IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 10970/13

In the matter between

ABDUL SHABANI AKANAKIMANA	Applicant
and	
THE CHAIRPERSON OF THE STANDING COMMITTEE FOR REFUGEE AFFAIRS	First Respondent
THE REFUGEE STATUS DETERMINATION OFFICER, ZAMUXOLO MZINYATI N.O.	Second Respondent
THE MINISTER OF HOME AFFAIRS	Third Respondent
THE DIRECTOR GENERAL OF THE DEPARTMENT OF HOME AFFAIRS	Fourth Respondent

DELIVERED : 18 FEBRUARY 2015

JUDGMENT

NDITA, J

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JUDGMENT

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[1] The Applicant in this application seeks a review and setting aside of two decisions taken by the First and Second Respondents refusing to grant refugee status and asylum to the Applicant.

[2] The Applicant applied for refugee status on 17 December 2008. On the same day his application was rejected by the Second Respondent, the Refuge Status Determination Officer (RSDO. The Second Respondent on 13 March 2009 referred the matter to the First Respondent, the Chairperson of the Standing Committee for Refugee Affairs (SCRA) for the review of the former's decision. On 30 January 2013, the SCRA upheld the decision of the RSDO refusing the applicant's asylum and refugee status application. These are the decisions the Applicant seeks to have reviewed and set aside.

[3] The grounds of review are listed as follows:

1. The RSDO's decision is unlawful, unreasonable and was taken in a manner that was procedurally unfair.

2. The conduct of the first and second respondents does not promote or fulfil South Africa's international obligations, nor does it uphold the spirit of the Constitution of the Republic of South Africa.

3. In considering the applicant's application for asylum, the RSDO failed to comply with the provisions of PAJA and the Refugees' Act 130 of 1998 (the Act) in that:

3.1 it failed to ensure that the Applicant understood his rights, the procedures and the evidence presented.

3.2 it did not apply its mind to the facts and provided no coherent reasons for its decision.

With regard to the first regard to the SCRA, the Applicant alleges that it when it reviewed the RSDO's decision it

1. Failed to apply its mind to the facts and the relevant circumstances

2. Failed to elicit more information when it was duty bound to do so and as such abused its discretion.
3. Delayed inordinately, taking over four years instead of five days to make a decision.

The application and the referral to oral evidence

[4] The application was brought in two parts in July 2013. Part A was an application for urgent interim relief *pendete lite* in the form of a temporary asylum seeker permit, pending the outcome of Part B, the review application. The parties agreed to an order granting the applicant a temporary asylum permit. In Part B, as earlier alluded to, the applicant seeks an order reviewing the First and Second Respondent's decisions. In addition thereto the Applicant prays for an order declaring that:

1. he is a refugee who is entitled to an asylum in the Republic of South Africa as contemplated in s 3 of the Act.

2. the Respondents be directed to issue to the Applicant written recognition of refugee status in terms of s 27(a) of the Act read with Regulation 15(1) within seven days of the date of the order.

3. Costs in the event of the matter being opposed.

The Respondents oppose the application on the basis that on the facts presented by the Applicant, he does not qualify for refugee status. More specifically, the Respondents, in affidavit deposed to by the RSDO, Mr Zamuxolo Mzinyathi, they aver that the Applicant presented a claim for economic migrancy. The matter served before Hlophe JP on 07 February 2014 and the matter was referred to oral evidence for the hearing of the testimony of Mr Mzinyathi, Mr Omar, and the Applicant with an view to determining the claim the latter presented before the RSDO.

The Refugee Status determination process legislative framework

[5] I deem it necessary to first outline the asylum and refugee status determination process before summarising the facts germane to this application. Section 3 of the Refugees Act 130 of 1998 (the Act) provides a follows:

"3.Refugee status – Subject to Chapter 3, a person qualifies for refugees status for the purposes 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; or
(b) 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; or
(c) Is a dependent of a person contemplated in paragraph (a) or (b). "

An Applicant desirous of applying for asylum and refugee status must, as a first port of call, be interviewed by a Refugee Reception Office (RRO). Section 21 outlines the duties of the RRO as follows:

"21 Application for Asylum –

(1) An application for asylum must be made in person in accordance with the prescribed procedures to a Refuge Reception Office at any Refuge Reception Office.

