IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

24/03/2017 .....
DATE SIGNATURE

Case Number: 71741/2014

In the matter between:

PAUL JOSEPH MUTOMBO MUKUNGUBILA	Applicant
and	
THE ADDITIONAL MAGISTRATE, JOHANNESBURG: MRS. A DU PREEZ *N.O.*	First Respondent
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second Respondent
THE DIRECTOR OF PUBLIC PROSECUTIONS: GAUTENG LOCAL DIVISION	Third Respondent
THE REFUGEE APPEAL BOARD OF SOUTH AFRICA	Fourth Respondent
THE DIRECTOR-GENERAL: DEPARTMENT OF HOME AFFAIRS	Fifth Respondent
THE MINSTER OF HOME AFFAIRS	Sixth Respondent

JUDGMENT

Maluleke AJ:

1. This is an application to review and set aside the decision of the fourth respondent wherein the fourth respondent refused to entertain the applicant's appeal to it for the purpose of being granted refugee status. A substitution of the decision is sought.

2. The applicant was born on 25 December 1947 in Kisala in the Democratic Republic of Congo ("DRC"). The chronicle commenced with his arrival in the Republic of South Africa ("RSA") on 6 January 2014. On 5 March 2014 he applied for asylum in terms of section 21 of the Refugees Act and was issued with an asylum seeker permit, pending the outcome of his asylum application. One 30 June 2014 the applicant's asylum application was rejected by Refugee Status Determination on the grounds of exclusion in terms of section 4(1)(a) and (b) of the Refugees Act. On 21 August 2014 the Refugee Appeal Board (RAB) dismissed the applicant's appeal dated 24 July 2014 which was seemingly filed with Pretoria High Court, on the grounds that the RAB does not have jurisdiction to entertain the appeal.

3. The applicant regards himself as a politician and a religious leader. His organisation is called Ministry for the restoration from Black Africa ("MRAN"). He is regarded by adherents of his faith as a prophet and a man of God who possesses revelatory powers about the future of the nation. The other name for his organisation is "Eglise de la Resouration". He alleges it's been in existence since 1977. His organisation has no constitution, but sources its rules within the New Testament scriptures. It has loose structures and consists of one thousand two hundred (1200) members in the DRC. He contends that he has also worked for Human Rights Organisation (C.I.I.D.H / D-ONGD.H).

4. The applicant is married to eighteen (18) wives and five (5) of them reside in RSA. He has nineteen (19) children and twelve (12) of them reside in RSA. He contends that he left the DRC because of persecution and threats of annihilation by the authorities of the DRC. He contends that he will suffer harm should he be deported to the DRC and he will not have a fair trial.

5. On 5 May 2014, the Honourable Minister of Justice and Constitutional Development ("as it then was") issued a notification under section 5(1)(a) of the

Extradition Act, 1962 ("Act 67 of 1962") that the applicant be extradited to the DRC to stand trial on a charge of murder contrary to articles 43 and 44 of the Criminal Code of the DRC, a charge of international aggravated assault contrary to article 43 of the Criminal Code of the DRC, a charge of malicious destruction contrary to articles 110 and 112 of the Criminal Code of the DRC and a charge of arbitrary and illegal detention contrary to article 67 if of the Criminal Code of DRC.

6. According to the Interpol report send to RSDO, the applicant had been investigated by the Interpol on request by the DRC and was arrested in Johannesburg on 15 May 2014. The criminal charges against the applicant appearing on the warrant of arrest of the Interpol are the same as the charges mentioned in the investigation report and a statement by the DRC Attorney-General Flory Kabange Numbi attached to the applicant's papers.

