

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA CASE NO: 992/2015

NGHC CASE NO.30123/11

In the matter between:

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

Appellant

and

**PRESIDENT OF THE REPUBLIC
OF SOUTH AFRICA**

First Respondent

THE MINISTER OF HOME AFFAIRS

Second Respondent

**THE MINISTER OF INTERNATIONAL
RELATIONS AND CO-OPERATION**

Third Respondent

THE MINISTER OF STATE SECURITY

Fourth Respondent

**THE DIRECTOR – GENERAL OF THE
OFFICE OF THE PRESIDENCY**

Fifth Respondent

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

Sixth Respondent

**THE DIRECTOR - GENERAL OF THE
DEPARTMENT OF INTERNATIONAL
RELATIONS AND CO-OPERATION**

Seventh Respondent

**THE DIRECTOR - GENERAL OF THE
DEPARTMENT OF STATE SECURITY**

Eighth Respondent

**CENTRE MANAGER FOR THE
CROWN MINES REFUGEE
RECEPTION OFFICE**

Ninth Respondent

THE CHAIRPERSON: THE STANDING
COMMITTEE FOR REFUGEE AFFAIRS

Tenth Respondent

THE REFUGEE STATUS DETERMINATION
OFFICER RESPONSIBLE FOR GRANTING
REFUGEE STATUS TO THE TWELFTH
RESPONDENT

Eleventh Respondent.

FAUSTIN KAYUMBA NYAMWASA

Twelfth Respondent

FILLING SHEET

1. Second, Sixth, Ninth, Tenth and Eleventh Respondents Practice Notes
2. Second, Sixth, Ninth, Tenth and Eleventh Respondents List of Authorities
3. Second, Sixth, Ninth, Tenth and Eleventh Respondents Heads Of Argument
4. Second, Sixth, Ninth, Tenth and Eleventh Respondents Certificate


M MTHETHO

SECOND, SIXTH, NINTH, TENTH
AND ELEVENTH RESPONDANT'S
ATTORNEY

THE STATE ATTORNEY

SALU BUILDING

GROUND FLOOR

316 THABO SEHUME STREET

PRIVATE BAG X91

PRETORIA

REF: 3306/2011/Z79

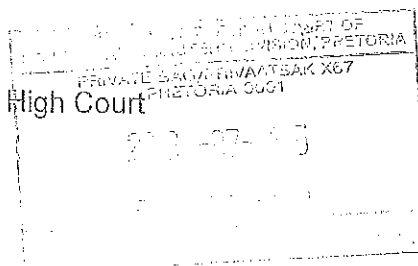
TEL: (012) 309 1646

FAX: 086 447 3588

ENQ: MR M MTHETHO

TO: The Registrar of Supreme Court of Appeal of South Africa
P.O Box 258
Bloemfontein, 9300

AND TO: The Registrar of the North Gauteng High Court
Private Bagx67
Pretoria, 1000



AND TO: WITS Law Clinic
University of Witwatersrand
West Campus
Braamfontein
(011) 717 8562

AND TO: Faustin Kayumba Nyamwasa
Twelfth Respondent
c/o Kennedy Gihana Attorneys
2nd floor, Van Erkom Building, Office 207
217 Pretorius Street
Pretoria
Ref: KMN/f034/2011
Tel: (012) 751 2108

15/07/16
Gihana Kennedy & Associates
246 Paul Kruger Street
Pretoria 0002
Tel: (+27) 60 000 3660
Fax: (086) 610 4134

1205
15/07/16

2016-07-15
RECEIVED

12:52
[Signature]

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA CASE NO: 992/2015

NGHC CASE NO.30123/11

In the matter between:

