



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No: 49327/21

- | | |
|-----|-------------------------------------|
| (1) | REPORTABLE: YES/NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES/NO |
| (3) | REVISED |

20/10/2022
DATE


SIGNATURE

NWABUEZE ANTHONY

Applicant

and

THE MINISTER OF HOME AFFAIRS

First Respondent

**THE DIRECTOR GENERAL:
DEPARTMENT OF HOME AFFAIRS**

Second Respondent

**THE CHAIRPERSON:
STANDING COMMITTEE FOR REFUGEE AFFAIRS**

Third Respondent

REFUGEE STATUS DETERMINATION OFFICER

Fourth Respondent

JUDGMENT

PHOOKO AJ

INTRODUCTION

- [1] This is an application for a review of a decision that was taken by the First Respondent¹ or the Third Respondent² refusing Mr. Anthony Nwaubeza ("the Applicant"), refugee status.
- [2] The Applicant *inter alia* seeks that this Court to review and set aside the aforesaid decision or to refer the matter back to the Third Respondent for reconsideration on the basis that the rules of natural justice and the provisions of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") were not observed. The Applicant also wants a cost order against the Respondents.

THE PARTIES

- [3] The Applicant is Anthony Nwaubeza, an adult male Nigerian citizen who has an expired asylum permit and resides in Kaalfontein, Johannesburg.
- [4] The First Respondent is the Minister of Home Affairs, the executive authority of the Department of Home Affairs who is *inter alia* responsible for inter alia issuing documents for all people who enter, reside, or leave the Republic of South Africa and whose address for these proceedings is that of the State Attorney, Salu Building, 316 Thabo Sehume Street, Pretoria.
- [5] The Second Respondent is the Director-General Department of Home Affairs cited in his official capacity and to the extent that he is responsible for administering the Refugees Act 130 of 1998 ("the Refugee Act") and has his principal place of business at Hallmark Building, 230 Johannes Ramokhoase

¹ Notice of Motion para 1.

² Applicant's founding affidavit para 4.

Street, Pretoria.

- [6] The Third Respondent is the Chairperson: Standing Committee for Refugee Affairs. A Committee established in terms of section 9 of the Refugees Act and whose address for the purpose of these proceedings is 7th Floor, City Centre Building Attorney, 8th Floor, 266 Pretorius Street, Pretoria.
- [7] The Fourth Respondent is the Refugee Status Determination Officer, an official appointed in terms of section 8 of the Refugees Act, and has his principal place of business at Hallmark Building, 230 Johannes Ramokhoase Street, Pretoria.

JURISDICTION

- [8] The cause of action arose within the jurisdiction of this Court. The Respondent's principal place of business is also situated within the jurisdiction of this Court. Therefore, this Court has the competency to adjudicate this matter.

THE ISSUE

- [9] The issue to be determined before this Court is whether the Third Respondent's decision to refuse the Applicant's application for refugee status ought to be reviewed and set aside.

THE FACTS

- [10] From the onset, it must be said that the pleadings brought before this Court were poorly drafted. The Applicant's case is vague. Even during oral submissions, counsel for the Applicant to a large extent did little to assist this Court but echoed the same points that are contained in the founding affidavit.
- [11] According to the Applicant, this application relates to the:

“ . . . lawfulness, reasonableness and procedural fairness of the decisions of:

5.1 The Refugee Determination Officer (“RSDO”) to reject my application for asylum.

5.2 The Standing Committee for Refugee Affairs (“SCFA”) for upholding the decision of the RSDO.

5.3 The Director-General who authorizes my detention for the purposes of Detention back to my country of origin without offering me an opportunity to exercise my rights of review and appeal in terms of the PAJA.”³

[12] As a result of the negative outcome of the Applicant’s application for refugee status, the Applicant instituted these review proceedings.

APPLICABLE LAW

[13] The legal framework for the promotion and protection of the rights of asylum seekers and refugees is well documented. The Constitution of the Republic of South Africa, 1996 (“the Constitution”), the Immigration Act 13 of 2002, and the Refugees Act 130 of 1998 are the first points of contact locally when dealing with the plight of asylum seekers or refugees.

[14] The Constitution unequivocally guarantees everyone, regardless of their citizenship, the fundamental rights and freedoms enshrined in it. As was correctly stated in *Siyad v Minister of Home Affairs and Others*⁴ by Khumalo J that:

“Our constitution commit to a culture of protection and respect of human rights of all people, especially the vulnerable, weak, citizens, non-citizens and the worst amongst us” (own emphasis added).

[15] At regional and international levels, South Africa has *inter alia* signed and ratified⁵

³ Applicant’s founding affidavit para 5.

⁴ (46038/2016) [2020] ZAGPPHC 54 (6 February 2020).

⁵ See General measures of implementation at <https://www.justice.gov.za/policy/african%20charter/afr-charter03.html> (Date of use: 15/10/2022).

the 1951 United Nations Convention relating to the Status of Refugees, the 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, and the 1967 Protocol relating to the Status of Refugees.

[16] Therefore, any decision-maker who deals with applications for an asylum seeker or refugee status must act within the ambit of the aforesaid legal framework. Failure to do so may render such a decision reviewable under PAJA and/or the principle of legality.