7. The Applicant contends that he obtained an asylum seeker temporary permit on the 27th of January 2014, which was extended several times, the last of which expired on 30 June 2014. The Fifth Respondent issued a notice requiring the Applicant to appear before an Officer of the Fifth Respondent on 7 July 2014 for report back on the Applicant's case. He was advised that his application for asylum had been rejected on the basis of Section 4(1)(a) and (b) of the Act. Thereupon he launched urgent proceedings out of the local division of this court in Johannesburg, for an interim interdict pending the outcome of the processes that are necessary for him to exhaust his internal remedies, including an appeal to the Refugee Appeal Board, and any subsequent review thereof. Having considered the Application, the Fifth and Sixth Respondents consented to the Order subject to certain conditions that were agreed upon by the parties' legal representatives. On the 29th of July 2014 the Applicant duly submitted an appeal to the Refugee Appeal Board. In the Notice of Appeal and the Founding Affidavit attached thereto, the Applicant set out material facts pertaining to his personal circumstances and the events that caused him to come to South Africa and seek asylum in this country. It is necessary to point out that there are a number of events that had taken place in this matter according to the Applicant which for the purpose of avoiding prolixity of this the judgment I do not wish to regurgitate as not all of them are relevant for the decision I am required to make.

8. It is further necessary to mention that on the 7th of July 2014 at about 7:30 the Applicant was given a document authored by a Refugee Status Determination

Officer (RSDO) in which he was advised that his application for asylum had been rejected. The Applicant contended that the RSDO's reasoning was fractured, incoherent and illogical. He took issue with the fact the RSDO had not interrogated whether the charges levelled against him are politically motivated or not. This he alleged on the basis that the RSDO solely relied on what appeared in the Interpol report. The Applicant's view is that the report offers no particularity as to the charges and that once regard is heard to the particularity thereof it will be clear that the charges are politically motivated. The Applicant stateD that when he attended at the Refugee reception office in Marabastad as directed he was there given a document that he was required to sign being an *"order to illegal foreigner to depart the Republic".* The Applicant signed that document on 7 July 2014. The said document, he contend was in English and had a certificate by an alleged French interpreter at its foot which stated that the contents thereof had been explained to the Applicant in French and the interpreter was satisfied that the Applicant have understood what the order meant and required.

9. The Applicant however denied this and said that what was explained to him was simply that he was required to leave the country. He further denied having agreed to leave the country as he stated that he cannot leave the country and return to the DRC for reasons that he will be persecuted in the fashion similar to the adherents of his faith and that as many of them have been mercilessly murdered and senselessly imprisoned, at least murder awaits him and other members of his family. The Applicant further contended that the document containing the order was irregular in that it ignored the appeal procedure that the Refugees Act and the Immigration Act permit. He contended that on the basis of advice he obtained, i.e that in terms of Section 8 of the Immigration Act, when an immigration official makes a decision that affects a person in his position, *"(4) an applicant aggrieved by a decision...may, within 10 working days from receipt of the notification contemplated in subsection (3) make an application in the prescribed manner to the director-general for the review or the appeal of a decision."*

10. It is apposite at this juncture to point out that the applicant is also the subject of an extradition application that currently serves before the Johannesburg Magistrate Court. In the said extradition application the Applicant is charged with murder, aggravated assault, malicious destruction (presumably of property) and a charge of arbitrary and illegal detention. For purposes of this judgment it is sufficient to state that the Applicant denies responsibility for any of the charges mentioned

therein, save to say that he is indeed the leader of a religious-political movement which engaged in peaceful demonstration, were unarmed and attempting to voice legitimate political protest when they were savagely set upon by the security forces, both the military and police of the DRC, and mercilessly slained. The Applicant further alleged that he has on a number of occasions been a victim of Mr Joseph Kabila ("Kabila") and his government. He stated that during 2006 when he contested the presidential election, he was similarly set upon by commandos sent by Kabila. The Applicant stated that he was arrested by members of Interpol on 15th of May 2015 on the authority of an arrest warrant issued pursuant to the provisions of Section 5(1)(a) of the Extradition Act No. 67 of 1962 ("the Extradition Act") and was released on bail on the same day pending the outcome of an enquiry in terms of Section 10 of the Act.

