Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 17413/2017

Before: The Hon. Mr Justice Binns-Ward
Hearing: 25 October 2018
Judgment: 19 November 2018

In the matter between:

ALEXIS KALISA	Applicant
and	
THE CHAIRPERSON OF THE REFUGEE APPEAL BOARD	First Respondent
REFUGEE STATUS DETERMINATION OFFICER, PORT ELIZABETH	Second Respondent
AKOS ESSEL N.O.	Third Respondent
THE MINISTER OF HOME AFFAIRS	Fourth Respondent
THE DIRECTOR-GENERAL OF THE DEPARTMENT OF HOME AFFAIRS	Fifth Respondent

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JUDGMENT

BINNS-WARD J:

Introduction

[1] The applicant was born in Burundi. He left there as a young child in 1994 when his parents fled with him to neighbouring Rwanda, reportedly because of the persecution to which his father was subjected at the time by reason of his affiliation to an ethnically aligned political grouping known as the 'Union pour le Progrès

National'. It is well known that Burundi is a country with a long history of violent ethnic hostility between the Hutu and Tutsi elements of its population.

[2] According to the applicant his family lived a hand to mouth existence in Rwanda, where they were denied any civic rights and forced to survive on the margins of society. This did not, however, prevent him from being politically active in Rwanda. According to his evidence in this court he joined or aligned himself with an opposition political movement there.[1]

[3] In 2005, at the age of 18, the applicant left Rwanda and came to South Africa, where he applied for asylum. The application was refused by the refugee status determination officer at the refugee reception centre at Port Elizabeth in 2007. The applicant lodged an appeal against that decision to the Refugee Appeal Board, as provided in terms of s 26(1) of the Refugees Act 130 of 1998 ('the Act'). The Appeal Board gave the applicant notice of a date in March 2008 upon which his appeal would be considered, and advised that he might appear before it on that day to make further representations in support of his application for asylum. The applicant failed to appear at the hearing, and it would appear the appeal was dismissed on account of his non-appearance without any consideration of the merits of the matter.

[4] It was around the time of his appeal to the Refugee Appeal Board that the applicant relocated from Port Elizabeth to Cape Town, where he found fixed employment. On arrival in Cape Town he reported to Cape Town refugee reception centre for the purpose of renewing the asylum seeker permit that had been issued to him in terms of s 21 of the Act pending the final determination of his application for asylum.

[5] Soon after the applicant's arrival in Cape Town widespread incidents of xenophobic violence broke out against foreign nationals of African origin living locally. He was one of many such people who took refuge in a facility set up by the government at the Youngsfield military base in Wynberg to shelter targets of the xenophobia. Apparently at the insistence of officials of the Department of Home Affairs, the applicant submitted a fresh application for asylum while he was at Youngsfield. That was during 2008.

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[1] In these proceedings the applicant testified in reply to having 'supported' the Liberal Party in Rwanda. In an appeal submitted to the Refugee Appeal Board in 2013, he made an affidavit that he had been active member of that party.

[6] After the violence had subsided, and he was able to go back to work, the applicant continued to report periodically at the relevant Cape Town offices of Home Affairs for the extension of his asylum-seeker's permit. It was when he presented there on 18 August 2017 that he was first informed that his aforementioned appeal to the Refugee Appeal Board had been unsuccessful and given a limited period within which to leave the country. (His 2008 application for asylum had in the meantime also been rejected as 'unfounded'. He lodged an appeal against that decision in 2013. Upon being given notice that the result of that appeal was available for collection the applicant went to ground, and for a period of 22 months thereafter neglected to extend his asylum seeker's permit.)

[7] As to be expected, having regard to the many years that had passed since his arrival in the country, the applicant had by 2017 established a life for himself here. Not only had he been in fixed employment for several years, he had also met and formed an intimate relationship with a woman from the Democratic Republic of the Congo, Ms Jolie Tuyishime, who is also living here. The relationship resulted in a child being born to them in 2015.[2] The applicant has testified that he subsequently married his partner by customary rites; apparently the rites of one or the other of their places of origin, no particularity has been provided. They have since become parents to a second child. Ms Tuyishime was granted formal refugee status in South Africa on 23 March 2015. The certificate issued to her in this regard reflects her marital status as single. The information endorsed on the certificate suggests that she was interviewed by a refugee reception officer on 10 February 2015.

[8] The applicant did not leave the country, as directed. His position became critical when his employers gave him notice that they were obliged to dismiss him because he had become an illegal alien. He then approached the Refugee Law Clinic at the University of Cape Town. The Law Clinic assisted him with the institution of the current proceedings whereby, in the first stage, in terms of an order granted by agreement between the parties,[3] he obtained the interim regularisation of his residence

[2] The child's unabridged birth certificate reflects that he was registered under his mother's surname, with no details provided as to the identity of his father.

[3] The Department of Home Affairs had initially opposed the granting of interim relief, but revised their position after the Constitutional Court's judgment in *Saidi and Others v Minister of Home Affairs and Others* [2018] ZACC 9; 2018 (7) BCLR 856 (CC); 2018 (4) SA 333 (CC), which was delivered on 24 April 2018.

status pending the determination of his application, in a second stage of the proceedings, for the judicial review and setting aside of the rejection of his application for asylum. This judgment deals with the review application.

