REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 6183/14

In the matter between:

ESNAT MAUREEN MAKUMBA	Applicant
and	
THE MINISTER OF HOME AFFAIRS	First Respondent
THE DIRECTOR GENERAL, DEPARTMENT OF HOME AFFAIRS	Second Respondent
THE MANAGER: REFUGEE RECEPTION OFFICE DEPARTMENT OF HOME AFFAIRS, CAPE TOWN	Third Respondent
THE CHIEF IMMIGRATION OFFICER DEPARTMENT OF HOME AFFAIRS	Fourth Respondent
THE REFUGEE STATUS DETERMINATION: OFFICER	Fifth Respondent
THE CHAIRPERSON, THE STANDING COMMITTEE REFUGEE AFFAIRS	Sixth Respondent

COURT:	SALIE-SAMUELS, AJ
HEARD:	28 October 2014
DELIVERED:	03 December 2014
COUNSEL FOR APPLICANT:	Adv. M Bishop
INSTRUCTED BY:	Legal Resource Centre
COUNSEL FOR RESPONDENTS:	Adv. N Mangcu-Lockwood
INSTRUCTED BY:	Office of the State Attorney

JUDGMENT TO BE DELIVERED ON 3RD OF DECEMBER 2014

SALIE-SAMUELS AJ:

[1] This is an application to review and set aside a decision of the Fifth Respondent (The Refugee Status Determination Officer – hereinafter referred to as "the RSDO") rejecting the Applicant's application for refugee status as manifestly unfounded, and the decision by the Sixth Respondent (The Chairperson of The Standing Committee Refugee Affairs – hereinafter referred to as "the SCRA") confirming the decision of the Fifth Respondent. Further relief is sought by the

Applicant for an order to substitute the Fifth Respondent's decision with a decision that the Applicant is entitled to refugee status in terms of Section 3(b) of the Refugees Act 130 of 1995. In the alternative, the Applicant is seeking an order remitting the matter for reconsideration before a Refugee Status Determination Officer within one (1) month of the date of the granting of such an order.

[2] The review is brought on procedural grounds in terms of Section 6(2)(c) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"). The basis for the review application is that (a) the applicant was not advised by the RSDO that she had 14 days within which to make written submissions to the SCRA, and therefore did not make any submissions to the SCRA; (b) the SCRA decision was taken despite the fact that the applicant had not received adequate notice of a right to make submissions to the SCRA; (c) the RSDO failed to inform her of the grounds on which she could claim refugee status, including discrimination on the basis of sexual orientation; (d) the Applicant had to rely on one of her country women to assist her in the process of the interview, and was therefore not in a position to confide in the RSDO. This latter complaint has, however, fallen way.

[3] The facts briefly are that the Applicant, a Malawian national, applied for asylum in Maitland between 24 and 27 January 2012, shortly after her arrival in South Africa. She sets out in her founding affidavit that at the time she was unaware that she could claim refugee status on the basis that she had been persecuted in Malawi because of her sexual orientation. She was also unsure whether it was acceptable to be openly lesbian in South Africa, and was afraid of how the officials at

the Refugee Reception Office would react. When she attended her first interview, she completed her application form, accompanied and assisted by a friend of a friend who was also from Malawi. Given the attitudes to homosexuality in her experience she feared revealing her status as her friends may have stopped giving her assistance. For these reasons, when she filled in her application form, she did not state the true reason for her flight from Malawi. Instead, she told the Department that she had fled for economic reasons; that she had lost her job and hoped to make money in South Africa. When she returned for her status determination interview with the RSDO on 2 May 2013, she again did not inform the RSDO that she had fled Malawi because of her sexual orientation. Instead, she kept up the pretence that she had come to South Africa for economic reasons. The Applicant explains that she had been informed by other people waiting in the queue that she should not change her story. She also did not want the RSDO to think that she was deceptive. She claims that she was only trying to protect herself from further homophobic persecution. The interview was short and upon its conclusion, the RSDO handed the Applicant a rejection letter. The applicant does not dispute that her application was, on the facts that she had presented to the RSDO, rightly rejected. She was also handed a document that informed her that the decision would be sent to the SCRA for confirmation and that she had the right to make representations to the SCRA. However, whilst the Applicant does not deny that she had received such a document, she denies that the contents of the documents, particularly her right to approach the SCRA, were explained to her. Either way, it is common cause that the Applicant signed for receipt of both documents. The RSDO's decision was referred to the SCRA on the same day, 2 May 2013. The SCRA upheld the RSDO's decision on 4 September 2013. The Applicant was informed of the SCRA's decision on 15

