aside and the matter is remitted back to respondents for consideration afresh, applicant will be granted refugee status and asylum. It would therefore be counterproductive to contribute to yet a further delay by referring the matter to respondents for reconsideration thereof, rather than to dispose of it now.

In the result the following order is made:

(1) The respondents' application for condonation for the late filing of their answering affidavits and heads of argument, is refused with costs.

(2) An order is granted in terms of paragraphs 1 to 4 of part B of applicant's notice of motion in the main application.

(3) A costs order is granted in accordance with paragraph 5 of Part B of the notice of motion, which costs are to include the costs of the urgent application brought on 24 July 2013.

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FOURIE, J

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