(2) The Refuge Reception Officer concerned –

(a) must accept the application form from the Applicant;

(b) must see to it that the application form is properly completed, and where necessary, must assist the applicant in this regard.

Once there has been compliance with s 21, the application must be determined by the RSDO. Section 24 sets out guidelines for the consideration of the application and provides thus:

"24 Decision regarding application for asylum –

(1) Upon receipt of an application for asylum the Refugee Status Determination Officer –

(a) in order to make a decision, may request any information or clarification he or she deems necessary from an applicant or Refugee Reception Officer

(b) where necessary, may consult with and invite a UNHCR representative to furnish information on specified matters; and

(b) where necessary, may consult with and invite a UNHCR representative to furnish information on specified matters; and

(c) may, with the permission of the asylum seeker, provide the UNHCR representative with such information as may be requested.

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

(3) The Refugee Status Determination Officer must at the conclusion of the hearing –

(a) grant asylum;

(b) reject the application as manifestly unfounded, abusive or fraudulent;

(c) reject the application as unfounded; or

(d) refer any question of law to the Standing Committee;

(4) If an application is rejected in terms of subsection 3(b) –

(a) written reasons must be furnished to the Applicant within five working days after the date of the rejection or referral;

(b) the record of the proceedings and a copy of the reasons referred to in paragraph (a) must be submitted to the Standing Committee within 10 working days after the date of the rejection or referral."

[6] It is common cause that in *casu,* the RSDO rejected the Applicant's application for asylum on the basis that it was manifestly unfounded in accordance with the provisions of s 24(3)(b).

The factual background that underpins this application

[7] The factual background that led to the Applicant 's arrival in South Africa as gleaned from his founding affidavit is largely uncontroverted and be summarised as follows: The Applicant is Burundi national who left his country in 2008. He was born in 1989 in the district of Kamenga. He avers that for many years Burundi was involved in a protracted civil war. The rebel militia clashed with government forces and engaged in armed combat in his area of residence forcing them to abandon their homes and seek refuge in nearby farms. They would return to their homes after about two weeks. The continual need to flee their homes was traumatic but nonetheless became part of a normal life.

[8] The Applicant states that on 20 October 2008, shortly before his nineteenth birthday, homes in their street were attacked during the night. His home consisted of a main building with a separate structure at the

back. According to his averments, his parents lived in the main building whilst he lived in the separate structure in the backyard. The Applicant further states that on the night in question, he heard a commotion, and when he looked through his window, he saw armed combatants entering the main building and houses all around. He became fearful and as a result of which he escaped through the back window of his dwelling structure. As he fled, the rebels set fire to his home. They were also shooting people. The rebels killed everyone in his family, his parents, his two sisters, and his brother, as well as his neighbours. He is in his family the sole survivor.

[9] The Applicant alleges that he fled and sought refuge in an Islamic church. The people at the church put him in a car which took him to the Tanzanian border, where he got to a lift to Mozambique and after three weeks of travelling, he arrived in South Africa in November 2008. According to the Applicant the rebel combatants who attacked his home, were at the time of deposing to the founding affidavit still in Burundi. He avers that he is afraid to return as he has no family and the government of Burundi is not in control of the regions where the rebels are active.

[10] On his arrival in South Africa, he, on 17 December 2008 applied for refugee status and asylum at the Cape Town Refuge Offices where he was given a B1-1590 Application form to complete. He states that he was unable to speak English and was assisted by a fellow refugee who was present on that day and who spoke Swahili. His name is Mr Sudi Omar and he is a Rhwandan national. Because he (the applicant) could neither speak nor read English he could not verify the information that

was written down on his behalf. After waiting for approximately two hours, the RSDO summoned him to his office and gave him a decision rejecting his Application. He was also given a temporary asylum seeker's permit.