[17] For the reasons that will follow later on, this Court does not deem it necessary to venture into the specific provisions of the above laws given the absence of certain crucial information.

APPLICANT'S SUBMISSIONS

[18] The crux of the Applicant's case can be summarised as follows: the decision made by the Third Respondent was procedurally unfair on the basis that the Applicant was not granted a hearing, was not allowed to make a statement, and was not notified about the date of the hearing.

[19] Furthermore, the Applicant contended that the decision of the Third Respondent *"is not rationally connected to the information that was before him in terms of section 6 (2)((f)(cc))"*.⁶ To this end, the Applicant argued that the Third Respondent *"conspicuously ignored the country's information"*.⁷

[20] Ultimately, the Applicant submitted that the decision made by the Third Respondent, whereby the Third Respondent found that the Applicant is not likely to face any reasonable risk of harm or persecution if the Applicant was to be returned to his home country ignores the actual persecution that the Applicant suffered in his country.

⁶ Applicant's founding affidavit para 15.

⁷ Ibid.

[21] Concerning costs, the Applicant sought costs of this application against the Respondents.

EVALUATION OF EVIDENCE AND SUBMISSIONS

[22] There are several concerns regarding this application, some of which range from the absence of information regarding the date when the Applicant's application was lodged with the office of the Third Respondent, and the record of proceedings thereof but I will only focus on a few. The Applicant brought this review application, but the Applicant failed to produce the record of proceedings of his refugee application under File No: PTANGA0003003413. Therefore, the references made by Applicant in his application to *inter alia*, the information ignored such as the Applicant's country's information, and the decision of the Third Respondent being reasonably biased is not before this Court. There are also various bold but unsubstantiated claims throughout the Applicant's founding affidavit.

[23] Consequently, this Court is placed at a disadvantage and left to second guess the outcome of the Third Respondent's decision and/or the reasons that led to the refusal of the Applicant's application for refugee status. In other words, the decision that is sought to be reviewed is not before this Court. I find it difficult to formulate what it is this Court is required to review in the absence of such a decision.

[24] The significance of making the record of proceedings of the previous forum available to the court of review cannot be gainsaid. In *Helen Suzman Foundation v Judicial Service Commission*⁸ the Constitutional Court per Mdlanga J said:

"The purpose of rule 53 is to "facilitate and regulate applications for review". The requirement in rule 53(1)(b) that the decision-maker file the record of decision is primarily intended to operate in favour of an applicant in review proceedings. It helps ensure that review

⁸ 2018 (7) BCLR 763 (CC) paras 13-16.

proceedings are not launched in the dark. The record enables the applicant and the court fully and properly to assess the lawfulness of the decision making process. It allows an applicant to interrogate the decision and, if necessary, to amend its notice of motion and supplement its grounds for review.

Our courts have recognised that rule 53 plays a vital role in enabling a court to perform its constitutionally entrenched review function:

“Without the record a court cannot perform its constitutionally entrenched review function, with the result that a litigant’s right in terms of section 34 of the Constitution to have a justiciable dispute decided in a fair public hearing before a court with all the issues being ventilated, would be infringed.”

The filing of the full record furthers an applicant’s right of access to court by ensuring both that the court has the relevant information before it and that there is equality of arms between the person challenging a decision and the decision-maker. Equality of arms requires that parties to the review proceedings must each have a reasonable opportunity of presenting their case under conditions that do not place them at a substantial disadvantage *vis-à-vis* their opponents. This requires that “all the parties have identical copies of the relevant documents on which to draft their affidavits and that they and the court have identical papers before them when the matter comes to court”.

In Turnbull-Jackson this Court held:

“Undeniably, a rule 53 record is an invaluable tool in the review process. It may help: shed light on what happened and why; give the lie to unfounded ex post facto (after the fact) justification of the decision under review; in the substantiation of as yet not fully substantiated grounds of review; in giving support to the

decision maker's stance; and in the performance of the reviewing court's function."

[27] It is therefore challenging if not impossible to review a decision that has not been made available before this Court. This presents a major defect in this application. This Court cannot simply make out a case on behalf of the Applicant. It is the duty of those who bring review cases before the courts to ensure that they make all the necessary information readily available to assist the courts to adjudicate their cases.

[28] In light of the above, the Applicant's case falls to be dismissed on this ground alone.

COSTS

[29] The Applicant sought a cost order against the Respondents. However, no compelling reasons whatsoever were advanced to justify such a costs order against the Respondents.

[30] In the absence of a justification for a cost order and the fact that the applicant has been an unsuccessful litigant, there is no reason to award a cost order in their favour.

ORDER

[31] I, therefore, make the following order:

(a) The application is dismissed.

(b) There is no order as to costs.



M R PHOOKO AJ

**ACTING JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, PRETORIA**

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 18 October 2022.

APPEARANCES:

Counsel for the Applicant: Adv M.S Moretsele

Instructed by: Xiviti Attorney

Counsel for the Respondent: n/a

Instructed by: State Attorney

Date of Hearing: 08 August 2022

Date of Judgment: 20 October 2022