



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

JUDGMENT

Not Reportable

Case No: 3599/24

In the matter between:

BELGICIAN ILUNGA

Applicant

and

THE MINISTER OF HOME AFFAIRS

First Respondent

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

Second Respondent

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

Third Respondent

**THE STANDING COMMITTEE
FOR REFUGEE AFFAIRS**

Fourth Respondent

**THE REFUGEE STATUS DETERMINATION
OFFICER, CAPE TOWN**

Fifth Respondent

Coram: **Yake AJ**

Heard: 9 June 2026

Delivered: Electronically on 17 September 2026

Summary: Administrative law — Section 6(2)(e)(iii) of the Promotion of Administrative Justice Act 3 of 2000 – review – respondent failure to consider relevant factors – consideration of irrelevant factors is reviewable.

ORDER

1. The decision of the third and fourth respondents dated 29 December 2023 is reviewed and set aside.
2. The matter is remitted to the fourth respondent for reconsideration in accordance with section 3 of the Refugees Act 130 of 1998, the provisions of PAJA, and section 33 of the Constitution.
3. The fourth respondent is directed to reconsider the applicant's refugee status within sixty (60) days of this order, taking into account all relevant considerations and disregarding irrelevant ones.
4. The respondents are ordered to pay the costs of this application, jointly and severally, the one paying the other to be absolved.

JUDGMENT

YAKE AJ

Introduction

[1] This is an application brought in terms of section 6 of the Promotion of Administrative Justice Act¹ ('PAJA'), read with the principle of legality, for an order reviewing and setting aside the third (The Chairperson of the Standing Committee for Refugee Affairs) and fourth (The Standing Committee for Refugee Affairs) respondents' decision made on 29 December 2023 to withdraw the applicant's refugee status. The Impugned Decision was premised on section 5(1)(e), read with section 36 of the Refugees Act.² The application is opposed by the respondents. It is instructive that I first set out the underpinning background facts of the applicant's challenge.

Factual Background

[2] The applicant is a citizen of the Democratic Republic of the Congo ("DRC"), born in 1982 in Pweto, situated in Haut-Katanga province, and is of Luba ethnicity. Upon completing his matric in 2000, he joined the *Force d'Autodefence Populaire* ("FAP"), a volunteer organisation established to identify and counter destabilising forces in the region. He became a prominent member of that organisation.

[3] In 2001, President Laurent Kabila, himself of Luba origin, was assassinated. Thereafter, Eddy Kapend, a senior military figure in President Kabila's administration and of Lunda ethnicity, was arrested, convicted in 2003 of involvement in the assassination, and sentenced to death. Following Kapend's arrest, tensions within the FAP between the Lunda and Luba factions intensified and endured for decades. Amid escalating violence, hostility, and widespread human rights violations, the applicant fled the DRC and arrived in

¹ Promotion of Administrative Act 3 of 2000.

² Refugees Act 130 of 1998.

South Africa in 2003. He applied for refugee status, which was duly granted in recognition of the prevailing conditions of war in the DRC.

[4] On 16 July 2015, the Katanga parliament resolved to break up Katanga into four provinces, namely Haut-Katanga, Lualaba, Haut-Lomami, and Tanganyika. Pursuant thereto, on 23 September 2015, the fourth respondent addressed correspondence to the applicant, advising of an intention to withdraw his refugee status. The applicant avers that this decision was predicated upon an erroneous assumption that he was a deserter from the DRC military. He maintains that he has never served in the military. Notwithstanding his denial, on 16 November 2016, the fourth respondent proceeded to withdraw the applicant's refugee status.

[5] On 9 May 2023, Erasmus J set aside the decision taken by the fourth respondent (cited as the third respondent in the present application) on 16 November 2016 and referred the matter to the fifth respondent (cited herein as the fourth respondent) for reconsideration of the applicant's refugee status ("the Erasmus order"). The respondents were further ordered to provide the outcome of the reconsideration by 12 July 2023. However, the respondents failed to do so.