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

Appellant

and

**PRESIDENT OF THE REPUBLIC
OF SOUTH AFRICA**

First Respondent

THE MINISTER OF HOME AFFAIRS

Second Respondent

**THE MINISTER OF INTERNATIONAL
RELATIONS AND CO-OPERATION**

Third Respondent

THE MINISTER OF STATE SECURITY

Fourth Respondent

**THE DIRECTOR -- GENERAL OF THE
OFFICE OF THE PRESIDENCY**

Fifth Respondent

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

Sixth Respondent

**THE DIRECTOR - GENERAL OF THE
DEPARTMENT OF INTERNATIONAL
RELATIONS AND CO-OPERATION**

Seventh Respondent

**THE DIRECTOR - GENERAL OF THE
DEPARTMENT OF STATE SECURITY**

Eighth Respondent

**CENTRE MANAGER FOR THE
CROWN MINES REFUGEE
RECEPTION OFFICE**

Ninth Respondent

THE CHAIRPERSON: THE STANDING
COMMITTEE FOR REFUGEE AFFAIRS

Tenth Respondent

THE REFUGEE STATUS DETERMINATION
OFFICER RESPONSIBLE FOR GRANTING
REFUGEE STATUS TO THE TWELFTH
RESPONDENT

Eleventh Respondent

FAUSTIN KAYUMBA NYAMWASA

Twelfth Respondent

SECOND; SIXTH; NINTH; TENTH AND ELEVENTH RESPONDENTS'
PRACTICE NOTE

Nature of appeal:

1. The appeal is against the order granted by Mngqibisa-Thusi J in the North Gauteng High Court, Pretoria, dismissing the appellant's application to review and set aside the decision taken by the eleventh respondent on 22 June 2010, acting under the supervision and control of the sixth respondent to grant the twelfth respondent refugee status in terms of section 24(3)(a) of the Refugees Act, 130 of 1998 (*"the Refugees Act"*).
2. Ancillary relief.
3. The second; sixth; ninth; tenth and eleventh respondents (government respondents) seek that the appeal be dismissed with costs

Key issues to be determined:

4. The main issues on appeal are the following:
 - 4.1 Whether the twelfth respondent was correctly granted refugee status;
 - 4.2 In the event he wasn't, whether he ought to have been deported or extradited.

- 4.3 The question of confidentiality of asylum application was not formally before Court as the appellant never sought any specific order against the respondents in this regard.

The appellant's contention

5. The appellant argue that:
 - 5.1 At the time of his application for asylum, there was reason to believe that the twelfth respondent has committed war crimes and crimes against humanity. Accordingly, he did not qualify for refugee status.
 - 5.2 When adjudicating the twelfth respondent's application for asylum, the eleventh respondent failed to take into account the allegations levelled against him, including the French and Spanish indictment issued against the twelfth respondent.
 - 5.3 Even though the appellant concedes that if deported or extradited, there is a well - founded fear that the twelfth respondent would be persecuted by reason of his political opinion as contemplated in section 2(a) and 3(b) of the Refugees Act, the appellant contends that the twelfth responded should not have been granted refugee status but a permit issued in terms of section 31(2)(b) of the Immigration Act.

The contention of the government respondents

6. The government respondents argue that:
 - 6.1 The allegations of war crimes and human rights violations made against the twelfth respondent were taken into account during the adjudication of his application for asylum. It was concluded that the reports were conflicting

and unsubstantiated and nothing concrete associated the twelfth respondent to the alleged crimes.

6.2 There was a well-founded fear that, if deported, the twelfth respondent will be subjected to persecution.

6.3 The Constitutional Court and this Court have consistently cautioned against deportation of people seeking protection on account of a possibility of being subjected to violation of co-values in the Constitution, notwithstanding the ineligibility to refugee status.

