

REPUBLIC OF SOUTH AFRICA



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

Case No.: 30123/2011

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

26/09/2014

[Signature]

In the matter between:

**CONSORTIUM FOR REFUGEES AND MIGRANTS  
IN SOUTH AFRICA**

Applicant

and

**PRESIDENT OF THE REPUBLIC OF  
SOUTH AFRICA  
MINISTER OF HOME AFFAIRS  
MINISTER FOR INTERNATIONAL AFFAIRS  
AND CO-OPERATION  
MINISTER OF STATE SECURITY  
DIRECTOR-GENERAL OF THE OFFICE OF  
THE PRESIDENCY  
DIRECTOR-GENERAL OF THE DEPARTMENT  
OF HOME AFFAIRS  
DIRECTOR-GENERAL OF THE DEPARTMENT**

1<sup>st</sup> Respondent  
2<sup>nd</sup> Respondent  
3<sup>rd</sup> Respondent  
4<sup>th</sup> Respondent  
5<sup>th</sup> Respondent  
6<sup>th</sup> Respondent

<b>OF INTERNATIONAL AFFAIRS AND CO-OPERATION</b>	7 <sup>th</sup> Respondent
<b>DIRECTOR-GENERAL OF THE DEPARTMENT OF</b>	
<b>STATE SECURITY</b>	8 <sup>th</sup> Respondent
<b>CENTRE MANAGER FOR THE CROWN MINES</b>	
<b>REFUGEE RECEPTION OFFICE</b>	9 <sup>th</sup> Respondent
<b>THE CHAIRPERSON: THE STANDING COMMITTEE</b>	
<b>FOR REFUGEE AFFAIRS</b>	10 <sup>th</sup> Respondent
<b>THE REFUGEE STATUS DETERMINATION</b>	
<b>OFFICER RESPONSIBLE FOR GRANTING</b>	
<b>REFUGEE STATUS TO THE TWELFTH RESPONDENT</b>	11 <sup>th</sup> Respondent
<b>FAUSTIN KAYUMBA NYAMWASA</b>	12 <sup>th</sup> Respondent

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**JUDGMENT**

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**MNGQIBISA-THUSI, J**

[1] The applicant is seeking the following relief:

- 1.1 the reviewing and setting aside of a decision taken by the ninth and/or tenth respondent(s) and/or eleventh respondent acting under the supervision and control of the second and sixth respondents during June 2010 to grant the twelfth respondent refugee status in terms of the **Refugees Act 130 of 1998** ("the Act").
- 1.2 declaring the impugned decision to be unlawful, inconsistent with the Constitution and invalid.
- 1.3 remitting the question of the twelfth respondent's refugee status in terms of the Act to the tenth and eleventh respondents, under the supervision and control of the second and sixth respondents, for

reconsideration in light of this court's judgment and under directions that:

1.3.1 the relevant respondents immediately reconsider the twelfth respondent's refugee status in terms of South African and international law and with due consideration to be given to the evidence provided by the twelfth respondent, should he choose to provide it; and

1.3.2 such reconsideration of the twelfth respondent's refugee status be completed and that a notification of such completion with full reasons for the decision be provided to this court within 30 days of this court's order.

1.3.3 Ordering those respondents that oppose the relief sought by the applicant to pay the costs of this application jointly and severally, the one paying the others to be absolved.

[2] The respondents oppose the relief sought by the applicant and the seventh respondent filed a notice to abide.

[3] The following facts are common cause. During February 2010 the twelfth respondent, a Rwandan national, together with his wife and children arrived in the country after fleeing Rwanda. This is after the twelfth respondent fell out of favour with Kagame government to which he had initially belonged to. They presented themselves to the Refugee Reception Office ("RRO") in Crown Mines, Johannesburg, to apply for asylum. Their application was

referred to the Refugee Status Determination Officer (“RSDO”) who granted the twelfth respondent and his family refugee status on 22 June 2010. On 19 June 2010 an attempt to assassinate the twelfth respondent was made in Johannesburg.