November 2013 when she went to renew her asylum seeker permit. The Applicant was then advised by a friend to attend the offices of the Legal Resources Centre ("LRC"), her attorneys of record. It was when consulting with her legal representatives that the Applicant claims she first felt comfortable to disclose the real reasons for her flight from Malawi. It was also the first time that she was informed that she was entitled to refugee status because she was persecuted on the basis of her sexual orientation in her country of origin. Be that as it may, the application for review is nonetheless essentially brought for the reasons that the administrative action by the Fifth Respondent was procedurally flawed and redress is sought in terms of the Promotion of Administrative Justice Act, Act 3 of 2000 ("PAJA"). In the course of relaying the basis for her complaint, that being, that she had not been afforded the internal recourse of making submissions to the committee when reviewing the RSDO's decision, she also laments on the persecution that she faced in Malawi for the reason that she is lesbian and that she fears return to her country of origin. In her founding affidavit, the Applicant concludes her frame of mind upon completion of the application form as: *"I hid the real reason as I feared facing the same homophobic persecution in South Africa that I had suffered in Malawi."*

[4] In opposing the relief sought, Buyiswa Nini, a Refugee Status Determination Officer employed by the Department of Home Affairs, deposing for the First to Fifth Respondents, states that the Applicant's application for refugee status was rejected on the basis that it sought asylum for economic reasons and thus her application was manifestly unfounded. Attached to the answering affidavit, are the RSDO's decision and a notice that the standing committee will review the decision of the RSDO officer and that representations may be done in writing to reach the SCRA not

later than fourteen working days after the date on which the RSDO decision was received by the applicant. These two documents, attached to the answering affidavits as "BN3" and "BN4", are signed on 02 May 2013 by the Applicant in acknowledgement of receipt. Nini further states that she personally explained the contents of the notices to the Applicant, in particular Annexure "BN4". Paragraph 19 of the Answering Affidavit reads: *"I personally explained the contents of annexure "BN4" to the applicant. I explain this document to every applicant whose application is found to be manifestly unfounded, because applicants usually do not know what the SCRA is or does. She clearly understood English. Throughout my interaction with her, there were no language difficulties."* Whilst the Applicant in her founding affidavit denies that the documents were explained to her she goes on to claim, in reply, that though she had acknowledged receipt of the notices, she did not understand the documents nor that she distinguished between the two documents. These are in essence two distinct and different claims.

[6] At this juncture, I accept that the Applicant was clearly notified of her rights and that the effect of the notices was duly explained to her. There is no reason to reject the Respondents' version and on motion that benefit must be afforded to the Respondents. Accordingly, I hold the view that the Applicant was duly afforded this right. In my view it is clear from the evidence that the Applicant was made aware of the review of the RSDO's decision by the SCRA, and of her rights to make submissions in that regard. During argument Mr. Bishop conceded that the claim of non-notification of the review by the SCRA was abandoned and accepted as having been honoured by the Respondents. He also did not pursue the Applicant's complaint that the RSDO failed to inform the Applicant that she would claim refugee

status on the ground of discrimination due to sexual orientation and conceded that this does not fall within the duties of the RSDO. This pertinent issue, however, is the nucleus of the application for review before this Court and brought by the Applicant.

So what is then left for this Court to determine?

[7] Mr. Bishop submitted that nothing turned on the difference between the parties' versions, that being on whether the applicant was informed of her right to approach the SCRA or not. His contention is not at all that the Applicant was not advised of her rights of review, but that the Applicant candidly admitted in her founding affidavit that she did not tell the RSDO the true reasons for her having fled from Malawi. She stated further in her founding papers that she is a lesbian and that she was assaulted and abused in Malawi because of her sexual orientation and that she came to South Africa hoping to escape persecution. In her Founding Affidavit, at paragraph 54, the Applicant sets out the legal position relating to homosexuality in Malawi. This has not been placed into dispute by the Respondents. The Applicant states that the government of Malawi has amended Penal code 7:01 in December 2011 to criminalize act of "indecent practices between females". It provides that any female person, who whether in public or private commits any act of gross indecency with another female shall be guilty of an offence and liable to prison term of five years. She states further than even though on 5 November 2012 President Joyce Banda announced that all laws in respect of homosexuality would not be prosecuted until a review of the laws had taken place, this has not happened and the moratorium was lifted three days after it was announced.