The review

[9] The review application resorts under s 6 of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'). It was common ground between the parties that there is no impediment, in terms of s 7 of that Act, to the court entertaining it. No point was taken that the applicant might reasonably have been expected to have become aware of the action and the reasons for it earlier than he actually did. If he is successful in obtaining an order setting aside the impugned decision, the applicant also seeks consequential relief of the sort contemplated by s 8(1)(c)(ii)(aa) of PAJA by way of an order granting him asylum. According to the tenor of the provision, that type of consequential relief – a substitution order - is available only in 'exceptional cases'. The usual remedy is that an ancillary order is made referring the matter for determination afresh by the appropriate administrative functionary.[4]

[10] In addition to the grounds upon which his applications to the refugee reception officers were made, the applicant now also relies in respect of his application for a substitution order on an entitlement to asylum on the ground that, by virtue of his marriage to a person who has acknowledged refugee status in terms of s 3(a) or (b) of the Act, he is a 'dependant' within the meaning of s 3(c) of the Act. Section 3(c) provides that '*Subject to Chapter 3, a person qualifies for refugee status for the purposes of this Act if that person - is a dependant of a person contemplated in paragraph (a) or (b)*'. The meaning of the word '*dependant*' is defined in s 1 as '*in relation to an asylum seeker or a refugee, includes <u>the spouse</u>, any unmarried dependant* (sic) *child or any destitute, aged or infirm member of the family of such asylum seeker or refugee*'.[5]

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[4] As contemplated by s 8(1)(c)(i) of PAJA.

[5] The definition of '*dependant*' in s 1 of the Act has been amended, in terms of legislation that has not yet been brought into operation, to attach a meaning that would exclude the applicant from its ambit because he had not been included in Ms Tuyishime's application. (See s 1(b) of the Refugees Amendment Act 11 of 2017.) The amending legislation, which also introduces a definition of the word '*marriage*' might, had it been brought into operation, also have borne on whether his marriage by the customary rites of a foreign country qualified as a marriage for the purposes of the Act. (See s 1 of the Refugees Amendment Act 33 of 2008 and the substituted definition of the word '*marriage*' inserted in terms thereof in s 1(d) of Act 11 of 2017.) Whether the newly introduced definition of 'marriage' would exclude the applicant from qualifying as his partner's '*spouse*' within the meaning of that

[11] The application was founded on several grounds of review. The applicant is entitled to succeed should any one of them be established. The question of the appropriate consequential relief will then arise for determination. The respondents argue that the applicant's application for refugee status should be remitted for consideration afresh.

[12] It is undisputed that only one member of the Board sat for the purpose of considering the applicant's appeal. The applicant contends that on that account the Board had been non-quorate when it considered his appeal. The contention is supported by the judgment of this court (per Davis J) in *Harerimana v Chairperson, Refugee Appeal Board and Others* [2013] ZAWCHC 20; 2014 (5) SA 550 (WCC), especially at paras. 15-20.[6] The respondents' counsel, quite correctly in my view, did not try to argue that *Harerimana* had been wrongly decided in the relevant respect. The judgment is binding on me unless I can find that it was clearly wrong.

[13] The respondent's counsel did, however, point out that the Board had been competently constituted according to its own rules made in terms of s 14(2) of the Act. She submitted that in the absence of a direct challenge to the legality of the relevant rule, proceedings of the Board carried on in accordance with it were clothed with apparent legality. She called the judgment in *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC); at para. 101 in aid of her argument in this regard. The cited paragraph merely recites the principle explained in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2004] ZASCA 48; 2004 (6) SA 222 (SCA) 'that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside'. The *Oudekraal* principle expressly acknowledges, however, the right of an affected individual to collaterally challenge an unlawful administrative decision that is brought prejudicially to bear on him or her. I do not consider it necessary in the current case to decide whether this is a matter in which a collateral challenge by the applicant would be permissible. In my view the issue can be resolved adversely to the

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(undefined) word in the Act is a moot point; cf. e.g. *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC).

6 See also *Bolanga v Refugee Status Determination Officer and Others* [2015] ZAKZDHC 13 (24 February 2015) at paras. 15-16, and *Mwamba v Chairperson of the Refugee Appeal Board and Others* [2017] ZAWCHC 16 (28 February 2017) at para. 61.

respondent's counsel's argument by the application of established principles of statutory interpretation. It is well-established in that field that a statutory rule or regulation cannot be construed or applied in a manner that would put it in conflict with the provisions of the governing statute under which it was purportedly made.[7] If upon a proper reading of a statutory rule or regulation it is identified as clearly contradicting its governing statute, it is necessarily exposed as patently void or ineffectual, and it would be invidious for a court in the discharge of its obligation to uphold the law to have to purport to recognize its validity or effectiveness.

[14] It follows that the Appeal Board's decision to confirm the refusal of the applicant's application for asylum falls to be reviewed and set aside.