- [4] Subsequent to the twelfth respondent and his family being granted refugee status, the applicant sent a Briefing Paper to the respondents and other government departments in which information alleging that the twelfth respondent is implicated in the commission of genocide, crimes against humanity and war crimes in Rwanda. Based on the contents of the briefing report, the applicant requested the respondents to withdraw their decision to grant the twelfth respondent refugee status, which request was declined.
- [5] As a result of the refusal by the respondents to withdraw the twelfth respondent’s refugee status, the applicant launched proceedings in terms of Rule 53 in which it sought to obtain from the respondents documents relating to the processing of the twelfth respondent’s application for asylum. The respondents opposed the application on the ground, *inter alia*, that the contents of the twelfth respondent’s application are confidential.
- [6] The parties are in agreement that the twelfth respondent has a well-founded fear of persecution for his political opposition to the government of current President Paul Kagame should he return to Rwanda, and twelfth respondent is unwilling to return to Rwanda. Furthermore, the parties are in agreement that the South African government is bound by the principle of *non-*

*refoulement* as set out in article 33 of the 1951 United Nations Convention Relating to the Status of Refugees (“the UN Convention”)<sup>1</sup>.

- [7] The respondents have raised as a point *in limine* the fact that the applicant does not have *locus standi* to bring this application.
- [8] The applicant in its founding affidavit describes itself as a registered non-profit organisation tasked with promoting and protecting refugee and migrant rights, comprising of a number of member organisations, *inter alia*, legal practitioners, research units and refugee and migrant communities.
- [9] The respondents have raised as points *in limine* the issue that the function of granting refugee status is not an administrative action in view of the fact that the applicant seeks to review the impugned decision in terms of the provisions of the **Promotion of Administrative Justice Act 3 of 2000** (“PAJA”); and that the applicant does not have *locus standi* in bringing this application as it has not alleged that any of its constitutional rights have been violated.
- [10] In its founding affidavit the applicant describes itself as a registered non-profit organisation tasked with promoting and protecting refugee and migrant rights, comprising of a number of member organisations, *inter alia*, legal practitioners, research units and refugee and migrant communities.
- [11] Without getting into detail of counsel’s arguments on the points raised, I am satisfied that the issues at hand are in the public interest and fall within the area of interest of the applicant. I therefore, having considered the facts

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<sup>1</sup> Article 33 of the UN Convention provides that “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.”

before me and heard argument by counsel that the applicant does have locus standi to bring this application. Secondly, the respondents in accepting, processing and deliberation on applications for asylum, are performing a public function and their decisions amount to administrative action which is reviewable.

[12] The applicant seeks to impugn the decision to grant the twelfth respondent refugee status on the following grounds. It is the applicant's contention that based on the information contained in the briefing paper it prepared and sent to the respondents, the twelfth respondent is suspected of having committed genocide, crimes against humanity and war crimes in Rwanda and does not qualify for refugee status. It is further the applicant's contention that had the respondents performed their obligations under the Act, the twelfth respondent would have been denied refugee status on the ground that he falls under the category of persons excluded from being accorded refugee status. In this regard the applicant relies on section 3 read with section 4(1)(a) of the Act.

[13] Furthermore, the applicant contends that the respondents' failure to administer and apply South African refugee law, in particular, the exclusion clause, has the effect of frustrating the purpose and objects of the Act.

[14] The applicant also alleges that in processing the twelfth respondent's application for refugee status, the respondents failed to comply with South Africa's international obligations in terms of the UN convention and protocol and the OAU convention in not investigating the allegations made against the twelfth respondent. The basis of this allegation is that the applicant alleges that the twelfth respondent applied and was granted refugee status on the

[19] Section 3(a)<sup>3</sup> of the Act provides that a person can be granted refugee status if such a person fears persecution in his homeland because of, *inter alia*, his or her race, tribe, religion, nationality, political opinion or membership of a particular social group. However section 4(1)(a)<sup>4</sup> of the Act disqualifies a person from being granted refugee status if there is reason to believe that such a person has committed, *inter alia*, a crime against humanity and war crimes.