[6] Pursuant to the Erasmus order, on 28 August 2023 the applicant attended the offices of the fourth respondent, where he was interviewed by two officials. Thereafter, on 27 October 2023, the applicant was requested to furnish credible reports or evidence demonstrating the existence of ethnic-related conflicts between the Luba and Lunda tribes in Pweto. The applicant complied with this request and submitted the reports on 5 December 2023. On 29 December 2023, the applicant's attorney received correspondence from the third respondent, which stated, inter alia, the following:

- ‘54 The circumstances under which the applicant was recognised as a refugee no longer exist and that is why the Standing Committee relied on section 5(1)(e) of the Refugees Act as amended.
- 55 The applicant has at the same time failed to show the Standing Committee that there are compelling reasons which arise from his claim when he came to South Africa as per section 5(2) of the Act.
- 56 As a result, the Standing Committee hereby withdraws Mr BELGICIAN ILUNGA’s refugee status based on section 5(1)(e) read with section 36 of the Refugees Act (Amended).’

[7] It is this decision of withdrawing the applicant’s refugee status taken by the third and fourth respondents on 29 December 2023 that the applicant now seeks an order reviewing and setting it aside. In addition to the relief of review and setting aside, the applicant seeks an order substituting the impugned decision with a determination that he is entitled to continue to enjoy refugee status in terms of the Refugees Act. In the alternative, the applicant seeks an order remitting the matter to the fourth respondent for reconsideration.

Statutory framework

[8] Before turning to the substantive facts of this application, it is apposite to refer to the relevant statutory provisions underpinning the applicant’s application. The preamble to the Refugees Act records that:

‘**Whereas** the Republic of South Africa has acceded to the 1951 Convention Relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees and the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa as well as other human rights instruments, and has in so doing, assumed certain obligations to receive and treat in its territory refugees in accordance with the standards and principles established in international law’

[9] Section 2 of the Refugees Act incorporates the international law principle of *non-refoulement*, which is articulated in Article 33.1 of the 1951 Convention Relating to the Status of Refugees (the 1951 Convention),³ as follows:

‘No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.’

[10] The circumstances in which one determines whether an individual qualifies for refugee status are set out in section 3 of the Refugees Act. Section 3(a) and (b) of the Refugees Act provide relevant parts:

‘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, 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’ (My omission)

[11] On the other hand, section 5(e) of the Refugees Act governs the cessation of refugee status and provides as follows:

³ *Convention Relating to the Status of Refugees* (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

‘(1) A person ceases to qualify for refugee status for the purposes of this Act if—

.....

(e) he or she can no longer continue to refuse to avail himself or herself of the protection of the country of his or her nationality because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist and no other circumstances have arisen which justify his or her continued recognition as a refugee’ (My omission)

[12] Furthermore, section 6(2)(e)(iii) of PAJA provides for judicial review of administrative action as follows:

‘(2) A court or tribunal has the power to judicially review an administrative action if—

(e) the action was taken—

(iii) because irrelevant considerations were taken into account or relevant considerations were not considered’ (My omission)

[13] Section 6(2)(e)(iii) flows from the requirements of just administrative action, which is entrenched in section 33 of the Constitution.⁴ Section 33(1) and (3) provide:

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

...

(3) National legislation must be enacted to give effect to these rights, and must—

(a) Provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal’

[14] Against the backdrop of the statutory provisions outlined above, I now turn to consider each of the grounds of review as advanced by the applicant. The applicant contends that these grounds for review are premised upon both the PAJA and the principle of legality. They require scrutiny in light of the

⁴ Constitution of the Republic of South Africa, 1996.

constitutional guarantee of lawful, reasonable, and procedurally fair administrative action. These grounds may be succinctly stated as follows:

- (a) That the impugned decision was taken based on irrelevant considerations and/or in disregard of relevant considerations.
- (b) That the decision is vitiated by an error of fact.
- (c) That the decision is further tainted by an error of law.

[15] The court is therefore enjoined to determine whether the impugned decision is vitiated by reviewable irregularities under PAJA and the Constitution, and whether the applicant is entitled to the relief sought. I now consider each of ground raise in detail in turn.

Reliance on irrelevant considerations / relevant considerations not considered.