11. The enquiry was scheduled to be heard by the First Respondent on the 14th and 15th of October 2014. The present proceedings were then instituted in 2 Parts namely Part A and B were subsequently launched. In part A of these proceedings, the Applicant seeks an order interdicting the First and Third Respondents from commencing with and conducting an enquiry in terms of Section 10 of the Extradition Act pending the final determination of his application for asylum by this court or, if need be, a court of appeal. The request by the government of the DRC to have the Applicant extradited is brought in terms of the South African Development Community (SADC) protocol on extradition to which the Republic of South Africa acceded. In terms of article 4 of the protocol, grounds are provided for the mandatory refusal of extradition which is *"if the requested state has substantial grounds for believing that the request for extradition has been made for purposes of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin, political opinion, sex or status or that the person's position may be prejudiced for any of those reasons".* The Applicant contended that as a consequence of the provisions of article 4 of the protocol if a person who's extradition is sought, is able to show at the extradition enquiry, that a request for extradition for an ordinary criminal offence has been made for the purposes of prosecuting or punishing him/her on account of the reasons enumerated in article 4, amongst which are his/her politically opinion, his/her extradition must be refused.

12. The Applicant alleged in his Founding Affidavit that the chronology of events in this matter shows that by the time that he was arrested and brought before the First

Respondent in terms of the Extradition Act, he had already applied for asylum and had obtained an asylum seeker temporary permit in terms of the Refugees Act on the 27th of January 2014 as well as several extensions thereof. He argued that the institution of Extradition proceedings at a time when he had already applied for asylum but have not exhausted all his rights of appeal or review is not in line with the provisions of Section 21(4) of the Refugees Act. The Applicant further argued that given the provisions of, Section 21(4) of the Refugees Act, the First Respondent had no jurisdiction to entertain the request for his extradition for as long as the application for asylum was pending and until he had exhausted all his remedies for appeal or review at law or under that Act. On the 22nd October 2014, the Applicant received a letter in which the Refugees Appeal Board through its Chairman rejected the appeal on the basis that the Applicant lacked *locus standi* to make the appeal, and that the Fourth Respondent (The Refugee Appeal Board of South Africa) had no jurisdiction to adjudicate the appeal. The said letter read in parts: *"Please take note that your client was rejected by the RSDO (Refugees Status Determination Officer) on 30 June 2014 in terms of Section 4(1) and (b) which means that he does not have locus standi to lodge an appeal with the Refugee Appeal Board. Kindly take note of the provisions of Section 24(3)(c) and (26)(1) of the Refugees Act read together with Refugee Appeal Board Rules. The implication thereof is that the Refugee Appeal Board has no jurisdiction to entertain your client's notice of appeal dated 24 July 2014 which was seemingly filed with the Pretoria High Court. The Board concluded that there are no appeal proceedings in respect of Joseph Mutombo Mukungubila before it."*

13. The Applicant's legal representatives wrote a letter dated 25 August 2014 which is annexed to the Founding Affidavit as Annexure FA7 directing a number of questions to the Refugee Appeal Board. The Applicant's legal representatives nor the Applicant himself received no response to this letter. As a result of this, the Applicant launched the present application. In Part A of the application as mentioned above, the Applicant sought a stay of the extradition proceedings before the First Respondent pending the outcome of the relief sought in Part B (including any subsequent appeal) interdicting the First and Third Respondents from commencing with and conducting an enquiry in terms of Section 10 of the Extradition Act in respect of the Applicant. In Part B of these proceedings the Applicant attacks the decision of the Appeal Board to refuse to hear his appeal on the grounds that it is:

13.1 Procedurally unfair;

13.2 Materially influenced by mistakes of law;

13.3 taken having regard to irrelevant considerations while ignoring relevant considerations;

13.4 taken under the wrongful dictates of an extraneous urgency;

13.5 *Ultra vires* the powers under the Act which compels the Board and obliged it to take a decision.

