

**IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)**

Case No.: 2727/2019

Date Delivered: 30 March 2021

In the matter between:

**TAURAI MASHIEL MAPINGURE**

Applicant

and

**THE CHAIRPERSON STANDING  
COMMITTEE FOR REFUGEE AFFAIRS**

First Respondent

**THE REFUGEE STATUS DETERMINATION OFFICER**

Second Respondent

**THE MINISTER OF HOME AFFAIRS**

Third Respondent

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

Fourth Respondent

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**JUDGMENT**

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Ronaasen AJ:

**Introduction**

[1] The Refugee Act, 130 of 1998 ("the Act") has as its purpose to provide for the reception into the Republic of South Africa of asylum seekers and to regulate applications for and recognition of refugee status for asylum seekers.

[2] The applicant, a Zimbabwean national, unsuccessfully applied for asylum in South Africa in terms of the Act. He now seeks to review the administrative actions of the first and second respondents, underlying the refusal of his asylum application in terms of the provisions of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA"). These administrative actions include:

2.1. the rejection of his application for asylum;

2.2. the result of the automatic internal review allowed for by the Act in terms of which the decision to reject his application for asylum was upheld.

[3] The respondents oppose the application.

**The process to be followed by an asylum seeker ("the process")**

[4] The process commences when a potential refugee into South Africa enters through a port of entry, which has been determined as such in terms of the Immigration Act, 13 of 2002. A port of entry is typically a land border post, an airport or a harbour.

[5] An entrant to South Africa who, at the port of entry, claims to be an asylum seeker, is issued with an Asylum Transit Permit. This permit is not renewable and its validity endures for five days. The permit gives the asylum seeker the requisite authority to travel from the port of entry to the closest Refugee Reception Office to apply for asylum in terms of the Act.

- [6] Should the holder of the abovementioned permit fail to report in person to a Refugee Reception Office to apply for asylum, before the expiry of the permit, he/she automatically becomes an illegal foreigner and may be dealt with in terms of the provisions of the Immigration Act.
- [7] The asylum seeker is obliged to present his application for asylum, in the prescribed form, in person, at a designated Refugee Reception Office.
- [8] The initial stage of the process involves the taking of the asylum seeker's fingerprints and the capturing of his image and biographical data in the refugee system.
- [9] An application for asylum must be made in the form and contain the information prescribed in Annexure 1 of the Regulations promulgated in terms of section 38 of the Act, published in Government Notice R366 contained in the Government Gazette 21075 of 6 April 2000. The form is known as the Eligibility Determination Form for Asylum Seekers and is designated as form DHA-1590 ("the form").
- [10] The form allows the asylum seeker to place on record all relevant information within his/her knowledge which may impact on the application for asylum. It affords the asylum seeker the opportunity to set out the reasons for fleeing his/her country of origin and why asylum is being sought in South Africa. The form poses questions such as the asylum seeker's reasons for requiring asylum, whether he/she was active in any political organisation in the country of origin and the role he/she played in such organisation. Asylum seekers are also asked whether they were ever arrested in their country of origin for political reasons and as to the endeavours they made to resolve the problems

experienced in their country of origin. Essentially the form, through appropriate questioning, is designed to determine whether an asylum seeker, measured against the criteria in the Act, qualifies for asylum.

[11] Upon arrival at a Refugee Reception Office an asylum seeker will ordinarily meet with a Refugee Reception Officer, who receives the application for asylum and conducts the first interview with the asylum seeker. During this interview the form is completed and the capturing of the other information referred to above is undertaken.

[12] The next step in the process is to issue the asylum seeker with a permit in terms of section 22 of the Act, which has a validity of six months, pending a final decision on the application for asylum. The permit may be extended while the process is underway. The permit enables the asylum seeker to work and study in South Africa and protects him/her from deportation to the country of origin pending completion of the process.

[13] After the abovementioned initial proceedings a further interview is conducted with the asylum seeker by a Refugee Status Determination Officer. The purpose of this interview is to determine the asylum seeker's refugee status in terms of section 24 of the Act. The officer conducting the interview must make a fair adjudication of the application for asylum and provide reasons for the decision ultimately made. To this end the responses given by the asylum seeker are recorded and form part of the official record or the so-called "interview notes".