7. For these reasons, the government respondents contend that the Court *a quo* correctly dismissed the appellant case.

Urgency for the precedence on the Roll

8. None

Estimated duration

9. It is estimated that the arguments on appeal will take one (1) day.

Relevant portions of the record

10. It would necessary to read:

10.1 the founding papers Vol 1 pages 1 – 94; Vol 2 and Vol 3; Vol 4 pages 281 – 352;

- 10.2 the government respondents' answering affidavit Vol 5 pages 414 – 455;
- 10.3 the twelfth respondent's Vol 5 pages 460 – 478, Vol 6 pages 479 - 498;
twelfth respondent supplementary affidavit Vol 6 pages 508 – 517;
- 10.4 appellant's replying affidavit and supplementary replying affidavit Vol 7
pages 576 – 659, Vol 8 pages 660 – 702.

Compliance with Rule 8(8) and (9):

11. No specific agreement has been reached between the parties as to the documentation to be excluded from the record.

Core Bundle

12. The government respondents did not consider it necessary to prepare a core bundle.

Other considerations:

13. None

Primary Authority

14. The respondents will make particular reference to the following authorities during the course of argument:

- ❖ *Mail and Guardian Media Ltd and Others v Chipu N.O. and Others* 2013 (6) SA 367 (CC)
- ❖ *Minister of Justice and Constitutional Development and Another v Tsebe and Others* 2012 (5) SA CC

- ❖ *Arse v Minister of Home Affairs and Others* 2012 (4) SA 544 (SCA)
- ❖ *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC)
- ❖ *Mohamed & another v President of the Republic of South Africa & others (Society for the Abolition of the Death Penalty in South Africa & another intervening)* 2001 (3) SA 893 (CC) Paras [48], [52] and [54]

ADV M T K MOERANE SC

ADV N MANAKA

Chambers - Durban and Maisels III (JSA)

Counsel for the government

Respondents

13 July 2016

THE CHAIRPERSON: THE STANDING
COMMITTEE FOR REFUGEE AFFAIRS

Tenth Respondent

THE REFUGEE STATUS DETERMINATION
OFFICER RESPONSIBLE FOR GRANTING
REFUGEE STATUS TO THE TWELFTH
RESPONDENT

Eleventh Respondent

FAUSTIN KAYUMBA NYAMIWASA

Twelfth Respondent

SECOND; SIXTH; NINTH; TENTH AND ELEVENTH RESPONDENTS'
LIST OF AUTHORITIES

STATUTES

Refugees Act, 130 of 1998

Promotion of Administrative Justice Act, 2000

Immigration Act, 13 of 2002

REGULATIONS

*Refugees Regulations: Forms and Procedure Published under Government Notice R366
in Government Gazette 21075 of 6 April 2000 as amended by Government Notice R938
Government Gazette 21573 of 15 September 2000*

CASES

*Mail and Guardian Media Ltd and Others v Chipu N.O. and Others 2013 (6) SA 367
(CC)*

Democratic Alliance v President of South Africa and Others 2013 (1) SA 248 (CC)

*Minister of Justice and Constitutional Development and Another v Tsebe and Others
2012 (5) SA CC*

Arse v Minister of Home Affairs and Others 2012 (4) SA 544 (SCA)

Albutt v Centre for the Study of Violence and Reconciliation, and Others 2010 (3) SA 29 (CC)

Biowatch Trust v Registrar, Genetic Resources, and Others 2009 (6) SA 232 (CC)

Minister of Home Affairs and Others v Watchenuka and Another 2004 (4) SA 326 (SCA)

Stanfield v Minister for Correctional Services 2004 (4) SA 43 (C)

Mohamed & another v President of the Republic of South Africa & others (Society for the Abolition of the Death Penalty in South Africa & another intervening) 2001 (3) SA 893 (CC)

National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others 2000 (2) SA 1 (CC)

Fedsure Life Assurance Ltd v Greater Johannesburg Traditional Metropolitan Council 1998 (2) SA 374 CC

INTERNATIONAL LAW

Universal Declaration of Human Rights, 1948

African Charter on Human and People's Rights, 1981

Convention Relating to the Status of Refugees, 1951

Protocol Relating to the Status of Refugees, 1967

OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969

FOREIGN LAW

R (European Roma Rights Centre) v Immigration Officer at Prague Airport (United Nations High Commissioner for Refugees intervening) [2005] 2 AC 1