[20] It is not in dispute that the twelfth respondent falls squarely within the vulnerable group sought to be protected in terms of the Act in that there is no doubt that his opposition to the Kagame government makes him a target of persecution should he return to Rwanda. As indicated above the applicant relies on the twelfth respondent's conviction *in absentia* in Rwanda and the indictments issued by the French and Spanish authorities. However, the initial investigation by Bruguière which led to the first indictment being issued has been discredited by Trévidic's conclusion that Habyarimana's was shot down by some members of his own army. This conclusion is common cause. Furthermore, the second indictment was based on the discredited indictment. The deponent to the answering affidavit deposed to on behalf of the second, fifth, sixth, ninth, tenth and eleventh respondents has deposed to the fact that

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<sup>3</sup> **3 Refugee status**

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

- (a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or
- (b) ...
- (c) Is a dependant of a person contemplated in paragraph (a) or (b)."

<sup>4</sup> **4 Exclusion from refugee status**

- (1) A person does not qualify for refugee status for the purposes of this Act if there is reason to believe that he or she-
  - (a) has committed a crime against peace, a war crime or a crime against humanity, as defined in any international legal instrument dealing with any such crimes."

same day without his application referred to the standing committee. It was furthermore contended that failure to withdraw the decision to grant the twelfth respondent refugee status will set a dangerous precedent whereby the South African authorities could use the confidentiality clause in refugee applications to protect perpetrators of international crimes against humanity.

[15] In preparing the briefing paper, the applicant appears to have relied on the following:

15.1 during January 2011 the twelfth respondent and others were sentenced, *in absentia* to life imprisonment by the Rwandan Military court for the grenade attacks in Kigali, Rwanda in February 2010.

15.2 during 2006 a French Judge Jean-Louis Bruguière ("Bruguière") indicted nine Rwandans (including the twelfth respondent) for complicity in the assassination of former Rwandan President Juvenal Habyarimana ("Habyarimana"). However, in 2012 Bruguière's investigation was re-examined by Judges Marc Trévidic ("Trévidic") and Nathalie Poux who found allegations made during Bruguière's investigations to be false.

15.3 on 6 February 2008, Andreu Merelles, an investigative judge in the Spanish High Court, based on Bruguière's report, issued indictments against 40 current and former high ranking Rwandan military officials, including the twelfth respondent, for crimes against humanity and war crimes allegedly perpetrated against civilians between 1990 and 2002.



- [16] The South African government has refused to extradite the twelfth respondent after the Spanish and French governments had sought his extradition.
- [17] It is the applicant's contention that in view of the serious allegations made against the twelfth respondent, the officials within the second respondent's department, who were responsible for processing and granted the twelfth respondent refugee status failed to fulfil the duties bestowed on them in terms of the Act and the obligations of the government in terms of international law conventions, protocols and the OAU conventions.
- [18] The Act and regulations thereto regulate the qualification for refugee status, application for refugee status, the rights and obligations of persons who have been granted refugee status and the disqualification of persons from being granted refugee status. In terms of the preamble to the Act, South Africa has assumed obligations in terms of the 1951 United Nations Convention Relating to Status of Refugees ("UN Convention), the 1967 Protocol Relating to Status of Refugees ("UN Protocol" and the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention"). In terms of section 6 of the Act, the Act has to be interpreted taking into consideration UN Convention, in particular Article 1F<sup>2</sup>, the UN Protocol and Article 1(5) of the OAU Convention. The UN Protocol and the OAU Convention have similar wording to the UN Convention in relation to people excluded from being granted refugee status.

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<sup>2</sup> 1F reads as follows: "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instrument drawn up to make provision in respect of such crimes."

when the twelfth respondent's application was considered, they were aware of the serious allegations as mentioned by the applicant and as required had considered them in assessing whether the twelfth respondent and his family should be granted refugee status. As submitted by counsel for the respondents, the International Criminal Court for Rwanda has charged and convicted the persons it identified as having been involved in crimes against humanity in Rwanda. In none of the indictments was the twelfth respondent cited. In its founding affidavit the applicant has admitted that taking into account the political situation in Rwanda and South Africa's adherence to the principle of *non-refoulement*, if the twelfth respondent is extradited to Rwanda he would be exposed to a well-founded risk of persecution due to his alleged opposition to the current president of Rwanda. I am therefore of the view that the twelfth respondent was correctly granted refugee status as he falls within the provisions of section 3 of the Act.