[14] Section 24(3) of the Act (as it read at the time of the applicant's application for asylum in 2018/2019 and prior to its amendment with effect from 1 January 2021) empowers the Refugee Status Determination Officer, in his/her discretion, to:

14.1. grant asylum;

14.2. reject the application as fraudulent; or

14.3. reject the application as unfounded.

[15] A rejection of an asylum application must be accompanied by written reasons, which, in terms of section 24(4) must be furnished to the asylum seeker within five days.

[16] The grounds for rejection of an application for asylum referred to in paragraph 14.2, above is contained in section 24(3)(b) of the Act (as it read in 2018/2019) and is the ground for rejection which forms the basis of this application.

[17] A rejection of an asylum application in terms of section 24(3)(b) is reviewed automatically by the Standing Committee for Refugee Affairs ("the Standing Committee") established in terms of the Act, in the manner contemplated in the then section 25 of the Act. The Standing Committee could, after having determined the review, confirm, set aside or substitute any decision taken by a Refugee Status Determination Officer in terms of section 24(3)(b) of the Act.

## **The applicant's case**

[18] The applicant's grounds for review are set out as follows in his supplementary founding affidavit, submitted after the record of proceedings was lodged in terms of rule 53:

### "GROUNDS FOR REVIEW

10. This judicial review application is predicated upon the following grounds:
  - 10.1. The procedural fairness of the entire refugee status determination process was riddled with irregularities committed by the RRO, RSDO and SCRA.
  - 10.2. To establish procedural fairness prescribed by the Constitution and expressed in PAJA need to begin at the RRO stage and continues throughout the office of the RSDO until a decision by the SCRA to uphold or set aside the decision of the RSDO.
  - 10.3. The decision was based on an error of law. The RSDO used a higher standard to determine whether I qualified for asylum. The requisite criteria is that of reasonable possibility of persecution. The RSDO used the balance of probabilities as a criteria.
  - 10.4. The decision taken by the Third Respondent and confirmed by the First Respondent was arbitrary, capricious and taken in bad faith. The administrator ignored the crucial principles of rationality, reasonableness, fairness and openness in determining whether I qualify for asylum or not.
  - 10.5. The Second Respondent in evaluating and assessing the determination process had predetermined the outcome of the determination process. No effort was made to solicit evidence whether favourable or unfavourable to the application.

The fact that I was not provided with opportunity to explain myself at the second interview is clear indication of such prejudgment. The RSDO was looking for any opportunity to identify contradiction in order to declare my account as incredible.

- 10.6. The RSDO in making a decision emphasized irrational consideration instead of a rational one. The political violence perpetrated by government police agents on me was ignored and the RSDO did not give me adequate opportunity to explain myself sufficiently during the determination hearing.
- 10.7. Enquiries were concluded in a rush manner without being given any chance to provide a response satisfactory and to the best of my ability.
- 10.8. There was an element of bias in conducting the RSDP by the RSDO and SCRA. Their approach was adversarial instead of being inquisitorial as envisaged by the International instrument to which the Republic is a contracting party. These instruments emphasise humanitarian approach in all affairs relating to status of refugee. The way I was treated is contrary to what is idealised by such instruments.
- 10.9. The approach of the RSDO was adversarial rather than inquisitorial as recommended by the International Instruments relating to refugees affairs.
- 10.10. These instruments emphasize a humanitarian approach in all affairs relating to status of refugees. The way I was treated is contrary to what is idealized by such instruments.
- 10.11. The emphases by RSDO on the lack of evidence on my part as applicant whether I was beaten or not is rational and the clear ground for the decision to be reviewed and set aside."

[19] Similar “grounds” for review are set out in the original founding affidavit.

[20] The applicant’s approach in his founding affidavits is largely argumentative and he fails to set out a cogent factual basis for the relief he seeks. He has not dealt in any meaningful way with the difficulties the first and second respondents had with his asylum application. He accordingly makes it extremely difficult for me to evaluate the underlying facts and to apply those facts to the provisions of PAJA.