14. It must be stated at this point that the 4th, 5th and 6th Respondents in this matter never filed any opposing affidavits in these proceedings. They have attempted to do so, albeit, outside the time periods prescribed in terms of the rules of this court. Counsel for the 5th and 6th Respondents applied for condonation from the bar arguing that the importance of this matter, the complexity of the issues and prospects of success support the granting of the condonation sought. No substantive application was made in this regard (I do not have such an application in the papers before me). Case law provides useful guidance to a court seized with a request for the condonation of non-compliance with the rules by the parties to the proceedings in exchanging their pleadings. The granting or refusal of such an application is pre-eminently a matter of the court's discretion. However, in exercising that discretion the court must have regard to certain factors such as the explanation given for the non-compliance, the prejudice that will befall a party, if any, an indication of the prospects of success and that the request/application must be brought within a reasonable time. Absent these, a court does not have an option but to refuse the condonation sought, as I do in this matter.

15. On the 24th of October 2014 the Fourth, Fifth and Sixth Respondents filed their Notice of Intention to Oppose. It is noteworthy that the Third Respondent filed opposing papers arguing for the dismissal with costs of Part A of the application on the basis that asylum and extradition proceedings could run parallel. I have difficulties with this line of argument given the veracity of the issues to be determined in the review papers before me. These difficulties will be reflected in the order that I will make and my reasons thereof.

16. It is common cause between the parties that the version of events as set out by the Applicant in his Founding Affidavit and annexures thereto remain undisputed, at least on the papers before me. Similarly the facts detailing the circumstances that caused the Applicant to flee the DRC are also not disputed by the

Respondents. I have already mentioned that the Fourth, Fifth and Sixth Respondents did not filed any Answering Affidavits in this matter and that the Court had to adjudicate the issues before it without the benefit of any evidence by the said Respondents to contradict the Applicant's version.

17. I am required to determine whether the decision of the Refugee Appeal Board of South Africa (Fourth Respondent) to refuse to entertain the Applicant's appeal was correct and/or lawful.

18. In doing so, it is important to understand the basis upon which the RSDO rejected the Applicants application as this is material in the determination of what rights of appeal or review are available to the Applicant thereafter. Judges are required to display analytical prowess, factual rigour and legal surefootedness in adjudicating matters of this nature. This matter is an example of a case in point where I am called upon to showcase those abilities. The ruling that I will make in this matter will surely bear testimony to my attempts at this difficult task that should not be taken lightly.

THE LAW

19.1 Section 33 of the Constitution of the Republic of South Africa provides that:

"(1) everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons."

19.2 All persons have the right to be granted a proper opportunity to present their case before any forum that is established by law. This is the foundation and/or overarching rationale behind the *audi alteram partem* principle in the realm of administrative law. In terms of Section 2 of the Refugees Act, it is provided that:

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

(b) His/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."

19.3 The above provisions deal with general prohibition of refusal of entry, expulsion, extradition or return to any other country in certain circumstances. I also wish to refer to Section 3 of the same Act which deals with refugee status. This section provides that:

"Subject to Chapter 3, a person qualifies for refugee 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."

19.4 In terms of Section 4:

"(1) A person does not qualify for refugee status for the purposes of this Act if there is reason to believe that he or she -

(a) has committed a crime against peace, a war crime or a crime against humanity, as defined in any international legal instrument dealing with any such crimes; or

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

19.5 In terms of Section 24(1) of the Act, it is stated that:

"(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*

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

19.6 In sub-section (2) the Act provides that "*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."*

19.7 In terms of Section 26(1) *"Any asylum seeker may lodge an appeal with the Appeal Board in the manner and within the period provided for in the rules if the Refugee Status Determination Officer has rejected the application in terms of section 24(3)(c).*

19.8 In terms of sub-section (2) *"The Appeal Board may after hearing an appeal confirm, set aside or substitute any decision taken by a Refugee Status Determination Officer in terms of section 24(3)."*

19.9 Section 24(3) reads as follows:

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

(a) *grant asylum; or*

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

(c) *reject the application as unfounded; or*

(d) *refer any question of law to the Standing Committee."*

19.10 In sub-section (4) it provides that:

"(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 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."*

19.11 Section 14 of the Act states that-

"(1) The Appeal Board must -

(a) *hear and determine any question of law referred to it in terms of this Act;*