Nishimura Ekiu v The United States 142 US 651 (1892)

BOOKS

Herbstein & Van Winsen: *The Civil Practice of Supreme Court of South Africa* (4th edition) at 1054 and numerous cases cited in fn 19

OTHERS

UNHCR Guidelines on International Protection: Application of the Exclusion Clauses, 4 September 2003

Handbook on Procedures and Criteria For Determining Refugee Status: Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, Geneva 1992

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA CASE NO: 992/2015
NGHC CASE NO.30123/11

In the matter between:

CONSORTIUM FOR REFUGEES AND
MIGRANTS IN SOUTH AFRICA

Appellant

and

PRESIDENT OF THE REPUBLIC
OF SOUTH AFRICA

First Respondent

THE MINISTER OF HOME AFFAIRS

Second Respondent

THE MINISTER OF INTERNATIONAL
RELATIONS AND CO-OPERATION

Third Respondent

THE MINISTER OF STATE SECURITY

Fourth Respondent

THE DIRECTOR – GENERAL OF THE
OFFICE OF THE PRESIDENCY

Fifth Respondent

THE DIRECTOR – GENERAL
DEPARTMENT OF HOME AFFAIRS

Sixth Respondent

THE DIRECTOR - GENERAL OF THE
DEPARTMENT OF INTERNATIONAL
RELATIONS AND CO-OPERATION

Seventh Respondent

THE DIRECTOR - GENERAL OF THE
DEPARTMENT OF STATE SECURITY

Eighth Respondent

CENTRE MANAGER FOR THE
CROWN MINES REFUGEE
RECEPTION OFFICE

Ninth Respondent

THE CHAIRPERSON: THE STANDING

Tenth Respondent

COMMITTEE FOR REFUGEE AFFAIRS

THE REFUGEE STATUS DETERMINATION
OFFICER RESPONSIBLE FOR GRANTING
REFUGEE STATUS TO THE TWELFTH
RESPONDENT

Eleventh Respondent

FAUSTIN KAYUMBA NYAMWASA

Twelfth Respondent

SECOND; SIXTH; NINTH; TENTH AND ELEVENTH RESPONDENTS'
HEADS OF ARGUMENT

<i>Table of contents</i>	<i>Page</i>
1 <i>Introduction</i>	2 – 7
2 <i>The exclusion clause and the principle of non-refoulement;</i>	7 - 14
3 <i>Failure to consider relevant information;</i>	14 – 16
4 <i>Rationality of the impugned decision;</i>	16 – 17
5 <i>Confidentiality of asylum applications; and</i>	17 – 20
6 <i>Costs</i>	20 – 21
7 <i>List of authorities</i>	22

INTRODUCTION

1. This is an appeal against the order of Her Ladyship Justice Mngqibisa-Thusi in the North Gauteng High Court, Pretoria, dismissing the appellant's application to review and set aside the decision taken by the eleventh respondent, more than 6 years ago, on 22 June 2010, acting under the supervision and control of the sixth respondent to grant the twelfth respondent refugee status in terms of section 24(3)(a) of the Refugees Act, 130 of 1998 (*"the Refugees Act"*).
2. The appeal is with leave of this Court after the Constitutional Court of South Africa unanimously dismissed appellant's application to appeal directly to that Court and leave to appeal against the said order was dismissed by the Court *a quo*.
3. Effectively, what the appellant is seeking is the withdrawal of the twelfth respondent's refugee status on the grounds that it was erroneously granted in that he, General Nyamwasa, a former General in the Rwandan Army, is implicated in the commission of war crimes and ought to have been extradited to Spain and France.

Appellant's heads of argument – page 5 para 6

4. The thrust of the appellant's argument is that the respondents ought to have refused General Nyamwasa's application for refugee status for the reasons contemplated in section 4(1)(a) of the Refugees Act.