[21] I am therefore of the view that the applicant, in view of the information currently available has not shown sufficient cause that there is reason to believe that the twelfth respondent was involved in the alleged crimes. Moreover, the twelfth respondent's wife qualifies for refugee status in her own right and twelfth respondent would also so qualify as her dependent.

[22] In view of the fact that the applicant also sought to sight the fourth respondent, it is an acknowledgement on its part that government departments interface and the fourth respondent must have been aware of the allegations against the twelfth respondent and must have communicated same to the other respondents. I am therefore satisfied that the respondents in granting the

twelfth respondent refugee status must have taken into consideration the allegation against the twelfth respondent when taking the decision.

[23] It was argued on behalf of the applicant that since the confidentiality provision in section 21(5) of the Act does not apply to the twelfth respondent, the contents of his application and documents relating to the processing of his application should, at the least be made available to this court and the parties' legal representatives under the guise of transparency and accountability.

[24] In terms of section 21(5) of the Act information contained in an application for asylum is confidential<sup>5</sup> and cannot be divulged to anyone except with the consent of the applicant<sup>6</sup> or under circumstances as set out in Regulation 6(3) to the Act<sup>7</sup>. There is no allegation that the twelfth respondent has consented to the disclosure of information contained in his application. Furthermore, the applicant does not qualify for disclosure in view of the fact that it is not a government official or employee. Inasmuch as I agree with the applicant that section 21(5) read with sub-regulation 6 (3) is not a blanket provision, I am of the view that the confidentiality clause is peremptory in the case where the applicant qualifies for refugee status.

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<sup>5</sup> "21(5) The confidentiality of asylum applications and the information contained therein must be ensured at all times."

<sup>6</sup> Sub-regulation "6(2) reads as follows: "Pursuant to section 21(5) of the Act, the information contained in an asylum application and elicited at the hearing, and other records that indicate an individual has applied for asylum, shall not be disclosed without the written consent of the applicant except as provided in sub-regulation 6(3)."

<sup>7</sup> Sub-regulation 6(3) reads as follows: "Sub-regulation 6(2) does not apply to disclosures to a government official or employee of the Republic who has need to examine the information in connection with-

- (a) the adjudication of the asylum application;
- (b) the defence of any legal action arising from the adjudication or failure to adjudicate the asylum application;
- (c) the defence of any legal action of which the asylum application or continuing eligibility for refugee status is a part;
- (d) or any investigation concerning any criminal or civil matter."

[25] This court was referred to laws of various foreign jurisdiction in terms of which the confidentiality of refugee applications is not absolute and disclosure is allowed where public interest outweighs any invasion of privacy or disclosure would be to the benefit of the applicant. In terms of section 151(2) of the New Zealand **Immigration Act**, disclosure of the contents of an applicant's application is allowed provided "there is no serious possibility that the safety of the claimant or any other person would be endangered by the disclosure of the information". In his answering affidavit, the twelfth respondent does indicate that the disclosure of the contents of his application and deliberations thereto could compromise not only his safety but that of other people.


[26] I am of the view that public interest does not demand that openness and accountability should surpass the safety of a vulnerable person. Furthermore, I reiterate that on the facts presented as excluding the twelfth respondent from being granted refugee status, it has not been shown that there is reason to believe that the twelfth respondent committed the alleged crimes and therefore there is no reason why confidential information disclosed by the twelfth respondent to the respondents should be divulged. Furthermore, taking into account the circumstances of this case, I see no reason why this court should have a 'judicial peek into the evidence relating to the twelfth respondents' application.

[27] In my view the application should therefore fail.

[28] I am satisfied that senior counsel and a junior were necessary.

[29] Accordingly the following order is made:

"That the application is dismissed with costs, including costs of two counsels."

  
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**NP MNGQIBISA-THUSI J**

Judge of the North Gauteng High Court

**Appearances:**

For the applicant: Adv Katz SC

Instructed by: Wits Law Clinic

For the 2<sup>nd</sup>, 6<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> & 11<sup>th</sup> respondents: Adv Moerane SC & Adv Manaka

Instructed by: State Attorney

For the 12<sup>th</sup> respondent: Adv Potgieter SC & Adv Mastoroudes

Instructed by: Kennedy Gihana Attorneys