[15] It seems in any event from the record that the appeal was dismissed solely because the appellant failed to appear at the hearing. If it had been necessary, that would have afforded another ground, by itself, for the Board's decision to be set aside; for it is clear from the considerations listed in s 26(3) of the Act that the members of the Board are required to apply their minds to the merits of any appeal irrespective of whether or not the appellant is present. They are empowered in terms of s 26(3)(e) to request an appellant to appear before the Board 'to provide any such other information as it may deem necessary'. The Board could only make such a request if, having considered the information available to it in regard to the application (which might include information garnered by it from third party sources such as the UNHCR representative, referred to in s 26(3)(a), or turned up by it in the course of an investigation of the sort contemplated by s 26(3)(d)), it had identified a need for other information that the appellant might be able to provide. The reasons given in the Appeal Board's decision, namely '*As there were factual and credibility issues which could not be resolved due to the appellant's non-appearance … the Board cannot establish whether the criteria for section 3(a) or (b) are met in the circumstances*' are opaque to say the least, especially in the context of the notice of the appeal hearing that was given to the applicant not having identified the nature of those issues.

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[7] Cf. the observation in Joubert *et al* (eds), LAWSA vol. 25(1) (First reissue) at para. 293, *'... superordinate and subordinate legislation <u>in pari materia</u> cannot really "be in conflict" because if they are inconsistent, the latter must as a rule yield to the former*'. See also *Harerimana* supra, at para. 20.

[16] There is no doubt in my mind that the instances of non-compliance with the Act were material in the circumstances. The intended purposes of the statute were not achieved. The purported refusal of the applicant's appeal is a decision that must therefore be set aside.

Remedy

[17] Section 8(1)(c)(ii)(aa) of PAJA, which, as mentioned, provides for the exceptional remedy of the substitution order sought by the applicant is a codification of a common law remedy in administrative law. The considerations that were brought to bear in determining whether it was appropriate to grant it have been rehearsed in a number of authoritative decisions. The most salient of these were quite recently reviewed at appeal court level in *Gauteng Gambling Board v Silverstar Development Ltd and Others* [2005] ZASCA 19; 2005 (4) SA 67 (SCA), at para 28-29, and extensively re-examined, in the context of their impact on the doctrine of the separation of powers, by the Constitutional Court in *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2016 (10) BCLR 1199 (CC), at para 34-55.

[18] PAJA requires the presence of two characteristics before a substitution order is made: (i) the existence of circumstances making the matter an 'exceptional case' (i.e. exceptional circumstances) and (ii) that it would be just and equitable in the context of such exceptional circumstances for an order of that sort to follow.[8] The judgment in *Trencon Construction* acknowledged that in applying s 8(1)(c)(ii)(aa) of PAJA, the courts had essentially been applying the common law approach to the making of substitution orders.[9]

[19] In *Gauteng Gambling Board* the appeal court referred to the remarks of Hefer AP in *Commissioner, Competition Commission v General Council of the Bar of South Africa and Others* 2002 (6) SA 606 (SCA), at para. 14, that the notion that '*the Court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary" does not tell the whole story. For, in order to give full effect to the right which everyone has to lawful, reasonable and procedurally fair*

[8] In *Trencon Construction* supra, at para. 35, the position was expressed as follows: '*In effect, even where there are exceptional circumstances, a court must be satisfied that it would be just and equitable to grant an order of substitution*'.

[9] *Trencon Construction* at para. 41.

administrative action, considerations of fairness also enter the picture. There will accordingly be no remittal to the administrative authority in cases where such a step will operate procedurally unfairly to both parties. As Holmes JA observed in Livestock and Meat Industries Control Board v Garda 1961 (1) SA 342 (A) at 349G

> *". . . the Court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and . . . although the matter will be sent back if there is no reason for not doing so, in essence it is a question of fairness to both sides."*'

and endorsed the statement in Baxter, *Administrative Law* at 684 that '*The mere fact that a 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.*' The court concluded '*All that can be said is that considerations of fairness may in a given case require the court to make the decision itself provided it is able to do so.*'

[20] The conclusion stated in *Gauteng Gambling Board* seemed to posit that considerations of fairness (or justness and equity to use the language employed in s 8(1)(c)(ii)(aa) of PAJA) might justify a substitutive order, provided the court was in as good a position as the administrative functionary to make the decision. An obvious example falling within that category would be a case in which the result was a foregone conclusion (cf. the cases referred to in *Johannesburg City Council v Administrator, Transvaal and Another* 1969 (2) SA 72 (T) at 75 *fin*- 76) and it would be unfair in the peculiar circumstances of the given case to subject the applicant to the delay and inconvenience entailed in a remittal to obtain that result from the administrator. Another, apparently independent,[10] category was '[w]*here the tribunal or functionary has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again*'; see *Johannesburg City Council* supra, at 76. The Supreme Court of Appeal's (pre-PAJA) judgment in *Erf One Six Seven Orchards CC v Greater Johannesburg Metropolitan Council: Johannesburg Administration and Another* [1998] ZASCA 91; 1999 (1) SA 104 (SCA) refers to both the aforementioned categories as examples of an apparently open-ended range of '*special circumstances*' that could give a court sufficient reason not to remit the matter to the relevant functionary.[11]

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[10] See *Trencon Construction* supra, at paras. 38-39.