[11] According to the information reflected on the application form he had completed, duly assisted by Mr Omar, the RSDO wrote that his parents had died ten years prior to 2008. The Applicant denies that he furnished such information to Mr Omar. The RSDO referred the matter to the SCRA . The Applicant states that the form through which the matter was referred to the SCRA incorrectly reflects that he was born in Ghana. Whilst awaiting the decision of the SCRA, the Applicant extended his permit continuously until 30 January 2013 when the Refugee office refused to extend it further. The SCRA upheld the decision of the RSDO. Thus, the present application.

[12] The RSDO, Mr Mzinyathi, confirms that he attended to the Applicant on 17 December 2008. According to Mr Mzinyathi, on receiving the form from the Refuge Reception Office, he realised that the Applicant would require services of an interpreter. Because he is can communicate in basic Swahili, he was able to inquire from the applicant "about an interpreter". The Applicant requested that he utilise the services of Mr Omar as he had already assisted him with the completion of the form. According to Mr Mzinyathi, Mr Omar explained to him that he was fluent in Kirundi and English, and on this basis, he allowed him to interpret for the applicant. Kirundi is a language spoken in Burundi. When he interviewed the Applicant, he explained that he (Mr Mzinyathi)

required clarification with regard to the information that was reflected on the form and requested the Applicant to answer truthfully. In accordance with his obligation to elicit further information, he probed the Applicant further in regard to the reasons for the application. This he did by firstly verifying the information that was contained in the form and specifically asked the Applicant why he was applying for asylum. The Applicant advanced the following reason:

"Because I left my country when my parent dead I had none with me I decide to leave to get new life."

The Applicant also explained to him that since the death of his parents, he earned a living by carrying goods for the people at the market and that he did not wish to return to his country because he "has no one back home". During the interview with the Applicant, Mr Mzinyathi recorded the following:

"You claim that you left your country because you want to have a better life you claim after your parents death you were left with no to take care of you and you decided to come to S.A. You mentioned that one of your parents died when you were 9 years old because of natural causes and one died when you were 10 years because of accident."

According to Mr Mzinyathi, the Applicant was adequately assisted with interpretation by Mr Omar in completing the application form. In addition, there was no need for RSDO and the SCRA to have regard to events seriously disturbing public order in Burundi as this was not a basis for the Applicant to seek asylum. Even if that were so, so avers Mr Mzinyathi, contrary to the reports presented by the Applicant , the UNHCR report in 2008 shows that there in fact a number of refugee returnees to Burundi who were being assisted by the UN to rebuild their lives.

The oral evidence

[12] The Applicant in his evidence confirmed the factual background which informed his leaving his home country already summarised. After the hearing of oral evidence, the respondents at the instance of the court, reassessed their stance to the opposition of this application. This resulted in them submitting a tender wherein they conceded that the assailed decisions should be set aside. For this obvious reason, I do not propose to deal with all of the evidence. The tender made by the respondents is to the following effect:

"1. The First Respondent's decision of 30 January 2013 be set aside;

2. The Second Respondent's decision of 17 December 2008 be set aside;

3. The Applicant shall be provided with the assistance of a competent interpreter in the completion of a BI-1590 form, for submission a the Refuge Office within 5 days of the date of the Order by this Honourable Court;

4. The Applicant shall be notified within 5 days of the submission of the B1-1590 form whether an interview with a Refuge Status Determination Office ("RSDO") is required, which interview shall be held within 5 days of such notification'

5. The Applicant shall be provided with the assistance of a competent interpreter at the interview;

6. The RSDO shall notify the Applicant of his decision within 5 days of the submission, alternatively the interview;

7. Should the RSDO's decision be that the claim is "manifestly unfounded", the RSDO shall submit the matter to the Standing Committee for Refuge Affairs ("SCRA") within five days of the decision.

8. The SCRA shall review the RSDO's decision and render its decision within 10 days;

9. Should the RSDO;s decision be that the claim is "unfounded". The Applicant may, in accordance with Regulation 14 to the Refugees Act 130 of 1998, lodge an appeal with the Refugee Appeal Board within 30 days of lodgement, the Applicant may withdraw such appeal and proceed in terms of paragraph 10 below;

10. In the event the above is not attended to timeously, the Applicant may approach this Honourable Court on the same papers, duly supplemented if necessary, for urgent relief including terms of paragraphs 3 and 4 of Part B of the Notice of Motion.