[16] In support of the application, Mr Maxongo, appearing for the applicant, contends that the decisions taken by the third and fourth respondents were manifestly unreasonable and fall foul of section 6(2)(e)(iii) of the PAJA. Counsel placed reliance upon the judgment of the Supreme Court of Appeal in *Ulde v Minister of Home Affairs*,⁵ wherein it was emphasised that it is not enough for an administrative official to merely state he considered an issue. An official must demonstrate that he has properly applied his mind to the issue.⁶ In this regard, the Court drew upon the earlier authority of *Northwest Townships (Pty) Ltd v The Administrator, Transvaal*,⁷ where Colman J observed that:

‘[A] failure by the person vested with the discretion to apply his mind to the matter... has been held, in other English and South African cases, to include capriciousness, a failure, on the part of the person enjoined to make the decision, to appreciate the

⁵ *Ulde v Minister of Home Affairs and Another* 2009 (4) SA 552 (SCA) para 7.

⁶ *Ibid* para 7.

⁷ *Northwest Townships (Pty) Ltd v The Administrator, Transvaal and Another* 1975 (4) SA 1 (T) at 8F-G.

nature and limits of the discretion to be exercised, a failure to direct his thoughts to the relevant data or the relevant principles, reliance on irrelevant considerations, an arbitrary approach, and an application of wrong principles.’

[17] The applicant’s application for refugee status in 2023 was premised upon ethnic-related conflicts between the Luba and Lunda tribes. However, counsel contends that the broader context discloses that the introduction of new governmental structures, coupled with the activities of militia, rebel groups, and other tribal factions, has perpetuated gross human rights violations and continued atrocities against the Luba people in the applicant’s home region and its surrounds. It is submitted that the third respondent adopted an unduly narrow approach in her assessment, disregarding these broader considerations, and thereby failed to correctly apply sections 3(a) and 3(b) of the Refugees Act.

[18] Counsel further asserts that the third respondent incorrectly stated that armed conflicts between rebel militia and the government of Katanga province were confined to the eastern parts of the DRC, and that the applicant was not from that region. This finding is disputed. Counsel maintains that the applicant is indeed from the eastern part of the DRC and that the respondent’s findings in this regard are factually inaccurate.

[19] Additionally, it is contended that the third respondent’s assertion that it is ‘relatively safe’ in Kinshasa and Haut-Katanga is irrelevant. What is material, counsel submits, is that the region is unsafe. Moreover, by acknowledging that it is only ‘relatively safe’, the third respondent implicitly concedes that conditions remain unsafe.

[20] Conversely, Mr Abba, appearing for the respondents, argued that the decision taken by the fourth respondent was reasonable in that it was based upon the material placed before her and, on that basis, she confirmed that the applicant’s refugee status should be withdrawn. Counsel emphasised that the

fourth respondent requested the applicant to provide evidence of ongoing ethnic-related conflict in the region. It was submitted that the applicant responded with outdated reports, including one published as far back as 2003, which had already been considered by the fourth respondent. Reliance was placed upon the authority of the Court of Justice of the European Union in *Joined Cases C-148/13 to C-150/13 A, B and C v Staatssecretaris van Veiligheid en Justitie*,⁸ where it was held that applicants bear a duty to cooperate by providing all relevant information and documentation in support of their applications.

[21] Counsel further submits that the applicant has failed to demonstrate that the specific ethnic and security conditions in Pweto, which formed the basis of his original recognition as a refugee, continue to exist. It is contended that the reports submitted either pre-date his arrival in South Africa, pertain to different geographic areas, or have already been considered and rejected by the Standing Committee for Refugee Affairs. In the absence of credible evidence establishing risk in Haut-Katanga, counsel argues the applicant cannot satisfy the objective component of the refugee definition.

Analysis

[22] It is common cause that the applicant departed the DRC in consequence of ethnic-related conflicts between the Luba and Lunda tribes in Pweto, and that he has been residing in South Africa since 2003. The central issue for consideration before this Court is whether those conflicts continue to exist so as to warrant the extension of his refugee status, or whether the fourth respondent's failure to consider other intervening circumstances resulted in the withdrawal of such status. Additionally, whether the decisions of the third and

⁸ *Joined Cases C-148/13 to C-150/13 A, B and C v Staatssecretaris van Veiligheid en Justitie* [2014] EU:C:2014:2406 (CJEU, Grand Chamber) paras 50 & 68.

fourth respondents withstand scrutiny under section 6(2)(e)(iii) of PAJA, which proscribes reliance upon irrelevant considerations or the failure to consider relevant ones.