[11] *Erf One Six Seven Orchards* at 109C-G (SALR).

[21] I think it was recognised, however, that that left the actual import of the relevant test somewhat amorphous. In particular, it was not clear whether any one of the recognised criteria for a substitution order would suffice, or whether any of them rated as a prerequisite in combination with one or more of the others. In particular, it was not clear how considerations of fairness in cases affected by unconscionable delay or woeful incompetence could, without more, empower courts to make substitutive orders if they were not qualified institutionally or by the evidence adduced in the given case to make the type of administrative decision in issue in the matter. Hence the expressly stated project undertaken in the Constitutional Court's judgment in *Trencon Construction* to endeavour '*to clarify the test for exceptional circumstances where a substitution order is sought*'.[12] Whether the endeavour was successful has been questioned by some commentators; see R. Cachalia, *Clarifying the Exceptional Circumstances Test in Trencon: An Opportunity Missed*, [2018] Constitutional Court Review 115 and L. Kohn, *The Test for 'Exceptional Circumstances' Where an Order of Substitution is Sought: An Analysis of Trencon Against the Backdrop of the Separation of Power* id., at 91.

[22] *Trencon Construction* unambiguously reiterated that '[r]*emittal is still almost always the prudent and proper course*'.[13] The Constitutional Court seems to have considered that the perceived need for clarity in the application of s 8(1)(c)(ii)(aa) of PAJA arose from uncertainty from a consideration of various post-PAJA judgments as to whether the various factors relied on in the common law based jurisprudence to justify the exceptional remedy of a substitutive order in review matters afforded discrete bases for such orders, or whether an accumulation of them was required.[14] Khampepe J, writing for a unanimous court, provided the following guidance in this regard:

> To my mind, given the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inevitably hold greater weight. The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is

[12] *Trencon Construction* supra, at para. 32.

[13] At para. 42.

[14] *Trencon Construction* supra, at para. 46, with reference to the judgments mentioned in footnote 43.

> whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances.
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> (Footnote omitted.)[15]

It is clear from the Constitutional Court's approach on the peculiar facts of the *Trencon Construction* case that, in the process of reaching its decision to overrule the appeal court's decision to reverse the substitutive relief granted at first instance, it applied the two first mentioned factors in the order in which they were stated in para. 47 of the judgment, as primarily qualifying factors for substitutive relief, and had regard to the other factors in weighing up whether it was just and equitable in the circumstances for such relief to have been granted by the first instance court.

[23] Having concluded that the first instance court had been (i) in as good a position as the responsible functionary to make the decision[16] and (ii) that the nature of the right decision was a foregone conclusion, the Court had regard to the adverse impact of the delay in remitting the issue would have on administrative efficiency and the public purse in concluding that it was just and equitable for a substitutive order to be have been made. The Court did not expressly state its findings in support of the 'exceptional circumstances' requirement, but it may be inferred that those were founded in the cumulative effect of the factual considerations traversed in its holistic assessment of the evidence.[17] Thus, although the first two factors have the greatest weight in any assessment of the appropriateness of substitutive relief, a court does not reach the stage of having to considering their incidence before it has concluded that the matter in question is an 'exceptional case' within the meaning of s 8. Although the Constitutional Court's judgment in *Trencon Construction* did not expressly hold

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[15] At para. 47.

[16] I agree with the opinion expressed by Kohn in her paper (cited in para. [21] above) that the identification of this factor as a point of departure is consistent with the view expressed by Plasket J in *Intertrade Two (Pty) Ltd v MEC for Roads and Public Works, Eastern Cape, and Another* [2007] ZAECHC 149, 2007 (6) SA 442 (Ck), [2008] 1 All SA 142 (Ck) at para. 43 that ''[t]*he availability of proper and adequate information and the institutional competence of the court to take the decision for the administrative decision-maker are necessary prerequisites that must be present, apart from "exceptional circumstances", before a court can legitimately assume an administrative decision-making function*'. Plasket J regarded satisfaction of the identified pre-requisites as '*a minimum requirement of rational decision-making, a fundamental requirement of the rule of law*'.

[17] *Trencon Construction* supra, at paras. 57-81.

as much, I think it there is an implicit recognition in its reasoning that a two-leg test is involved.

[24] The Constitutional Court characterised the power of determining the appropriate consequential remedy in terms of s 8 of PAJA as entailing the exercise of judicial discretion in the true or strict sense.[18] That characterisation plainly applies in respect of the decision whether to grant the remedial order; in other words the decision whether making a substitution order would be just and equitable in the circumstances. On my reading of the judgment it is not clear, however, whether the same holds for the necessarily associated, and usually antecedent, decision whether 'exceptional circumstances' within the meaning of s 8(1)(c)(ii)(aa) of PAJA have been established; in other words, to the decision that an 'exceptional case' has been demonstrated. Indeed, the Court's own approach to the latter question seems to me on an analysis of its reasoning to have involved weighing 'a number of disparate and incommensurable features' in the sort of exercise identified in *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A), at 361H-I, as consistent with the exercise of a wide or loose discretion.