11. The respondents shall pay the Applicant's costs on a party and party scale, subject to the condition that such costs shall be limited to attendances up to and including the date of service of this notice."

Although the tender unequivocally acknowledges that the impugned decisions fall to be set aside, it remains to be explained fully the grounds upon which each of the decisions is to be set aside, as set out in the Notice of Motion. I now turn to examine the aforementioned grounds.

[13] It is plain from the papers, as well as the evidence that the Applicant was not provided with competent interpretation. Neither was he properly assisted in completing the application the form. The officer at the Refuge Reception office failed to comply with Regulation 5 which provides that when it is *not practicable* for the Department to provide an interpreter, but interpretation is needed, the asylum seeker will be given at *least seven days advance notice* to himself bring an interpreter to assist him to communicate with the RRO. Similarly, the RSDO was obliged to satisfy himself that Mr Omar was competent an interpreter. I take note of Mr Mzinyathi's evidence that the situation has since changed as the Department of Home Affairs now secured the services of trained interpreters to assist with applications such as the present. This

is an important milestone as the value of everything that Mr Mzinyathi relied upon for his determination depended upon the interpretation, the quality of which could not been checked, there being no audio recording of the interview. Ms Harvey, correctly submitted, in my view, that it is not only the refugee who has the right to competent interpretation, every decision-maker upon whom a duty is cast to make a determination affecting another person's right should not be expected to do so if he cannot communicate effectively with that person. It follows as a matter of logic that it is not possible to apply the mind to information which is not fully understood. Failure on the part of a RSDO provide an interpreter was *'egregious shortcoming'* rendering the hearing unfair. (See *Katsshingu v Chairperson of Standing Committee for Refuge Affairs and Others* (19726/2010) [2011] ZAWCH C480(2 November 2011). Had competent interpretation been provided to the Applicant, it would have been clear from the outset that the Applicant's application for asylum was not based on economic migrancy.

The Status determination interview

[14] I have already indicated that the Applicant's application was rejected as being *'manisfestly unfounded'*. It has long been accepted by courts that asylum seekers are vulnerable and face a range of peculiar difficulties. It is for this reason that the duty to formulate the claim is accordingly shared between the asylum seeker and the RSDO. As explained in the UHRC Handbook, the standard of proof is lower than the normal civil standard, and the asylum seeker is to be given the benefit of the doubt. In *van Gaderen NO v Refugee Appeal Board and*

Others (TPD case No 30720/2006, 19 June 2007, the court after considering various domestic and international authorities.

"All this confirms my view that the normal onus in civil proceedings is in appropriate in refugee cases. The enquiry has an inquisitorial element. The burden is mitigated by a lower standard of proof and a liberal application of the benefit of doubt principle."

[15] In order to come to the conclusion that the application was manifestly unfounded, the RSDO was obliged to closely scrutinise the facts germane to it. The applicant and Mr Omar gave evidence to the effect that the RSDO did not ensure that the applicant fully understood his rights as well the procedures applicable to his application. Mr Omar, specifically testified that on the date in question he was in a hurry to attend to his own affairs and that he did not recall being requested to interpret the procedures envisaged in s 24(2) of the Act. Whereas the purpose of the interview by the RSDO is to elicit facts bearing upon the application, Mr Mzinyathi conceded that he did not probe further despite being aware of the volatile political situation in Burundi. It was clearly wrong of him to conclude, without a proper investigation that the application was manifestly unfounded. The very use of the word *'manifestly'* denotes that it must be clear or obvious to the mind. (See the *Concise Oxford Dictionary*). A perusal of the Applicant's application and the RSDO's interview notes show that this was not the case in the instant matter. Of note, is that Mr Mzinyathi conceded that had he elicited sufficient information for the purpose of determining whether the applicant was a refuge, more particularly the information that has been placed before court, the Applicant would have qualified as a refugee. It follows that the written reasons for the decision do not pass scrutiny.

This is particularly so in the light of the fact that written decision included substantial misinformation on the standard and the burden of proof.

[16] I now turn to consider the decision of the SCRA.