(b) *hear and determine any appeal lodged in terms of this Act;*

(c) *...."*

ANALYSIS

20. It was argued for the Fifth and Sixth Respondents that this matter turns on a narrow legal point, namely, whether the Applicant has been correctly excluded by the provisions of Section 4 of the Refugees Act and whether he has a right to appeal to the Fourth Respondent. Legal submissions were made in argument to advance reasons in support of a proposition that justifies the conclusion that the Appellant was correctly excluded in terms of Section 4 and therefore not competent to avail himself the right of appeal. I have already stated that no evidence was submitted in support of this, save for counsel's submissions to that effect.

21. I disagree with the submission that this matter turns on a narrow point of law as argued. The issues are in my view much more about what rights of recourse are available to an Applicant who, without an opportunity to be heard and to give evidence in support of the appeal, is informed that owing to some information and untested allegations levelled against him by the Interpol and other authorities, their application for asylum has been excluded by the provisions of Section 4(1)(a) and (b) read with Section 1(a) of the Refugees Act and that they consequently do not have *locus standi* to appeal to the Fourth Respondent. All these are based on hearsay and untested evidence in the extradition proceedings that has not been challenged.

22. It is an untenable proposition to hold that view, as to do so, defies logic and is an affront to the constitution and the well-founded principle of *audi alteram partem* rule. This is a classic case of putting the proverbial cart before the horse. The question that begs an answer, is how can the Applicant not have standing to institute an appeal without the appeal first being heard by the 4th Respondent? There is no basis in our law that would support such an arbitrary and absurd proposition. This approach is consistent with the difficulties that the Applicant met with in obtaining the record necessary to prosecute Part B of this application, the time that lapsed for the filing of answering affidavits without same being filed and other court processes instituted before arriving at the point where this application is before me. The Applicant was thoroughly frustrated.

23. The provisions of Section 2 of the Refugees Act are clear. This section per se does not grant refugee status. The Applicant alleged that he qualifies for refugee status under section 3. It is provided therein that the Applicant may not 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 or expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where:-

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

23.2 His/her life or 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 whole of the country.

24. Based on averments made in his founding affidavit, It is clear that the Applicant will be subjected to persecution on account of his religion, political opinion and/or membership of his social group. I have no evidence from the said Respondents contradicting that version of the Applicants' evidence. There is equally no argument that suggests that the Applicant did not file his appeal properly or in terms of the Act. There was simply no evidence before the decision maker to enable him/her to refuse to hear the appeal. It is trite that the decision made in these circumstances must be fair from an administrative point of view. This is

anything but fair. All that the decision maker say is that once he or she heard that there were criminal charges against the Applicant he or she was left with no choice but to exclude the Applicant in terms of Section 4 of Act. No further information whatsoever is provided in support of this.

25. The provisions of Section 14(1)(a) of the Refugees Act are very clear and provide the answer to the issues before this court. The Fourth Respondent is by virtue thereof obliged to hear and determine any question of law referred to it in terms of the Act or hear and determine any appeal lodged in terms of the Act (own emphasis). Accordingly, when the Applicant arrived at the doorstep of 4th Respondent with an appeal, the latter had no choice but to hear him and make a decision after hearing him. I therefore find that it was *ultra vires* its powers for the 4th Respondent to refuse to so hear the appeal without the Applicant's representations at the very least. I completely reject the approach adopted by the Fourth Respondent in this regard.