Appellant's heads of argument – page 16 para 45

5. The appellant's case, in substance, is premised on the allegation that the respondents failed to take into consideration the French and Spanish indictments against General Nyamwasa and allegations of the international crimes he allegedly committed. The appellant so asserts in spite of not having the record of the proceedings or evidence.
6. The primary source of the appellant's case is the so-called briefing paper which is an opinion authored by the counsel who appeared for the appellant in the Court *quo*.

Vol 1: FA – Annexure KR7 pages 56 to 94

7. In the very briefing paper on which this case is solely reliant, the appellant concedes that if returned to Rwanda or extradited thereto, General Nyamwasa and his family members are likely to be subjected to persecution based on his political opinion. In this regard, the appellant stated as follows:

"We assert that in light of the political situation in Rwanda and the jurisprudence dealing with non-refoulement in South Africa, to extradite or deport Nyamwasa would expose him to the well-founded fear of being persecuted as a result of his alleged political opposition to the Rwandan government and statements criticising President Kagame, and the possibility of ill-treatment."

Vol 1: FA – Annexure KR 7 page 86 para 69

8. Notwithstanding its concession, the appellant has sought that General Nyamwasa, a member of the "*vulnerable constituency of migrants refugees*", be stripped of his refugee status in circumstances where such act would render him an illegal foreigner liable to be deported in terms of the provisions of section 32 of the Immigration Act, 13 of 2002 ("*the Immigration Act*") or a prohibited person in terms of section 29 of the said Act, thereby not qualifying for, *inter alia*, a temporary or a permanent residence permit.

9. In the briefing paper, the appellant, with respect, proposes outlandish solutions to a problem that was conjured up by it. In this regard, we are referring in particular to the proposals made under the heading "*Truth-telling as a condition for continued status in South Africa.*" The appellant arrogates to itself the right to dictate to or advise the Minister of Home Affairs (and his/her Director-General) how to apply provisions of the Immigration Act, namely, sections 31(2)(b), read with sections 25, 29, 30 and 32, after General Nyamwasa has been stripped of his refugee status.

Vol 1: FA – Annexure KR 7 pages 91 to 92 paras 100 – 102

10. In this regard, the appellant is oblivious of the fact that a decision under section 31(2)(b) is a policy and polycentric decision which would be triggered by an application by the relevant foreigner. Without such application the Minister would not be able to exercise the power conferred by the said section.

11. In light of the undeniable fact that if extradited or deported, General Nyamwasa would be subjected to persecution for the reasons set out in section 2 (a) of the Refugees Act, we submit that the appellant's concessions, were properly made and the relief sought in this appeal, we submit, is destructive of the assertions made by the appellant above.
12. If the ultimate result sought by the appellant is not the deportation or extradition of General Nyamwasa, we submit that the issues raised in this appeal are abstract, hypothetical or academic in nature as contemplated in *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others* 2000 (2) SA 1 (CC) para [21], fn 18, where the Constitutional Court held that:

"A case is moot and therefore not justifiable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law."

13. Our courts have repeatedly declined to exercise discretion to grant declaratory orders in respect of abstract, hypothetical or academic questions.

See Herbstein & Van Winsen: *The Civil Practice of Supreme Court of South Africa* (4th edition) at 1054 and numerous cases cited in fn 19

14. In the result, we submit that this appeal is not only academic but also self-defeating and contradictory in nature and stands to fail.

15. In the passages that follows, we deal with the following in turn, *inter alia*:

- 15.1 The exclusion clause and the principle of *non-refoulement*;
- 15.2 Failure to consider relevant information;
- 15.3 Rationality of the impugned decision;
- 15.4 Confidentiality of asylum applications; and
- 15.5 Costs

We deal with these issues in turn.