[25] The arguable lack of clarity in this respect flows from the absence of a clear distinction in the reasoning concerning what might qualify as an exceptional case and how a court, having identified a case as exceptional in the relevant sense, would then determine whether a substitution order would afford a just and equitable remedy. In *Trencon Construction*, the Constitutional Court's reasoning first identified why the case was one in which a substitution order might be made and then reasoned why, exceptionally, such an order was indicated in the matter. The order in which the exercises were undertaken is understandable in the appellate context of the adjudication of the case. One can nevertheless apply the principles enunciated in the judgment approaching the case the other way round, which, I would venture, is how a court of first instance would often undertake the required analysis. What is clear from the statutory provision itself, however, is that decisions have to be made on both legs of the test before a court makes a substitution order.

[26] Regardless of the nature of the discretion involved in making these decisions, I fail to see how the court's discretion could properly be exercised in favour of making

[18] Id. at paras. 90-92.

a substitutive decision if the court does not have an adequate basis on the material before it in the particular case, or by virtue of its institutional competency, to be satisfied that the substitutive order it might consider making would comply with the constitutional requirements applicable to the impugned decision that it would replace, viz. one that would be lawful, reasonable and procedurally fair.[19] It is difficult to conceive how it could do that if it were not, or had not been placed by the evidence, in as good a position as the administrator to make the decision.

[27] That begs the question of what it should do in a case where it is not in such a position, but it is evident that the designated decision maker is biased or incompetent and it would for that reason be unreasonable and unfair to just remit the decision. I venture that it is in such cases that the open-ended potential of the purpose-specific remedies that a court is empowered by s 8 of PAJA to craft comes into play; for, as recognised in *Trencon Construction*, it is the courts' constitutional responsibility to provide effective 'constitutionally mandated' relief against instances of the infringement of persons' constitutional rights. The facts of a particular case may well demand constructively imaginative thinking from a court in devising an effective remedy of a sort not specifically identified in s 8.[20] [21] The facts in *Trencon Construction* did not require that, and nor do the facts of the current case.

[28] There are two aspects to the current matter concerning the applicant's asylum claim that have not enjoyed the attention of the responsible authorities. Both of them call for further investigation, the outcome of which will bear on the result.

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[19] A decision that would comply with the standards prescribed in s 33(1) of the Constitution.

[20] Kohn op. cit. has postulated that '*…in seeking to accommodate the separation-of-powers concerns within the test, Khampepe J has arguably made it harder for litigants to meet the case for substitution in certain instances, namely where the separation-of-powers requirements cannot be met but the facts, which evidence for example glaring incompetence or bias, nonetheless cry out for substitution*'. The postulate, even if correct, should not mislead anyone into believing that The Constitutional Court's approach has made it harder for PAJA litigants to obtain appropriate effective relief. It must not be overlooked that s 8 provides for any order that might be just and equitable in those circumstances and does not consider that substitution is not the only alternative to remittal. If the Constitutional Court has made the requirements for substitutive relief more stringent by identifying the factors that must carry greater weight in a similar way to the 'prerequisites' identified in *Intertrade Two* supra (at note 16), loc. cit., that has only served as confirmation of Plasket J's compelling exposition of the requirements of lawful decision-making.

[21] An example of such a specially crafted remedy is the order made by the Constitutional Court in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)* [2014] ZACC 12; 2014 (4) SA 179 (CC); and 2014 (6) BCLR 641 (CC).

[29] Firstly, the applicant's position in Rwanda was not considered because he appears to have relied in his application for asylum on the situation in Burundi. It is not clear that he disclosed that he had lived in Rwanda for many years before coming to this country. In the current proceedings, the applicant expatiated on his position in respect of the conditions under which he and his family lived in Rwanda, and his alleged inability to return there, only in his replying papers. As the respondents' counsel pointed out, the matter may be of some significance because of s 4(1)(d) of the Act, which provides:

> A person does not qualify for refugee status for the purposes of this Act if there is reason to believe that he or she-
>
> (d) enjoys the protection of any other country in which he or she has taken residence.

There is no record that the applicant disclosed his extended period of residence in Rwanda to the responsible authorities when applying for asylum. They should be entitled to consider the effect of his residence there for 10 years, and make a determination whether it afforded him adequate protection in the circumstances in which he had been rendered a refugee from Burundi.

[30] Secondly, and this is an issue that - dependent on its determination - could even render the first mentioned aspect irrelevant, the relevant authorities have not had the opportunity to consider whether the applicant is not in any event entitled to refugee status in terms of s 3(c) of the Act by virtue of his reported marriage to a person who has been granted asylum. As noted, the details concerning the formalisation of this union are sketchy on the papers.

[31] Both of these aspects are matters that the relevant authorities, and not the court, are better equipped to investigate and determine. They are also matters that, owing to their location in the area of responsibility of the executive arm of government, should be dealt with there and not by the court. In short they are matters that the court is not in as good a position as the responsible functionary to decide, and also on which the right decision is not a foregone conclusion.