[17] It is unclear from the record whether SCRA was lawfully convened to exercise its review powers. According to Mr Mzinyathi the SCRA made its decision on 17 March 2009, the date reflected on the stamp. It is common cause that it was communicated to the Applicant on 30 January 2013 when he sought to renew his temporary permit. Mr Mzinyathi explains the delay thus:

'It would seem that after the SCRA decision in March 2009, instead of the file being taken to the administrator to update the database, the file might have been packed for relocation.

After unpacking and categorising the files at the new offices in Maitland, which took some months due to the number of files, due to an oversight it would seem that the Applicant's file was returned to the filing system instead of having been taken to the administrator to update the database.

Subsequently, the Office again relocated from Maitland to Cape Town during mid-2012, which again required the packing up and categorisation of the files beforehand which took a few months. Subsequently, it would seem the oversight was repeated in that the Applicant's file was not taken to the administrator to update the database.'

The SCRA did not provide reasons for its decision. Instead, the Applicant was notified that he would be handed over to immigration authorities. The delay therefore was caused by the Department of Home Affairs' failure to maintain and coordinate its filing system.

[18] Regarding the substance of the application, it is clear that the SCRA did not properly review the decision of RSDO. This I say because had it done so, it would have been able notice that the RSDO did not elicit sufficient facts to make a determination whether or not the Applicant was a refugee. All it needed to consider is whether there was a rational objective basis justifying the connection made by the RSDO between the material available and the ultimate decision arrived. Based on the reasoning I have advanced as a basis for the setting aside of the decision of the RSDO, it is my judgment that SCRA did not properly carry out its mandate. In fact the decision of the RSDO and SCRA fall to be set aside on all the grounds listed in the notice of motion.

[19] Ms Harvey argued that the decisions of both the RSDO and the SCRA are tainted by bad faith and improper motives to exclude refugees, rather than to recognise them. According to Ms Harvey, the fact that the RSDO misinformed the Applicant as to the burden of proof supports this contention. In my view, the conduct of both the RSDO and the SCRA clearly shows dereliction of duty and bad faith, but I cannot say on these papers, that the motive was to exclude refuges.

[20] I have in this judgment held that the manner in which the Respondents received and assessed the Applicant's application resulted in insufficient facts being placed before them. Despite the facts being insufficient for the taking of a decision, a decision was made refusing to recognise that the Applicant is a refugee. As correctly contended by Ms Harvey, this decision unlawfully denies the applicant the protection to which he is entitled, and has the result that he would have been be

forced to return to a place where his rights are not secure, in violation of the principle of *non refoulement.*

[21] In conclusion, the conduct or omission on the part of both the First and Second Respondents falls foul of the provisions of the Act to which they should have regard when making determinations relating to the status of refugees. I have already outlined the applicable legislative framework. Such failure relates to the procedural and substantive prescripts. In addition, the Applicant's right to reasonable and fair administration action as envisaged in s 3(2)(d) and 3(2)(e) of PAJA read with s 33 of the Constitution were not observed.

[22] Flowing the above conclusion, what remains to be considered is the remedy.

REMEDY

[23] Section 8 of PAJA sets out the remedies in proceedings for judicial review.

"8 Remedies in proceedings for judicial review –

The court or tribunal, in proceedings for judicial review in terms of 6(1) may granny any *order that is just and equitable, including*

orders-

(a) directing the administrator –

(i) to give reasons; or

(ii) to act in the manner the court or tribunal requires;

(b) prohibiting the administrator from acting in a particular manner;

(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; or

(bb) directing the administrator or any other party to the proceedings to pay compensation;

(d) declaring the rights of the parties in respect of any matter to which the administrative action relates;

(e) granting a temporary interdict or other temporary relief; or

(f) As to costs

(2) The court or tribunal, in proceedings for judicial review in terms of section 6 (3), may grant any order that is just and equitable, including orders-

(a) directing the taking of the decision;

(b) declaring the rights of the parties in relation to the taking of the decision;

(c) directing any of the parties to do, or to refrain from doing, any act

or thing the doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties; or

(d) as to costs."