[23] The legal position is clear: if the court finds that the fourth respondent failed to take into account relevant considerations, or relied upon considerations that were irrelevant, the impugned decision is susceptible to review under section 6 of PAJA.⁹ In such circumstances, the court is empowered to set aside the decision and substitute or remit the matter, or otherwise to make an order that is just and equitable in the circumstances. It must, however, be emphasised that the court's powers of review are not to be exercised capriciously or without proper foundation. The court is enjoined to assess the facts placed before it, weigh the considerations advanced, and determine, upon a reasoned and informed basis, whether the threshold for review has been met. Only where the impugned decision is shown to be vitiated by the defects contemplated in section 6 of PAJA will judicial intervention be warranted. In this Division, Le Grange J, in the matter of *A.M v Chairperson of the Refugee Appeal Board*,¹⁰ has stated that:

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

[24] This requires a careful balancing of the applicant's evidence of continuing persecution and insecurity against the respondents' contention that the conditions underpinning the original recognition have ceased to exist. The court must assess whether the decision-maker meaningfully applied her mind to

⁹ Section 6(2)(e)(iii).

¹⁰ *A.M v Chairperson of the Refugee Appeal Board and Others* (1102/2019) [2019] ZAWCHC 113 para 39.

the totality of the circumstances, or whether the approach adopted was unduly narrow and therefore unreasonable.

[25] The applicant's case rests upon the contention that the respondents adopted an unduly narrow approach, disregarding the broader context of militia activity, rebel incursions, and systemic human rights violations affecting the Luba people. The respondents, conversely, emphasise the applicant's duty to cooperate by furnishing credible, updated evidence, and argue that the documentation submitted was outdated, geographically misplaced, or previously considered. While the duty of cooperation is a recognised principle in refugee law, it cannot absolve the decision-maker of the obligation to apply her mind to the totality of the circumstances. The authorities of *Ulde* and *Northwest Townships* make it clear that a mere ritualistic assertion of consideration is insufficient. The decision-maker must demonstrate meaningful engagement with the material facts.

[26] The respondents' reliance upon the assertion that Kinshasa and Haut-Katanga are 'relatively safe' is problematic. Such a concession implicitly acknowledges the persistence of insecurity. To predicate a decision upon this equivocal finding, while disregarding broader evidence of ongoing conflict and persecution, amounts to reliance upon irrelevant considerations and a failure to accord proper weight to relevant ones. It must be borne in mind that section 3 of the Refugees Act accords refugee status to persons who, being outside their country of origin, have a well-founded fear of persecution by reason of race, tribe, religion, nationality, political opinion, or membership of a particular social group, or are compelled to leave their country owing to events seriously disturbing or disrupting public order in either a part or the whole of that country.¹¹ Moreover, section 5(2) of the Refugees Act stipulates that even where the circumstances justifying refugee status have ostensibly ceased to exist, a

¹¹ Section 3(a) and (b) of the Refugees Act.

person remains a refugee if he or she can invoke compelling reasons arising from previous persecution for refusing to avail himself or herself of the protection of the country of nationality.

[27] I agree with the applicant's counsel that the third respondent appears to have adopted a narrow approach, confining her assessment to inter-ethnic tensions between the Luba and Lunda tribes, while disregarding broader evidence of militia incursions and human rights violations affecting the applicant's community. As a result, I find that the decisions of the third and fourth respondents are vitiated by reviewable irregularities under PAJA. Consequently, based on this ground alone, the decisions accordingly fall to be reviewed and set aside.