[32] The applicant's counsel placed considerable stress, however, in a somewhat impassioned argument in support of substitutive relief, on the prejudicial consequences on the applicant of the extraordinary delay in notifying him of the outcome of his appeal. He pointed out, justifiably, that a decision at this point that could result in the separation of the applicant from the children that have been born to

him in this country would be inhumane. He referred to various judgments in which the prejudicial effects of delay have weighed heavily in comparable matters in persuading the court to make substitution orders conferring refugee status on persons who had successfully challenged the refusal of their asylum applications on review. Indeed, as the applicant's counsel reminded me, I made such an order myself in *Tshiyombo v Members of the Refugee Appeal Board and Others* [2015] ZAWCHC 170; [2016] 2 All SA 278; (WCC); 2016 (4) SA 469 (WCC).

[33] It is unacceptable delays in the administrative decision-making process and the poor reflection they have on the competence of the responsible administrator, coupled with the resultant prejudice suffered by the applicant, that tend to call into question the fairness of holding a review applicant to the usual remedy of remittal.[22] These are considerations that can make a case 'exceptional' in the relevant sense. As stressed earlier, however, finding that the case is 'exceptional' satisfies only one leg of the test for substitutive relief.

[34] In *Tshiyombo,* a substitution order was just and equitable because not only was the case 'exceptional', for the reasons explained at paras. 43-44, but also because it was considered that the court was in as good a position as the administrator to make the decision and that the outcome of the asylum application in that case was a foregone conclusion on the uncontroverted evidence (see para. 46). In the context of those findings it was considered that it would only be fair in the given factual context to make a substitution order. I believe that the approach to making a substitution order in *Tshiyombo* was entirely consistent with that propounded in *Trencon Construction.*

[35] In *Radjabu v Chairperson of the Standing Committee for Refugee Affairs and Others* [2014] ZAWCHC 134; [2015] 1 All SA 100 (WCC), however, in declining to make such an order, despite a similar argument advanced on behalf of the applicant in that case, I pointed out that '[i]*ssues such as the prejudice occasioned by delay (cf. Ruyobeza v Minister of Home Affairs 2003 (5) SA 51 (C), 2003 (8) BCLR 920, at 65C-H (SALR)) cannot justify the granting of asylum in circumstances in which it is*

[22] In the current case the applicant's own conduct in failing to attend at the hearing of his appeal in 2007 probably contributed to some degree towards the unsatisfactory position in which he finds himself. His initially advanced claim not to have received notice of it was exposed as fallacious when the respondents produced a document bearing his signature in acknowledgment of receipt of such notice.

not sufficiently clear that an applicant qualifies for refugee status in terms of s 3 of the Refugees Act. In Tantoush [23], *for example, the substitution order sought was granted for a number of reasons; demonstrated bias by the decision-maker and prejudicial uncertainty occasioned by delay were mentioned in the judgment. But, 'most importantly', as the learned judge* [Murphy J] *noted, he was able on the evidence before him to determine that the applicant had 'a well-founded fear of persecution' by reason of his political opinions, and therefore also able to determine that the applicant qualified for refugee status in terms of s 3(a) of the Act*'.

[36] The approach taken in *Radjabu* accorded with the articulation of relevant principle by Plasket J in *Intertrade Two*, discussed above,[24] which, in essence, has since been affirmed in the Constitutional Court's judgment in *Trencon Construction*. The fact that the delay in the final determination of the applicant's application for asylum might be charged with the potential for unpalatable outcomes should he not be granted refugee status is no basis, by itself, for deciding that he qualifies for such status. If the court cannot be sufficiently satisfied on the evidence it has before it that he does so qualify in terms of the Act, it cannot make a substitution order that it could be assured was lawful, and thus conformable with the standard to which administrative decisions are bound by s 33(1) of the Constitution.

[37] An additional complicating factor in the current matter, as it was in *Radjabu*, is that the reliability of the applicant's evidence concerning his personal history is demonstrably questionable in certain respects. He will have the opportunity to clarify these matters if his application is remitted. His counsel offered to make him available for questioning by the court at the hearing, but, as I indicated at the time, I consider that interviewing the applicant would have been wholly inappropriate. It would entail the court in becoming a supernumerary administrator. The court's ability to make a substitution order in judicial review cases should appear from the material in the papers; it should not have to assume the administrator's powers of enquiry to ascertain on a basis *dehors* the evidence in the review application whether it might properly make an exceptional order.

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[23] *Tantoush v Refugee Appeal Board and Others* [2007] ZAGPHC 191; 2008 (1) SA 232 (T).

[24] At note 1616.