Counsel for the Applicant, argued that whilst the primary remedy in review proceedings is to remit to the functionary, this principle yields where such remittal would be unfair in all the circumstances. In this case the Applicant asks that the Court *not* remit the matter to the original functionaries for a decision to be taken afresh, but to substitute rather

than to refer it back to the original functionary. The Applicant asks that the Court declare that he is a refugee, and direct the Minister of Home Affairs to issue to him written recognition of refugee status within seven days of the date of the Order. Counsel for the Respondents, Ms Titus, on the other hand, argued that an administrative functionary that is vested by statute with the power to consider and approve an application is generally best equipped by the variety of its composition, by experience and access to sources of relevant information to make the right decision.

[24] The guidelines on how this court should deal with a successful review application are set out in *Premier Mpumalanga v Association of Estate Agents School* 1999 (2) (CC) 113 at para 50. The general principle under common law is that a court is reluctant to substitute its decision for that of the original decision-maker, but there are circumstances where it would be appropriate for a court to do so. The general principle is that a review court, when setting aside the decision of an administrative authority, will not substitute its own decision for that of the administrative authority unless exceptional circumstances exist. This is clearly set out in *Masamba v Chairperson, Western Cape Regional Committee, Immigrants Selection Board and Others* 2001 (12) (BCLR) (C) at 1259 E:

> *"The purpose of judicial review is to scrutinize the lawfulness of administrative action in order to ensure that the limits to the exercise of public power are not transgressed, not to give the courts the power to perform the relevant function themselves. As a general principle, a Review Court, when setting aside a decision of an administrative authority, will not substitute its own decision for*

that of the administrative authority, but will refer the matter back to the authority for a fresh decision…"

But, the court went further to determine the exceptional circumstances under which a court is competent to substitute the decision of an administrative body under review.

In *Tantoush V Refugee Appeal Board ant others* 2008 (1) SA 332 (T) the court summarised the principles thus:

"[28] When a court sets aside a decision of a body such as the RAB, the default position must be to refer the matter back to the designated body to enable it to reconsider the issue and make a fresh decision. As Her JA said in Gauteng Gambling Board v Silverstar Development Ltd 2005 (4) SA 67 (SCA) paragraph 29 [also reported at [2005]JOL 14068 (SCA) – Ed]:

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

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

[29] However, as acknowledged in sections 8(1)(c)(ii)(aa) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), a court is granted the power on review to substitute or correct a defect arising from a decision "in exceptional circumstances". The phrase "exceptional circumstances" does not equate to a court adopting the view that it is in as good a position to make a decision as the administrative body. That would be subvert the default position. But, fairness is a consideration which must be uppermost in the mind of court in determining whether it is dealing with the kind of exceptional case which calls for substitution as opposed to a remittal."

[25] Commenting on the power to substitute its own decision for that of a functionary under an Act in *University of the Western Cape and Others v Member of the Executive Committee for Health and Social Services and Others* 1998 (3) SA 124 (C) Hlophe JP (as he then was) stated:

> *"Where the end result is in any event a foregone conclusion and it would merely be a waste of time to order the tribunal or functionary to reconsider the matter, the courts have not hesitated to substitute their own decision for that of the functionary… The courts have also not hesitated to substitute their own decision for that of the functionary where undue delay would cause unjustifiable prejudice to the Applicant… our courts have further recognized that they will substitute a decision of a functionary where the functionary or tribunal has exhibited bias incompetence to such a degree that it would be unfair to require the Applicant to submit to the same jurisdiction again… It would also seem that our courts are willing to interfere, thereby substituting their own decision for that of a functionary where the court is in a good position to make the decision itself as qualified should take the decision of the administrator's powers or functions. In some cases however, fairness to the Applicant may demand the court should take such a view".*

Similarly, in *Gambling Board v Silverstar Development Ltd & Others, supra* (Tantoush judgment), the Supreme Court of Appeal held that an 'exceptional' case is one where, due to considerations of fairness, the Court is:

"Persuaded that a decision to exercise a power should not be left to the designated functionary".

The test is ultimately one of fairness. On these facts, and applying the legal principle, should this court substitute the decision of the RSDO and SCRA and grant the applicant a refugee status?