26. Counsel for the, Fifth and Sixth Respondents argued that the Applicant does not seek relief against the RSDO, in other words the party that made the decision that is the subject of these proceedings is not in court. Worse, he argued, the RSDO is not even cited as a party to these proceeding. On this basis he submitted that the application must fail. He further argued that the RSDO made the decision to exclude the Applicant in terms of Section 4 of the Act and not the Fourth Respondent. He expressed difficulties with the fact that the last mentioned decision is, however not taken on review in terms of the present case. He contended that Section 4(1)(a) and (b) is not concerned with whether the decision is right or wrong. He submitted that in its present form the Applicant's application amounts to an abusive application as defined in Section 1 of the Act. It was his clients' case that in terms of Section 24(1) it is the RSDO that makes the decision, but strangely that decision is not challenged in this case. Having concluded that the application of the Applicant was excluded in terms of Section 4 the said Respondents argued that once a person is so excluded the only right of recourse available to them is the one envisaged in terms of Section 25, namely a review by the standing committee. Accordingly to Section 26(1), Counsel argued, only the decisions made in terms of Section 24(3)(c) goes to the Appeal Board. It was on this basis that they contended that the 4th Respondent has no jurisdiction to hear the appeal. It was argued that once I find that the 4th Respondent had not jurisdiction to entertain the appeal, I must dismiss the application. This is the crux

of their case. Their further argument was that if the RSDO as a decision maker was before this court in the present application, then it would have been necessary and/or important for them to deal with all the allegations in the papers with some detail. Counsel's final submission was that no case whatsoever is made by the Applicant for the kinds of declarators he is seeking requested this court to simply dismiss the application with costs.

27. It is my view that the above arguments miss the whole point of the present application. The Fourth Respondent made a decision (i.e. the refusal to hear the appeal due to an alleged lack of jurisdiction). It is that decision that is now challenged in terms hereof and not the one made by the RSDO to exclude the Applicant in terms of Section 4. If we look as Section 7(2) of the Refugees Act, this Section provides for the exhaustion of internal remedies. The 4th Respondent is the body that by law is empowered to set aside or substitute any decision (own emphasis). It has a legal duty to consider all matters before it. I also have no basis, factually or otherwise, to make an inference that the RSDO's decision was made under the provisions of Section 24(3)(c). Accordingly, I reject this argument completely.

28. On the strength of uncontested evidence before this court, legal submissions made by counsel and the law referred to above, I believe a proper case was made out by the Applicant for the review and setting aside of the decision of the Fourth Respondent for the reasons that I have already provided. Equally I am a satisfied that there is a case for this court to grant the interdictory relief sought by the Applicant in Part A of this application as to do otherwise would be undermining fundamental constitutional rights of the Applicant and making a mockery of the *audi alteram partem* principle which is so entrenched in our constitutional democracy. The requirements for an interdict are well founded in our law and have been met in this case. For the avoidance of prolixity of the judgement I will not take this matter further. It is common cause that the institution of the extradition proceedings took place at a time when the Applicant had already applied for asylum but had not exhausted all his rights of appeal or review in terms of the Act. There can be no question that the issues before this court and those standing in the extradition proceedings are fundamentally connected and substantially similar.

29. I shall now deal with the Applicant's prayer for the correction and substitution of the 4th Respondent's decision by this court as contained in prayer 2 of Part B of the application.

30. The Applicant stated that it was concerning that he must point out events that occurred in this matter around his efforts to exercise his rights. This was part and parcel of the evidence presented to this court in making out the case that the decision making of the Refugees Appeal Board was manifestly influenced by an extraneous agency. This court was referred to the timing of the refusal to renew the provisional refugee permit of the Applicant following immediately upon the Interpol arrest, other matters detailed in paragraphs 36 – 46 of the Applicant's Founding Affidavit as well as those set out in the Supplementary Affidavit. The Applicant presented a picture of a carefully choreographed attempt by the Respondents to achieve his extradition by refusing to grant him refugee status and then hastening the exhaustion of internal remedies. In the first place, the court was referred to the Fifth and Sixth Respondents refusal to comply with a court order after which the Applicant instituted contempt proceedings. It appears that those contempt proceedings where settled on the basis of an agreed court order. Shortly thereafter, the said Respondents attempted to appeal the very order they had agreed and consented to. This, the Applicant alleged, was done in order to get the order suspended to allow time for the 4th Respondent to hear the appeal. I have pointed out that there is a Supplementary Affidavit filed to supplement the Founding Affidavit for purposes of pursuing relief sought in Part B of the Notice of Motion and for purpose of establishing further facts upon which the Applicant will request this court to substitute its decision in relation to the question whether or not he should be granted asylum. More importantly to point out additional grounds why the Applicant makes its submission that the decision in his matter bears the illegal interference from an external agency.