[8] For the Applicant, it is argued that had she presented those facts to the RSDO when she applied for refugee status, this would be a simple case as she would be entitled to refugee status. The difficulty is that, that is not what the Applicant told the RSDO. She brought the application for asylum from Malawi to South Africa for economic reasons resulting in her application rightly being rejected. Now, for a different reason, one based on her sexual orientation, she seeks redress from this Court either substituting the decision of the RSDO (confirmed by the SCRA) or remitting the matter to the RSDO for reconsideration based on a new disclosed ground. The Applicant at the hearing of this matter essentially changed the basis for the relief sought. The Respondent essentially answered the averments set out in the Founding Affidavit relating to procedural unfairness. The averments raised by the Applicant relating to her sexual orientation and threat of persecution were she to return to Malawi, is answered by the Respondents to the effect that the department has not had an opportunity to consider and investigate the alleged circumstances on which she now relies in the application before this Court.

[9] As regards seeking the relief of a substitution order, as our Courts are entitled to do in terms of Section 8(1)(c)(ii)(aa) of PAJA, same would only be done in exceptional circumstances whereby it will substitute its own decision for that of a functionary who has a discretion under the Act. The common law principles establishing the circumstances in which a court will be prepared to substitute an administrative decision were dealt with in **Johannesburg City Council v The Administrator, Transvaal, and Another 1969 (2) SA 72 (T)** at page 76 thereof and defined as follows:

[8.1] where the end result is a forgone conclusion and it would be a waste of time to order the functionary to reconsider the matter;

[8.2] any further delay would cause unjustifiable prejudice to the Applicant;

[8.3] the original decision maker has exhibited bias or incompetence to such a degree that it would be unfair to ask the Applicant to submit to its jurisdiction again;

[8.4] the principle that such decision may be taken where the Court is as well qualified to make that decision was added in **Gauteng Gambling Board v Silver Star Development Limited 2005 (4) SA 67 (SCA).**

[9] At common law, correction or substitution is the exception rather than the rule. The common law position is given statutory expression in PAJA which permits a court to substitute or vary the administrative action, or to correct a defect resulting from the administrative action, only in "exceptional cases". In **Gauteng Gambling Board** *supra* Heher JA indicated that remittal is almost always the prudent and proper course. The reasons for this are not only constitutional but also institutional in nature, since the administrator is generally best equipped by the variety of its composition and experience, and its access to sources of relevant information and expertise to make the right decision. The court typically has none of these advantages and is required to recognise its own limitations. It follows therefore that this Court is not qualified or equipped to investigate the averments to support the grounds of sexual orientation raised by the Applicant.

If every applicant was entitled to have a second bite at the cherry and make a new claim for refugee status after his or her original claim had been rejected, would the system not become unworkable?

[10] The Applicant lied in her application for asylum when she stated that the basis for her application is economic reasons. The reasons for lying are succinctly that she did not understand South African law; what protection she could get; on what grounds; whether it was acceptable in South Africa to be a lesbian and was afraid of how the refugee office would react to the news. Her reasons in a nutshell are that she prevailed under ignorance and moreover an all pervasive fear of being persecuted and ostracized as she claims she had and would be in Malawi.

[11] The Court questioned Counsel for the Respondents whether the Applicant's election to withhold the real reason in her application for refugee status would mean that she must now live by that lie. Further, does it mean that that she cannot now rely on other facts to claim refugee status, even if such facts are that of her sexual orientation and that the country that she would face to be deported to would be a country where homosexuality is criminalized by law. This question was answered by Counsel in the affirmative. In response to this I refer to relevant sections of the Refugees Act which contains a clear prohibition on returning anybody to a country where they will face persecution on the basis of their sexual orientation. Section 2 headed: **"General prohibition of refusal of entry, expulsion, extradition or return to other country in certain circumstances"** reads as follows:

"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 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."

[12] Section 2 tracks South Africa's international obligations under Article 1A(2) of the 1951 Refugee Convention read with the Optional Protocol. Being homosexual qualifies as *"membership of a particular social group".* This has been recognised by the United Nations High Commission for Refugees (UNHCR) and numerous foreign courts, including the Canadian Supreme Court[1], the House of Lords[2], and the Federal Court of Australia. The UNHCR[3] at paragraph 8 thereof states that:

"Sexual orientation is a fundamental part of human identity, as are those five characteristics of human identity that form the basis of the refugee definition: race,

1. Canada (Attorney General) v Ward [1993] 2 S.C.R 689
2. Islam v Secretary of State for the home Department; R v Immigration Appeal Tribunal and Another, Ex Parte Shah [1999] UKHL 20; [1999] 2 AC 629; [1999] 2 All ER 545
3. UNHCR Guidance Note on refugee claims relating to sexual orientation and gender identity, Geneva (2008)

religion, nationality, membership of a particular social group and political opinion. Claims relating to sexual orientation and gender identity are primarily recognized under the 1951 Convention ground of membership of a particular social group...".