[26] I am of the view that in the matter at hand, it is indeed a foregone conclusion that the Applicant is a refugee. This I base on the evidence of the RSDO, Mr Mzinyathi, who unequivocally testified that on the facts before court, he would have come to the conclusion that the applicant qualifies for to be awarded the status of a refugee. In addition, the circumstances that compelled the Applicant to leave his home country are undisputed. They accord with the information contained in the UNHCR 2008 Global Report and the US Human 2008 Human Rights Report on Burundi which state thus:

"Peace negotiations with the country's last rebel group, Palipehutu-FNL, experienced setbacks that culminated in armed confrontations around the Capital, Bujumbura in April 2008. Talks between the Government and the rebels then resumed. . .

Constraints: Movement was restricted due to the security situation, particularly in the northwest of the country. Deteriorating conditions in the eastern DRC prevented organised repatriation to the area, though a few hundred refugees expressed an interest in repatriation.

Despite the cease-fire, abuses by the FNL against civilians continued and occurred primarily in the FNL traditional strongholds of Bujumbura Rural, and the northern provinces of Bubanze, Cibitoke, Muramvya and Kanyaza. These abuses included killings, kidnappings, rapes, extortion, and the use of forced labour.

During the year security force abuse occurred, and FNL rebel combatants continued to commit numerous serious abuses against the civilian population, including torture, rape and the looting and burning of houses, principally in Bujumbura Rural Province and the western provinces of Cibitoke and Bubanza.

On July 6, in Muhuta, a Bujumbura Rural Province, FNL rebels reportedly killed the head of a family and looted his house.

On July 8, a large number of armed FNL rebels moved into Isale, Bujumbura Rural Province, looting houses, burning fields, and killing livestock: local media documented the destruction. No arrests were made following these incidents."

[27] The tender made by the Respondents is no more than affirmation that when it re-considers the Applicant's application, it will abide by the prescripts of the legislative framework, which they ought to have regard to in the first place. This is cold comfort when one is considers the fact that the delay in processing the application is unreasonable. In addition, there is no proper explanation of the first and second respondents' disregard for the very statutory provisions that direct the determination of the applicant's application. Furthermore, the facts espoused by the Applicant in this application are uncontroverted. A further delay will cause prejudice to the Applicant. Delay has been considered in numerous decisions as a basis on which a court might find justification for substituting the decision of the functionary. In this matter almost four years had elapsed before the Applicant was advised of the decision of the first respondent. I am mindful of the fact that a court's reluctance to substitute its own decision for that of an administrative authority (but rather to remit it to the authority concerned) is in accordance with the court's understanding of the principle of separation of powers and the distinction between appeal and review. However, I am in the circumstances of this case of a firm view that that the dictates of fairness demand that the decision of the functionary be substituted.

[28] It remains to be said that during the hearing of this matter and after oral evidence was tendered, I took a view fact that the Respondent's opposition, given the fact that it was clear from the papers no determination was made by the RSDO as to the competence of the interpreter, Mr Omar. This prompted the Respondents to make the tender referred to in this judgment. Even at the stage the matter was referred to oral evidence, it ought to have been plain to the Respondents

that no such determination was made by the RSDO despite there being a clear legislative framework demanding so. Much time and resources would have been preserved by a consideration from the outset of whether or not the RSDO had complied with the relevant legislation. But as I said, the Respondents made a tender in acknowledgment of this fact.

[29] In the result, for all these reasons, the following order is issued:

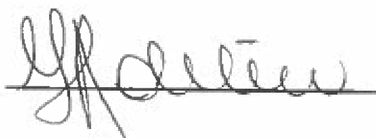
1. The decision of the Second Respondent taken on 17 December 2008, rejecting the Applicant's application to be declared a refugee is hereby set aside.

2. The decision of the First Respondent taken on 30 January 2013, upholding the Second Respondent's decision of 17 December 2008 is hereby set aside.

3. The Applicant is hereby declared a refuge and is entitled to asylum in the Republic of South Africa

4. The Third Respondent id directed to issue to the Applicant written recognition of refugee status in terms of section 27 (a) of the Refugees Act read with Regulation 15 (1) within 21 days of the date of this order.

5. The Respondents shall bear the costs of this application, jointly and severally, the one paying the other to be absolved.



NDITA; J