[38] In the circumstances I propose to give directions that the applicant's application for asylum be reconsidered afresh by the relevant authorities. Having regard to the passage of time since the submission of his previous applications and the intervening events that need to be taken into account in considering whether he is entitled to refugee status in terms of the Act, it is desirable that the application process should recommence from the beginning. Apart from the applicant's altered circumstances, it is also necessary for the responsible authorities, if they are to give proper weight to the principle of *non-refoulement* incorporated in s 2 of the Act, to have regard to the effect of current circumstances in both Burundi and Rwanda insofar as they would affect the applicant. (Even if he did not qualify as a refugee when he submitted his previous applications, it has to be considered whether he might not since have become a *sur place* refugee.[25])

[39] The applicant's legal representatives expressed concern about the further delay and attendant prejudice to which a remittal order would expose the applicant. Having regard to the unfortunately large number of judgments in which the courts have been constrained to lament the inefficiencies in the Department of Home Affairs' administration of the Refugees Act, their concern is justified. The respondents have undertaken on affidavit to ensure that the processing of the applicant's fresh application for asylum will be processed without delay. A timetable for this purpose has been offered. It was framed in accordance with the indications I gave at the hearing as to the time within which I anticipated being ready to deliver judgment. In the event that has taken longer than I had hoped because of my workload. The timetable suggested by the Department will therefore necessarily have to be adjusted for the purposes of the directions to be incorporated in the remittal order.

[40] The applicant's counsel also expressed concerns about the ability of the applicant to access an office of the Department of Home Affairs in Cape Town where his application might be accepted and processed. The issue of the ready accessibility, or lack thereof, of offices where asylum seekers may submit their applications is a controversial matter in the public domain. It has also been the subject of litigation, in respect of which counsel pointed out questions of non-compliance by the Department with various court orders have arisen.

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[25] Cf. *Radjabu* supra, at para. 37.

[41] As to the first of these concerns, the Department has undertaken, in an affidavit made by Mr Zanecebo Menze of the Legal Services Unit of the Department of Home Affairs that was submitted in response to a request by the court during the hearing, that the applicant's application will be received and processed at an address in Cape Town of which the applicant's attorneys will be advised in writing. It was pointed out in this regard that the applicant has, without any problem, been afforded local access to the necessary facilities since the interim order made on 17 November 2017 in the first stage of these proceedings for the periodic extension of his asylum seeker permit.

[42] As to the concern about non-compliance, the applicant, who is legally represented by the UCT Refugees Rights Clinic, will no doubt be appropriately assisted to obtain the indicated remedies in the event of pertinent non-compliance with any order granted in his favour. It is sincerely to be hoped that will not become necessary. Officialdom must be aware of the growing trend by the judiciary in judgments related to contempt of court orders to hold delinquent public servants personally responsible.

Sundry interlocutory matters

[43] The respondents contended that the applicant's replying papers should be struck out in whole as an abuse of process; alternatively, they objected to portions thereof and contended that they should be struck out for various reasons, namely that they introduced new matter, included irrelevant, scandalous and vexatious averments and included inadmissible hearsay evidence. While there was validity in some of the objections, the determination of all of them in the respondents' favour *ex hypothesi* would have made no difference to the determination of the substantive case, and I therefore do not intend to burden this judgment with a detailed consideration and determination of the application to strike out. In the given circumstances the only practical effect of such an exercise would be its bearing on costs. The costs order to be made in the principal case will, in my view, adequately address the unfortunate nuisance value features of the matter.

[44] I do think, however, that it might usefully be mentioned that it is not good drafting practice in motion matters to include extensive argument and reference to case law, including the attachment of copies of judgments, in affidavits. The essence

of an affidavit should be the recital of factual evidence. Any explanation by the deponent of the legal context or significance of his or her evidence should be kept succinct, mindful of the role of legal argument when the matter is heard. It is also ordinarily not appropriate to indiscriminately attach an entire rule 53 administrative record to an affidavit. The body of an affidavit should pertinently identify the materiality and relevance of every bit of documentary evidence that the deponent sees fit to attach as annexures; the reader should not be expected to undertake an unguided and possibly unprofitable perusal of the documentary attachments to an affidavit.

Costs

[45] The applicant has obtained substantial success in the review application. However, the greater part of the hearing was given over to argument on whether a substitution order should be made, an issue on which the respondents have been successful. In the circumstances I consider that fairness would be served were the applicant to be awarded two thirds of his costs of suit, such costs to exclude the costs associated with the inclusion of annexures AK 30 and AK36 to his replying papers. No orders as to costs will be made in respect of the respondents' applications to strike out and to cross-examine the applicant, or the applicant's application in terms of rule 6(5)(e).

Orders

[46] The following orders are made:

1. The purported decision of the Refugee Appeal Board, dated 3 April 2008, to uphold the decision of the second respondent rejecting the applicant's application for asylum is reviewed and set aside.