### **Legal principles**

[21] The legal framework against which I must consider whether the administrative actions concerned are reviewable was succinctly set out by Plasket, J (speaking for the Full Bench of this Division) as follows in **WDR Earthmoving Enterprises CC and Another v Joe Gqabi District Municipality and Others ZAECGHC 45 (13 March 2017)**:

“[8] A court that is approached to review an administrative action does not have a free hand to interfere in the administrative process. Its powers are limited. As Lord Brightman stated in *Chief Constable of the North Wales Police v Evans* “[j]udicial review is concerned, not with the decision, but with the decision-making process”. This was made clear by Innes CJ more than a century ago in *Johannesburg Consolidated Investment Co Ltd v Johannesburg Town Council* when he said:

‘Whenever a public body has a duty imposed on it by statute, and disregards important provisions of the statute, or is guilty of gross irregularity or clear illegality in the performance

of the duty, this Court may be asked to review the proceedings complained of and set aside or correct them.'

[9] Less than a decade later, after Union and the establishment of the Appellate Division, Innes ACJ, in *Shidiack v Union Government (Minister of the Interior)*, captured the limits of the review functions of a superior court when he said that a court would be "*unable to interfere with a due and honest exercise of discretion, even if it considered the decision inequitable or wrong*". The reason for this is simple: the legislature mandated and empowered administrators to administer, and not courts; and the role of the court is limited to ensuring that administrators do not stray beyond the legal limits of their mandates.

[10] The passages I have cited from the *Johannesburg Consolidated Investments* case and the *Shidiack* case articulated the position when the review of administrative action was common law jurisdiction of the superior courts. The principles stated still hold good now that the power to review administrative action is sourced in the Constitution and the PAJA: the distinction between appeal and review, based as it is on the doctrine of the separation of powers, remains in place and remains fundamentally important. Administrative action may only be set aside by a court exercising its review powers if it is irregular. It may not be interfered with because it is a decision a judge considers to be wrong."

**[Detailed case references omitted]**

[22] The abovementioned principles are consonant with the concept of judicial deference described by **Hoexter, in (2000) 117 SALJ 484 at 501 – 2**, as follows:

“(A) Judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinise administrative action, but by a careful weighing up of the need for – and the consequences of – judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal.”

[23] In **Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism and Others v Bato Star Fishing (Pty) Ltd 2003 (6) SA 407 (SCA)** at [50] it was held that judicial deference does not imply judicial timidity or an unreadiness to perform the judicial function. It merely recognises that the law itself places certain administrative actions in the hands of the executive and not the judiciary.

[24] These sentiments were endorsed by the Constitutional Court in **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 (4) SA 490 (CC)** at [48] as follows:

“In treating the decisions of administrative agencies with the appropriate respect, a Court is recognising the proper role of the Executive within the Constitution. In doing so a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other

branches of government. A Court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a Court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a Court should pay due respect to the route selected by the decision-maker. This does not mean, however, that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a Court may not review that decision. A Court should not rubber-stamp an unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker.”

[25] As to bad faith and other grounds of review, in **Shidiack v Union Government (Minister of Interior) 1912 AD 642 at 651 – 2** the court held as follows:

“There are circumstances in which interference would be possible and right. If for instance such an officer had acted *mala fide* or from ulterior and improper motives, if he had not applied his mind to the matter or exercised his discretion at all, or if he had disregarded the express provisions of a statute – in such cases the Court might grant relief. But it would be unable to interfere with a due and honest exercise of discretion, even if it considered the decision inequitable or wrong.”

[26] In approving the abovementioned passage the Constitutional Court in **Pharmaceutical Manufacturers of SA and Another: In re *ex parte* President of the Republic of South Africa and Others 2000 (2) SA 674 (CC)** at [83] stated that:

“To the extent that *Shidiack* requires public officials to exercise their powers in good faith and in accordance with the other requirements mentioned by Innes ACJ, it is consistent with the foundational principle of the rule of law enshrined in our Constitution. The Constitution, however, requires more: it places further significant constraints upon the exercise of public power through the bill of rights and the founding principle enshrining the rule of law.”