Why is there a need for our Court to take cognisance of the UNHCR's guidelines?

[13] Reference to the above needs a brief understanding of what is the legal position in relation to refugees. On 6 September 1993 the South African Government and the United Nations High Commissioner for Refugees (UNHCR) concluded an agreement in relation to the policy regarding asylum seekers and refugees in South Africa. After that, in 1996, South Africa acceded to the United Nations Convention Relating to the Status of Refugees of 1951 and its 1967 Protocol. In the same year, South Africa became party to the Organisation of African Unity Convention Governing the Specific Aspects of Refugee Protection of 1969. In order to give effect to these newly acquired international obligations, Parliament enacted the Refugees Act 130 of 1998. The Act provides a new regime and seeks to reflect the principles contained in the various international instruments. The treaties have thus been incorporated into domestic law[4].

[15] Section 3 - **"Refugee Status"** - is the operative provision in determining refugee status. The section relevant for the purpose of this judgment reads:

4. Tantoush v Refugee Appeal Board and Others 2008 (1) SA 232 (T)

"Subject to ch 3, a person qualifies for refugee status for the purpose of this Act if that person –

(a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it;

[16] Section 3 must be read together with Section 2 that entrenches the international law obligation of non-refoulement. Section 6 provides that the Act must be interpreted and applied with due regard to the two Conventions, the Protocol, the Universal Declaration of Human Rights and *'any other relevant convention or international agreement to which the Republic is or becomes a party'*.

[17] In **Minister of Home Affairs and Others v Watchenuka and Another 2004 (4) SA 326 (SCA) 2004 (2) BCLR 120** in para 25 the Supreme Court of Appeal held:

"Human dignity has no nationality. It is inherent in all people – citizens and non-citizens alike – simply because they are human. And while that person happens to be

in this country – for whatever reason – it must be respected, and is protected, by S10 of the Bill of Rights."

[18] The UNHCR guidance note *supra* states that a common element in the experience of many homosexual applicants is having to keep aspects and sometimes large parts of their lives secret. This may be in response to societal pressure, explicit or implicit hostility and discrimination, and/or criminal sanctions. The consequence is that they often have limited evidence to establish their homosexual identity or may not be able to demonstrate past persecution, in particular where they were not living openly as such in the country of origin.

[19] Section 7(2) of our Constitution requires all organs of state to respect, protect, promote and fulfil the rights in the Bill of Rights. Section 9 states that everyone has the right not to be unfairly discriminated against on the basis of one's sexual orientation, Section 10 ensures the right to dignity and Section 12(1)(c) deals with the right to be free from all forms of public and private violence. Our Constitutional Court has held that, in some circumstances, Section 7(2) imposes a positive obligation on the State and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection[5]

5. Glenister v President of the Republic of South Africa and Others [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 at para 189, quoting Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening) [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR (CC) at paragraph 44.

[20] In my view when new facts come to the attention of the Respondents after an application for refugee status has been rejected – even if that rejection was correct on the facts originally presented – there will in some cases be an obligation on the Department to reconsider that application. This would be the case where the following criteria are met: (a) there is a plausible explanation why the true facts were not originally placed before the RSDO; (b) the new facts are credible and are supported by objective evidence or confirmed by witnesses; (c) if the new facts are true. The principle of non-refoulement is binding on our country and is codified in Section 2(a) of the Refugees Act. It imposes an obligation on South Africa not to surrender persons, whether by way of extradition or deportation, where there are substantial grounds for believing that the person would be subjected to cruel and inhuman treatment or punishment, or would face persecution in the receiving state.

[21] Section 172(1)(b) of the Constitution provides that a court considering a constitutional matter has the power to grant a "just and equitable remedy". The Constitutional Court has held that the *"remedial power envisaged in Section 172(1)(b) is not only available when a court makes an order of constitutional invalidity of a law or conduct under Section 172(1)(a). A just and equitable order may be made even in instances where the outcome of a constitutional dispute does not hinge on constitutional invalidity of legislation or conduct."* [6]

6. Head of Department: Mpumalanga Department of Education and Another v Hoerskool Ermelo and Another 2010 (2) A 415 (CC) 2010 (3) BCLR 177 at paragraph 97; In Minister of Safety and Security v Van der Merwe and others 2011 (5) SA 61 (CC), the learned Justice Mogoeng (as he then was) cited this authority with approval).