2. Pursuant to the order made in paragraph 1 above, the matter of whether the applicant is entitled to recognition as a refugee in terms of the Refugees Act 130 of 1998 ('the Act') is remitted to the responsible authorities for determination afresh in accordance with the following procedural directions:

    a) Pending the final determination by the responsible authorities in terms of the Act of the applicant's application for asylum in accordance with the directions given in this order, the third respondent, or her successor from time to time as manager of the Cape Town Temporary Refugee Facility or any substitute for such facility, shall extend the validity of

the permit issued to the applicant in terms of s 22 of the Act in accordance with paragraph 4 of the order of this Court made in this matter by the Honourable Mr Justice Le Grange on 17 November 2017.

b) The applicant is directed to appear in person before the Refugee Status Determination Officer at the Cape Town Refugee Reception Office on Wednesday, 28 November 2018, at 10h00, or on such alternative later date and time as might in writing be advised by the respondents' attorney of record to the applicant's attorney of record by no later than 12h00 on Thursday, 22 November 2018, in order to submit a fresh application for asylum. Any alternative later date that might be determined, as permitted in terms of this sub-paragraph, shall not be later than Friday, 14 December 2018.

c) The applicant is directed to procure that Ms Jolie Tuyishime accompanies him when he attends on the Refugee Status Determination Officer in compliance with sub-paragraph (b) above.

d) The Department of Home Affairs, represented for this purpose by Mr Zanecebo Menze of the Legal Services Unit, is directed to make the necessary arrangements to ensure that the applicant and Ms Jolie Tuyishime will be able to obtain access to the Cape Town Refugee Reception Office for the purpose of compliance with sub-paragraph (b) above, and to ensure that the applicant's attorneys of record are advised in writing of such arrangements by the respondents' attorneys of record by no later than 12h00 on Thursday, 22 November 2018.

e) The respondents' attorneys of record are directed to ensure that a copy of this order is provided to the aforementioned Mr Menze by 15h00 on 19 November 2018 (today) by email and thereafter forthwith to furnish the applicants' attorneys of record with written confirmation that they have done so, and that they have pertinently directed Mr Menze's attention to the obligations imposed on him in terms of this order.

f) The aforementioned Refugee Status Determination Officer shall for the purposes of compliance with this order discharge the functions of a

refugee reception officer in terms of s 22 of the Act to the extent necessary in respect of the receipt of the application and thereafter determine the application in terms of s 24 of the Act as if he or she had received the application from a refugee reception officer in the ordinary course.

g) The aforementioned Refugee Status Determination Officer shall determine the applicant's application for asylum by no later than Thursday, 31 January 2019, or such later date as might for sufficient reason be agreed to in writing by the applicant's attorneys of record, or, failing such agreement, determined by the presiding Judge in chambers on application to be made in writing through the Judge's registrar on or before 31 January 2019.

h) The aforementioned Refugee Status Determination Officer is directed, as soon as he or she has determined the application, to forthwith notify the applicant and the applicant's attorneys of record in writing that the decision is available for collection from the Cape Town Refugee Reception Office and to provide a copy of the decision to the said attorneys by email.

i) In the event that the decision is not collected from Refugee Reception Office, the applicant shall be deemed to have obtained knowledge of the determination of his application for asylum within 10 days of his attorneys of record having been given notice thereof as provided in sub-paragraph (h) above.

j) The aforementioned Refugee Status Determination Officer is directed, should he or she reject the applicant's application for asylum as 'manifestly unfounded, abusive or fraudulent', to comply punctiliously with the provisions of s 24(4) of the Act, and also to (i) provide the applicant's attorneys of record with a copy of the reasons provided for in terms of s 24(4)(a) of the Act and (ii) provide the Standing Committee with a copy of this order and to draw to its pertinent attention the provisions of sub-paragraph (k) below.

k) In the event of the application being referred to the Standing Committee, it shall inform the Refugee Status Determination Officer and the applicant's attorneys of record of its decision within 15 days of the application being referred to it; alternatively within such extended time as might for sufficient reason be agreed to by the applicant's attorneys in writing, or, failing such agreement, granted on written application to the presiding Judge in chambers before the expiry of the said period of 15 days.

l) In the event of the applicant's application for asylum being rejected as 'unfounded', he shall lodge any appeal he might wish to bring in terms of s 26 of the Act within 30 calendar days of his receipt or deemed knowledge of the decision, whichever is earlier, as provided in the regulations made under the Act.

m) It is directed that any appeal brought by the applicant in terms of s 26 of the Act shall be considered and determined by the Refugee Appeal Board constituted in a manner compliant with the construction of the relevant provisions of the Act enunciated in the judgment of this Court in case no. 10972/2013 (*Harerimana v Chairperson of the Refugee Appeal Board and Others* [2013] ZAWCHC 209; 2014 (5) SA 550 (WCC)).

3. The respondent's attorneys of record are directed to serve a copy of this order on the Director-General of the Department of Home Affairs and a copy of the judgment and order on the chairperson for the time being of the Refugee Appeal Board, and to file an affidavit at the office of the Registrar of this Court by no later than 30 November 2018, with a copy thereof to be provided to the applicant's attorneys of record, confirming that compliance has been made with this direction.

4. Subject to paragraph 5 below, the fourth respondent is directed to pay two thirds of the applicant's costs of suit, such costs to exclude the costs associated with or arising from the inclusion of annexures AK 30 and AK36 in his replying papers.

5. No orders as to costs are made in respect of the respondents' applications to strike out and to cross-examine the applicant or the applicant's application in terms of rule 6(5)(e).

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES

Applicant's counsel:	**David Simonsz**
Applicant's attorneys:	**UCT Refugee Rights Clinic** **Cape Town**
Respondents' counsel:	**Mushahida Adikhari**
Respondents' attorneys:	**The State Attorney** **Cape Town**