### **Application of principles**

[27] The process, described above, was followed in this case.

[28] In evaluating whether the applicant has established any ground for review in terms of section 6(2) of PAJA the essential question is whether the first and second respondents acted contrary to the Act, which is the empowering provision by which they had to be guided.

[29] The administrative actions of the first and second respondents must be measured against the background of section 3 of the Act, which provides as follows:

“3. Refugee Status

Subject to Chapter 3, a person qualifies for refugee status for the purposes of this Act is that person –

- (a) owing to a well-founded fear of being persecuted by reason of his or her race, gender, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or
- (b) owing to external aggression, occupation, foreign domination or other events seriously disturbing public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge in another place outside his or her country of origin or nationality; or
- (c) is a spouse or dependant of a person contemplated in paragraph (a) or (b)."

[30] The respondents contend that the applicant's application for asylum was rejected essentially by reason of his response to a question posed by the second respondent as to what South Africa could do for him, in the following terms:

"I want to get a legal document so that I can be able to work. I have Two children. I want to support my children."

[31] Section 3 of the Act clearly does not allow for refugee status to be granted to an asylum seeker on the basis of the applicant's response set out in the preceding paragraph. This, in my view, is decisive of the applicant's application if the further considerations, set out below, are taken into account.

[32] The applicant, furthermore, appeared to be less than forthcoming in his interviews.

When interviewed by the Refugee Reception Officer he told her that he was applying for asylum because he had been assaulted and adversely affected by the political situation in Zimbabwe, hence his coming to South Africa. When he was interviewed by the second respondent, however, he first indicated that he had been assaulted, but later denied that this was the case.

[33] The applicant's explanation in his founding affidavits for the discrepancies in the version put up to the second respondent are unpersuasive and are a further attempt to conceal the true motive for his coming to South Africa, namely to seek employment.

[34] In section 1 of the Act a fraudulent application for asylum is defined as meaning:

"..... an application for asylum based without reasonable cause on information, documents or representations which the applicant knows to be false and are intended to materially affect the outcome of the application."

[35] A consideration of the applicant's responses in the form satisfy me that his application for asylum was based on representations which he knew to be false and which were intended to materially affect the outcome of the application and, thus, fall within the definition of a fraudulent application. The misrepresentations are highlighted by the clear discrepancies where he first stated that he had been assaulted and then later retracted this. His statements in this regard were a poor attempt to disguise the true reason for his coming to South Africa, namely to obtain employment, by attempting to portray himself as a victim of the Zimbabwean political situation.

[36] I do not agree with the submission that the respondents applied a higher standard of proof than is generally accepted in respect of asylum applications, namely that of a reasonable possibility of persecution. A consideration of the documents in the record satisfactorily demonstrate to me that the applicant did not satisfy the standard of proof by showing that he faced the reasonable possibility of persecution in Zimbabwe. As stated, his vague references to his being a victim of the political situation in Zimbabwe were calculated to disguise the true reason for his coming to South Africa.

[37] There is no substantiation for the applicant's assertions that the first and second respondents, in applying the provisions of the Act, acted with bias or in bad faith.

[38] I am accordingly satisfied with the reasons furnished by the second respondent for her decision in refusing the applicant's application for asylum on the basis of section 24(3)(b) of the Act. By parity of reasoning the decision of the first respondent to uphold the decision of the second respondent, on review, is also unassailable.

[39] Thus, there is no reason for me to interfere in the decisions of the first and second respondents.

### **Order**

[40] The application is accordingly dismissed with costs.

**O H RONAASEN**

**ACTING JUDGE OF THE HIGH COURT**

By agreement between the parties this application was determined without the hearing of oral argument. Heads of argument on behalf of the applicant were signed by Mr Andile Ngqakayi and for the respondents by Advocate V Madokwe.

The parties were represented as follows:

**The applicant:** Andile Ngqakayi Inc, Third Floor, Capitol Building, 545 Govan Mbeki Avenue, North End, Port Elizabeth.

**The respondent:** The State Attorney, 29 Western Road, Central, Port Elizabeth.