Error of fact

[28] It is trite that material mistakes of fact are reviewable where the decision-maker fails to consider 'uncontroversial and objectively verifiable' facts that are material and which, if properly considered, would probably have led to a different outcome.¹² Mr Maxongo contends that the third respondent erred in concluding that the reports of atrocities related to Tanganyika province rather than Haut-Katanga, the applicant's province of origin. Counsel submits that Tanganyika and Haut-Katanga are contiguous, and that conflicts in one province inevitably spill over into the other. In this regard, it is argued that the third respondent's conclusion that the reports were irrelevant is factually unsustainable, particularly in light of her own finding that there was a

¹² See *Pepcor Retirement Fund and Another v Financial Services Board and Another* 2003 (6) SA 38 (SCA) paras 47-48; *South Durban Community Environmental Alliance v MEC for Economic Development, Tourism and Environmental Affairs, KwaZulu-Natal Provincial Government and Another* 2020 (4) SA 453 (SCA) paras 23-24; *Airports Company South Africa v Tswelokgotso Trading Enterprises CC* 2019 (1) SA 204 (GJ) para 12.

resurgence of incursions by Mai-Mai Bakata-Katanga in Pweto, situated in Haut-Katanga, the applicant's place of origin.

[29] Counsel further submitted that this ground falls squarely within section 6(2)(e)(iii) of PAJA in that the third respondent failed to take into account relevant considerations. The relevant consideration, he argues, is that Pweto was expressly mentioned in the reports as an area experiencing renewed incursions by Mai-Mai Bakata-Katanga (a militant rebel group). Counsel contends that there is no evidence demonstrating that Mai-Mai Bakata-Katanga has been fully withdrawn from the region and that the report marked 'I' confirms its continued presence. In addition, counsel asserts that there is no evidence to suggest that the clashes between the Pygmy Batwa and Luba tribes have ceased.

[30] Conversely, Mr Abba argued that the applicant was originally granted refugee status on the basis of alleged persecution arising from his tribal affiliation and his claimed membership of the FAP. This was in the context of inter-ethnic tensions between the Luba and Lunda tribes in Katanga. Counsel submits that Pweto is not affected by armed conflict in the eastern DRC, and that the conditions which originally underpinned his recognition as a refugee have accordingly ceased to exist.

Analysis

[31] The evidence placed before this Court includes reports of atrocities relating to the Tanganyika region. While the applicant did not reside in Tanganyika, it has been submitted that conflicts in that province spill over into Haut-Katanga, where the applicant originally resided. In my view, any evidence suggesting otherwise is untenable given the geographical proximity and the well-documented pattern of cross-border incursions. Moreover, the third respondent expressly acknowledged a resurgence of incursions by Mai-Mai

Bakata-Katanga in Pweto, which is situated in Haut-Katanga, the applicant's place of origin. This acknowledgment fatally undermines the conclusion that the reports were irrelevant. It demonstrates that the respondent failed to properly weigh relevant considerations and instead discounted evidence that directly corroborated the applicant's claim of ongoing insecurity.

[32] It is correct that the applicant's original recognition as a refugee was premised upon persecution arising from his tribal affiliation and alleged membership of the FAP. However, that historical basis does not negate the fact that Pweto remains affected by ongoing insecurity. Moreover, the applicant's contention that Pweto was expressly mentioned in the reports as an area experiencing renewed incursions is significant. The absence of evidence demonstrating that Mai-Mai Bakata-Katanga has withdrawn from the region, coupled with the continued clashes between the Pygmy Batwa and Luba tribes, constitutes relevant considerations that ought properly to have been taken into account. The failure to do so amounts to a material error of fact and a disregard of relevant considerations within the meaning of section 6(2)(e)(iii) of PAJA.

[33] In the circumstances, I am satisfied that the third respondent's decision was vitiated by a material mistake of fact. Therefore, the failure to properly engage with objectively verifiable evidence of ongoing conflict in Pweto constitutes a reviewable irregularity under PAJA.

Error of law

[34] The applicant's contention is that the Erasmus order directed the fourth respondent to reconsider and determine his refugee status in accordance with section 3(a) and 3(b) of the Refugees Act. On the strength of the sources placed before the respondents, it is argued that the applicant's tribe, the Luba, has been subjected to constant attacks by the Lunda, Pygmy Twa, Mai-Mai

Bakata-Katanga, and other ethnic groups in Pweto and the greater Katanga province. These circumstances, counsel submits, establish a well-founded fear of persecution on account of tribal affiliation, membership of a particular social group, and political opinion, corroborated by objective evidence of the inability of the DRC government to afford protection.