[22] In terms of Section 38 of the Constitution the Court can grant *"appropriate relief"* whenever a right in the Bill of Rights is infringed or threatened. Our Courts thus have a wide power entitling it to *"forge new tools"* in order to vindicate the rights at stake. I am of the view that in providing the Applicant to be re-interviewed, she is afforded an effective opportunity to vindicate her constitutional rights which appears to be at stake.

[23] The UNHCR international guidelines on sexual orientation (supra) states at paragraph 38 that:

> *"The applicant will not always know that sexual orientation can constitute a basis for refugee status or can be reluctant to talk about such intimate matters, particularly where his or her sexual orientation would be the cause of shame or taboo in the country of origin. As a result, he or she may at first not feel confident to speak freely or to give an accurate account of his or her case. Even where the intitial submission for asylum contains false statements, or where the application is not submitted until some time has passed after the arrival to the country of asylum, the applicant can still be able to establish a credible claim."*

[24] As for the burden of proof that rests upon the Applicant in matters of this nature, I refer to **Van Garderen NO v Refugee Appeal Board (unreported decision, TPD case No 30720/2006 of 19 June 2007** which was cited with approval by the Court in **Tantoush v Refugee Appeal Board and Others 2008 (1) SA 232 (T)**. In the former, Botha J stated: *"In my view by simply referring to the normal civil*

standard, the RAB imposed too onerous a burden of proof. .... All this confirmed my view that the normal onus in civil proceedings is inappropriate in refugee cases. The inquiry has an inquisitorial element. The burden is mitigated by a lower standard of proof and a liberal application of the benefit of doubt principle."

[25] Ms. Mangcu-Lockwood argued that as the Applicant had committed lies in the course of her refugee status application, her credibility is doubtful, wherefore this application for review ought to be dismissed for her evident lack of credibility. In **Tantoush v Refugee Appeal Board** (*supra*) the Court dealt with an applicant who was denied asylum by the board for the reasons that, *inter alia*, it was evident from the Appellant's testimony that he was not a person who is used to the truth. At page 102 C – G thereof the Murphy J held that:

> *"....the fact that a witness has been untruthful on one or other aspect on another occasion does not mean that he was untruthful in relation to the enquiry at hand, or that his entire testimony should be rejected on account of any admitted untruth. .....it will usually not be enough to rely almost exclusively on the evidence of the asylum seeker only to reject his claim of fear of persecution because he has previously lied while living, for whatever reasons, on the margins or in the shadows of a legal existence."*

[26] Accordingly I find that the Applicant's evident dishonesty as hereinbefore addressed and in these prevailing circumstances does not disentitle her from the

relief she now seeks. I am of the view that the Department cannot return the Applicant without further inquiry. I am satisfied that, at the very least, that the RSDO is obliged to re-interview the applicant to determine the validity of her new claim and she is entitled to any further processes in law which may flow from that re-interview. Also filed in support of this application is the affidavit of Tania Maseti, an adult female, residing in Old Cross Roads, Cape Town who confirms that she is in a romantic relationship with the Applicant. The RSDO may need to confirm this information and whether or not the Applicant will indeed face persecution if she is returned to her country of origin and collect other evidence to support her sexual orientation and the grounds for asylum flowing therefrom. It is my view that the department would violate its non-refoulement obligation by returning the Applicant to his or her country of origin in these specific circumstances.

27] Whilst our Constitution is progressive and the legislature has adopted international obligations to receive and treat in its territory refugees in accordance with the standards and principles established in international law, implementation on the ground appears to adopt restrictive and narrow policies.

28] Matters of this nature must be approached with caution however, for unsuccessful asylum applicants will rush to Court pleading different grounds for asylum than those on which they originally relied upon, similar to this review application. That is not to say that this decision risks the opening of floodgates to every unsuccessful refugee applicant. However, I am of the view that the Applicant herein has established cogent grounds in that she has satisfied the criteria which I

refer to in paragraph 20 *supra* to justify a re-interview and assessment of her application for asylum. To afford the Applicant an opportunity to be re-interviewed in light of these facts would be in keeping with the stance of a human rights culture and within the spirit of our Constitution.

[29] In the circumstances it is just and equitable to set the decision of the RSDO aside and order that the Applicant be re-interviewed. In the result I make the following order:

(a) The decision made by the Fifth Respondent on 2 May 2013 is hereby reviewed and set aside;

(b) The decision made by the Sixth Respondent on 15 November 2013 is hereby reviewed and set aside;

(c) The Fifth Respondent is ordered to re-interview and reconsider the Applicant's application within two (2) months of the date of this order;

(d) No order as to costs.

SALIE-SAMUELS, AJ