31. In the Supplementary Affidavit, the Applicant complains of a deliberate attempt on the part of the person compiling the record on behalf of the 4th Respondent to selectively recreate a record. The Deponent expressed concern and suspicion based on attempts to include documents that were not part of the appeal to the 4th Respondent given the principle upon which the decision of the Board was reached as well as having shown what information was before the RSDO. A conclusion was therefore made that neither the RSDO nor the Board had any concrete facts that could disqualify the Applicant as a *bona fide* asylum seeker. Furthermore it

was alleged that no other evidence was placed before the RSDO that would constitute admissible factual matter to contradict the corroborated and proven basis for the granting of asylum that the Applicant had set out. It was submitted to this court that these and other issues detailed above had the effect of undermining all confidence that the Applicant might have in having the matter referred back to the board for reconsideration. On this basis, the court was requested to substitute the decision of the Fourth Respondent. The Applicant alleged that there is an approach of coordinated efforts between the Department of Home Affairs and the Fourth Respondent to work together to achieve the refusal of asylum and the ultimate deportation and extradition of the Applicant. It was argued for the Applicant that this offended the requirement that the Board stands as an independent and objective body which pointed to an inference of unlawful executive influence and interference with the 4th Respondent. Counsel for the Fifth and Sixth Respondents argued that in terms of Section 8 of the Promotion of Administrative Justice Act 30 of 2000 (PAJA), substitution of the decision of a functionary by the court is only permissible where there are exceptional circumstances demonstrated. In this case he argued, none of the exceptional circumstances have been demonstrated, requiring substitution by the decision of this court.

32. It is indeed trite that a court will substitute its decision for that of the decision maker where there are exceptional circumstances as contemplated by Section 8 of PAJA. Generally it is required that the court be satisfied that all the facts relevant to making the decisions are before it and that the court has the institutional competence to make the order. The court must also consider whether further delay will cause the Applicant unjustifiable prejudice, whether the original decision maker has exhibited bias and incompetence and whether the remitting of the matter back to that decision maker will result in a foregone conclusion. I was referred to a number of authorities in this respect. In the decision of ***Gauteng Gambling Board v Silverstar Development Limited and others 2005 (4) SA 67 (SCA) 75D-76E***. At paragraph [28] the court stated that the power of a court on review to substitute or vary administrative action or correct a defect arising from such action depends upon a determination that a case is "exceptional" according to the imports and wording of Section 8 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

33. The court pointed out that since the normal rule of common law is that an administrative organ on which a power is conferred is the appropriate entity to exercise that power, a case is exceptional when, upon a proper consideration of all the relevant facts, a court is persuaded that a decision to excises its power should not be left to the designated functionary. How that conclusion is to be reached is not statutorily ordained and will depend on established principles informed by the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair. There will accordingly be no remittal to the administrative authority in cases where such a step will operate procedurally and fairly to both parties. It is stated that the mere fact that the court considers itself as qualified to take the decision as the administrator does, not of itself, justify usurping that administrator's powers. Sometimes, however, fairness to the Applicant may demand that the court should take such a view. At paragraph [29] the court said that an administrative function that is vested by statute with the power to consider and approve or reject 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 recognise its own limitations that is why remittal is almost always the prudent and proper cause.

34. It was submitted on behalf of the Applicant that the facts of this case fall within the extraordinary circumstances that justify a substitution by this court of its decision for that of the 4th Respondent. In the first place the Applicant argued that nothing has been offered to contradict his very compelling case for refugee status and that further delay at the hands of the responsible bureaucrats will be unjust. In the second place, the considerations that are relevant are prescribed by statute the court is in as good a position as the RSDO or the 4th Respondent to make the decision. Thirdly, it was argued that the 4th Respondent has shown itself pliable in the hands of the Fifth and the Sixth Respondents. Lastly, it was argued that it would be unfair to refer the matter back to the Fourth Respondent.