[35] The applicant further relies upon the prevailing conditions in Pweto and Katanga, evidenced in reports and articles, which reveal extreme violence, gross human rights violations, and disruption of public order. It is contended that the third respondent failed to properly consider section 3(a) of the Refugees Act, notwithstanding clear findings that the region remains unsafe and unstable. On this basis, counsel avers that exceptional circumstances exist warranting substitution of the impugned decision, as remittal would serve no practical purpose given the extensive representations already made.

[36] The respondents, conversely, argue that the principle of legality constitutes a residual ground of review which does not apply where the impugned conduct falls within the ambit of PAJA. Since the withdrawal of refugee status constitutes ‘administrative action’ within the meaning of PAJA, it is submitted that PAJA provides the applicable framework. Counsel further contends that section 6(2)(d) of PAJA expressly provides for review where administrative action has been materially influenced by an error of law, which encompasses errors of fact. Reliance is placed upon *Pepcor*,¹³ with the submission that the alleged errors identified by the applicant are either not errors at all, immaterial to the outcome, or adequately explained.

¹³ *Pepcor* supra fn 12.

Analysis

[37] The Constitutional Court has clarified the proper approach to determining whether a matter falls to be brought under PAJA or pursuant to the common law. The Court has held that, where PAJA applies, litigants are obliged to frame their cases within its provisions rather than relying upon residual common-law grounds of review.¹⁴ The principle of legality retains relevance only in circumstances where the impugned conduct does not fall within PAJA's definition of administrative action.¹⁵

[38] Similarly, while section 33 of the Constitution guarantees the right to just administrative action, it does not constitute a primary review pathway in itself. PAJA was enacted to give effect to section 33, and litigants may not bypass PAJA by invoking the constitutional provision directly, save where the constitutionality of PAJA itself is challenged. Direct reliance upon section 33 remains permissible only in cases where PAJA does not apply, or where PAJA is impugned for inconsistency with the Constitution. In certain instances, legislation other than PAJA provides for a specialised statutory review mechanism which displaces PAJA. Thus, for example, rulings of the Commission for Conciliation, Mediation and Arbitration ('CCMA') fall to be reviewed under the Labour Relations Act¹⁶ 66 of 1996, rather than under PAJA. This demonstrates that PAJA does not apply universally and may be ousted where Parliament has enacted a tailored review framework for specific categories of administrative decisions.

[39] In the present matter, it is accepted that the PAJA constitutes the relevant framework governing these proceedings. The applicant's reference to the

¹⁴ *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC) para 96 and *Minister of Home Affairs and Another v Public Protector* 2018 (3) SA 380 (SCA) para 27-28.

¹⁵ *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) para 59 and Klaaren & Penfold "Just administrative action" in Matthew Chaskalson et al *Constitutional Law of South Africa* (2002) at 15.

¹⁶ Labour Relations Act 66 of 1996.

principle of legality, though misplaced, does not vitiate the proceedings. The invocation of legality does not introduce a distinct or independent ground of review beyond that already encompassed within PAJA. The statutory framework is sufficiently comprehensive to address the applicant's complaints, and the reliance upon legality adds no substantive dimension to the case.

[40] Having clarified the position on the applicable review framework, it is necessary to consider whether an error of law materially influenced the impugned decision. Our courts recognise that such error arises where a decision-maker misconstrues the empowering provision or applies the wrong legal standard. Section 6(2)(d) of PAJA expressly provides that administrative action is reviewable where it was materially influenced by an error of law.

[41] In *Hirt & Carter (Pty) Ltd v Arntsen NO*,¹⁷ the Supreme Court of Appeal held that a material error of law arises where a statutory criterion is wrongly interpreted and, on the correct approach, the facts do not support the decision. Similarly, such error is present where the administrator asks itself the wrong question or bases its decision on considerations not prescribed by the statute.