THE EXCLUSION CLAUSE

16. The Refugees Act regulates applications for and recognition of refugee status and provides for the rights and obligations flowing from that status. In its preamble, the Refugees Act states that it is designed to give effect within the Republic of South Africa to the relevant international instruments, principles and standards relating to refugees and to provide for the reception into South Africa of asylum seekers.
17. The interpretation, application and administration of the Refugees Act must be with due regard to the Convention Relating to the Status of Refugees (UN, 1951); the Protocol Relating to the Status of Refugees (UN, 1967); the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU, 1969); the Universal Declaration of Human Rights (UN, 1948); and any other relevant

convention or international agreement to which the Republic is or becomes a party

- Section 6 (1) of the Refugees Act

18. Section 4 of the Refugees Act deals with exclusion from refugee status and states:

"4. 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"

19. The 1951 Convention Relating to the Status of Refugees ("the "1951 Convention") contains similar provisions. Article 1(F)(a) thereof deals with Persons considered not to be deserving of international protection and states:

"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 instruments drawn up to make provision in respect of such crimes"*

20. In interpreting the 1951 Convention, the English Court held in *R (European Roma Rights Centre) v Immigration Officer at Prague Airport (United Nations High Commissioner for Refugees intervening)* [2005] 2 AC 1 at para 18 that:

"the Convention should be given a generous and purposive interpretation, bearing in mind its humanitarian objects and purpose clearly stated in the Preamble."

21. According to the United Nations High Commissioner for Refugees guidelines on the exclusion clause (*"UNHCR Guidelines"*) *"given the grave consequences of exclusion, it is essential that rigorous procedural safeguards are built into the exclusion determination procedure. Exclusion decisions should in principle be dealt with in the context of the regular refugee status determination procedure and not in either admissibility or accelerated procedures, so that a full factual and legal assessment of the case can be made."*

UNHCR Guidelines on International Protection: Application of the Exclusion Clauses, 4 September 2003 at para 31

22. The UNHCR' guidelines also state that the interpretation of the exclusion clauses must be restrictive considering the serious implications on the person concerned. It is also incumbent upon the contracting State to decide whether any of the exclusion clauses are applicable.

UNHCR Guidelines Page 35 Para 149; See also UNHCR Guideline at para 2

23. The appellant has failed to produce sufficiently cogent evidence to establish that there was reason to believe that General Nyamwasa was involved in the alleged crimes or that the exclusion clause ought to apply.
24. The briefing paper is, with respect, a thesis of the authors that does not carry the weight of evidence. It was rightly found by the Court *a quo* as not constituting sufficient evidence establishing that there was reason to believe that General Nyamwasa was involved in the crimes mentioned in section 4(1)(a) of the Refugees Act.
25. In their affidavit the respondents have confirmed the facts and circumstances that led to the grant of asylum to General Nyamwasa, in particular, and to his wife and family, in general. In effect, General Nyamwasa qualified for asylum, in terms of the provisions of section 3(a) of the Refugees Act. About this there is no dispute. General Nyamwasa also qualifies by virtue of being the spouse of his wife who qualifies in her own right.
26. The respondents also stated that the allegations of war crimes made against General Nyamwasa were considered and a conclusion was arrived at that there were conflicting and unsubstantiated reports which did not amount to concrete information linking the General Nyamwasa to the alleged crimes. We have illustrated above on the basis of the common cause or undisputed facts that the appellant has conceded that General Nyamwasa should not be deported or returned to Rwanda

or be extradited on the basis that there is likelihood that he will be subjected to persecution.

Vol 5: AA of the sixth respondent pages 439 to 441 and 444 paras 52.3, 52.4, 53.1, 54.1, 54.2 and 66.3;

Eleventh respondent's confirmatory affidavit pages 454 to 455

27. This evidence was accepted by the Court *a quo* in its findings – correctly so, we respectfully submit.

28. The appellant seems to suggest that the exclusion clause trumps section 2(a) of the Refugees Act. We submit not. We will argue that once it is established, just like it is in this case, that owing to a well-founded fear of being persecuted by reason of any factor set out in section 3(a) of the Refugee Act, a person who is unable or unwilling to avail himself or herself of the protection of the country of his or her former habitual residence, may not expelled, extradited or returned to any other country or be subject to any similar measure notwithstanding any other provision of the Refugees Act or any other law to the contrary.