35. I have already stated that from the evidence before me, I am convinced that the Applicant in this matter entertains a well-founded fear of persecution. On the basis of what has transpired in this matter, the dictates of fairness implore me to hold this view. Accordingly I find that exceptional circumstances justifying substitution are present in this matter. This matter has a long and protracted history of regrettable events. It is clear from the evidence that all kinds of tactics and

stumbling blocks have been deployed at every possible avenue that the Applicant explored in order to enforce and protect his rights. This has created substantial uncertainty surrounding the Applicant's fate, which uncertainty cannot be allowed to perpetuate *ad infinitum*. I regard the delay in allowing the Applicant an opportunity to present his case and to be allowed to exhaust all internal remedies as provided for in the Refugees Act as exceptional circumstance justifying substitution of the decision of the 4th Respondent. There is also no evidence placed before me that suggests that the Applicant poses any risk, violent or otherwise to South Africa which would have influenced me otherwise. Equally there was no evidence placed before this court to suggest that a newly constituted board would be available to determine the Applicants appeal to persuade me on a referral.

36. For all the above reasons, I make the following order:

36.1 Pending the outcome of the relief sought in Part B (including any subsequent appeal) the First and Third Respondents are interdicted from commencing with and conducting an inquiry in terms of Section 10 of the Extradition Act 76 of 1962 in respect of the Applicant.

36.2 The decision of the 4th Respondent, communicated in the letter addressed to the Applicant's attorney dated 21 August 2014, wherein the 4th Respondent refused to entertain the Applicant's appeal of the rejection by the Refugee Status Determination Officer (RSDO) at the Marabastad Refugee Reception Office on 30 June 2014, of the Applicants application for asylum in terms of Section 21 of the Refugees Act 130 of 1998 ("the Refugees Act and/or the Act"), is declared to be inconsistent with the Constitution of the Republic of South Africa, unlawful and invalid; and is hereby reviewed and set aside.

36.3 The 4th Respondents failure to have granted the Applicant asylum in terms of Section 3 of the Refugees Act; and to have ruled that the Applicant could not be instructed to leave the Republic of South Africa as advised on 7 July 2014, alternatively deported from the Republic of South Africa by virtue of Section 2 of the Refugees Act, is declared to be inconsistent with the Constitution of the Republic of South Africa, unlawful and invalid; and is hereby reviewed and set aside.

36.4 The Applicant is entitled to appeal his refused application for Refugee status and is hereby granted asylum.

36.5 That the Applicant cannot be instructed to leave the Republic of South Africa, alternatively be deported from the Republic of South Africa unless the State demonstrates that the circumstances set out in Section 2 of the Act no longer apply in respect of the Applicant.

36.6 It is hereby declared that:

36.6.1 a Refugee Status Determination Officer can determine whether or not asylum should be granted to an applicant therefore, notwithstanding the existence of an application for the extradition of such applicant;

36.6.2 the Refugee Appeal Board has jurisdiction to determine appeals in such matters from the Refugee Status Determination Officers of the fifth Respondent;

36.6.3 pending the outcome of an asylum seeker's application for asylum, and appeal therefrom, if prosecuted, no extradition of such applicant can take place;

36.6.4 the decision to grant refugee status to an applicant is a decision to be made independently of the fact of the existence of extradition proceedings; and

36.6.5 upon a finding of an applicant's qualification for refugee status in terms of the Act, no extradition of the successful applicant can occur.

36.7 The Fourth, Fifth and Sixth Respondents are ordered to pay the costs of this Application including the costs of counsel, jointly and severally, the one paying the other to be absolved.

MJ MALULEKE

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Date of hearing: 17 OCTOBER 2016

Date of delivery: 30 MARCH 2017

Representation for Applicant:

Counsel	:	Adv DJ Vetten
Instructed by :		Edward S Classen and Associates
		C/O Van Zyl Le Roux Inc

Representation for Respondents:

Counsel	:	Adv W Mokhari SC and Adv MP Mdalana
Instructed by :		State Attorney, Pretoria