[42] However, in *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal*,¹⁸ the Constitutional Court held:

‘However, a mere error of law is not sufficient for an administrative act to be set aside. Section 6(2)(d) of the Promotion of Administrative Justice Act permits administrative action to be reviewed and set aside only where it is “materially influenced by an error of law”. An error of law is not material if it does not affect the outcome of the decision.¹⁹ This occurs if, on the facts, the decision-maker would have reached the same decision despite the error of law.’ (Footnotes omitted)

¹⁷ *Hirt & Carter (Pty) Ltd v Arntsen NO and Others* [2021] ZASCA 85 paras 29–30.

¹⁸ *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 (6) SA 182 (CC) para 91.

¹⁹ See *Hira and Another v Booysen and Another* 1992 (4) SA 69 (A) at 93G-H

[43] Therefore, the critical enquiry in my view is whether the fourth respondent's decision to withdraw the applicant's refugee status was materially influenced by an error of law within the meaning of section 6(2)(d) of PAJA. If so, the impugned decision cannot be sustained in law. Put differently, whether the respondents properly applied section 3(a) and 3(b) of the Refugees Act in reconsidering the applicant's status.

[44] In the present matter, it has been argued that the respondent's narrow interpretation of section 3 of the Refugees Act, coupled with her reliance on irrelevant geographic distinctions, constitutes precisely such an error. By confining the statutory inquiry to geographic categorisations, the respondent misconstrued the empowering provision and thereby excluded considerations central to the statutory scheme. This, in my view, demonstrates that the third respondent failed to meaningfully engage with reports indicating ongoing persecution and instability in Pweto and Katanga. The interpretation excluded relevant considerations prescribed by statute, namely the disruption of public order and the persecution of the applicant's tribe in those regions.

[45] Furthermore, the argument that any alleged errors were immaterial, as the decision would have been the same on the facts, is not sustainable. The record reveals that the applicant's representations, supported by objective sources, established a well-founded fear of persecution and disruption of public order. Had the respondent correctly interpreted section 3, these considerations would have been central to the inquiry. The exclusion of such evidence materially influenced the outcome. In the circumstances, I find that the impugned decision was materially influenced by an error of law within the meaning of section 6(2)(d) of PAJA.

Conclusion

[46] The cumulative effect of the defects outlined above is that the impugned decision cannot withstand scrutiny under PAJA. The respondent relied upon irrelevant considerations, disregarded material and relevant evidence, committed a material error of fact, and misconstrued the applicable legal framework under section 3 of the Refugees Act. Each of these defects, whether considered individually or cumulatively, renders the decision unlawful, unreasonable, and procedurally unfair within the meaning of section 33 of the Constitution and section 6 of PAJA.

[47] I have duly considered the applicant's submissions urging this Court to exercise its powers of substitution on the basis that a remittal to the fourth respondent would serve no practical purpose. I am unable to agree with this contention. While it is correct that this Court is vested with the discretion to substitute the order by the administrator, such relief is reserved for exceptional circumstances. In my view, the respondents remain best placed to undertake the determination, having regard to all relevant considerations within the statutory framework.

[48] In the circumstances, the impugned decision of 29 December 2023 cannot be sustained. It falls to be reviewed and set aside. The matter is accordingly remitted to the fourth respondent for reconsideration in accordance with the Refugees Act.

Costs

[49] What remains for determination is the issue of costs. The general principle is that costs follow the result, subject to the court's discretion to depart therefrom in appropriate circumstances. In the present matter, I discern no basis

upon which such departure would be justified. The ordinary rule must accordingly apply.

Order

[50] In the result, the following order is made:

1. The decision of the third respondent dated 29 December 2023 is reviewed and set aside.
2. The matter is remitted to the fourth respondent for reconsideration in accordance with section 3 of the Refugees Act 130 of 1998, the provisions of PAJA, and section 33 of the Constitution.
3. The fourth respondent is directed to reconsider the applicant's refugee status within sixty (60) days of this order, taking into account all relevant considerations and disregarding irrelevant ones.
4. The respondents are ordered to pay the costs of this application, jointly and severally, the one paying the other to be absolved.

S YAKE
ACTING JUDGE OF THE HIGH COURT

Appearances

For Applicant: Q Maxongo

Instructed by: J Luna Attorneys

For Respondent: Y Abbas

Instructed by: Office of the State Attorney