Refugees Act sections 2(a) and 3(a)

***Arse v Minister of Home Affairs and Others* 2012 (4) SA 544 (SCA) at paras [14] and [19]**

29. Article 14 (1) of the 1948 Universal Declaration of Human Rights entitles everyone to a right to seek and to enjoy in other countries asylum from persecution.

30. Similarly, article 12 (3) of the 1981 African Charter on Human and People's Rights affords everyone a right to seek and obtain asylum in other countries and in accordance with the law of that specific country and international conventions when persecuted.
31. The South African State is founded on the values of the supremacy of the Constitution and respect for the rights in the Bill of Rights. Section 7 of the Constitution enjoins organs of the State to respect, promote and fulfil the rights in the Bill of Rights. This Court has on a numerous occasions impressed upon government respondents that they comply with these duties especially when dealing with refugees or other vulnerable persons who might be exposed to the risk of persecution, physical violence or cruel, inhuman and degrading punishment in their home country in conflict.
32. South African constitutional jurisprudence prohibits the deportation, extradition or rendition of a person from South Africa to a place where fundamental rights entrenched in the Constitution such as the right to dignity and the right not to be subjected to cruel, inhuman and degrading treatment are likely to be violated.

Mohamed & another v President of the Republic of South Africa & others (Society for the Abolition of the Death Penalty in South Africa & another intervening) 2001 (3) SA 893 (CC) Paras [48], [52] and [54]

Minister of Justice and Constitutional Development and Another v Tsebe and Others 2012 (5) SA CC [41] to [43]

33. Apart from the above mentioned submission, we further submit that the appellant's stance that General Nyamwasa must be deprived of protection flies in the face of the Constitutional Court's decisions and the foundational values entrenched in the Constitution. In particular, the Constitutional Court forcefully stated in *Tsebe supra* at para [43] that:

"...This Court's decision in Mohamed means that if any official in the employ of the State, without the requisite assurance, hands over anyone from within South Africa, or under the control of South African officials, to another country to stand trial knowing that such person runs the real risk of a violation of his right to life, right to human dignity and right not to be treated or punished in a cruel, inhuman or degrading way in that country, he or she acts in breach of the duty provided for in section 7(2) of the Constitution."

See also *Nishimura Ekiu v The United States* 142 US 651 (1892) at 659
quoted with approval in *Minister of Home Affairs and Others v Watchenuka
and Another* 2004 (4) SA 326 (SCA) at Para 29

34. We submit that the respondents avowed that they were mindful of the allegations against General Nyamwasa when considering the application for asylum and exercised discretion in favour of granting him and his family refugee status in line with the South African jurisprudence on the principle of *non-refoulement*.

35. The appellant's persistence that General Nyamwasa ought not to have been granted refugee status contradicts what South Africa stands for insofar as human rights and the appellant's objectives.
36. We submit that the impugned decision is lawful and constitutionally permissible and the Court *a quo* was correct, we respectfully submit, to take into consideration the provisions of section 3 of the Refugees Act, as failure to do so would have resulted in failure to promote the values in our Constitution. Moreover, the appellant failed to produce tangible proof of the allegations against General Nyamwasa and proof of extradition applications which were allegedly brought by either Spain or France since 25 June 2010, the date of the letter relied upon, which was after General Nyamwasa had been granted refugee status.
37. The decision of the Court *a quo* is consistent with the finding of this Court and the Constitutional Court on issues of extradition and deportation of persons with real risk of persecution in their countries of origin.

FAILURE TO CONSIDER RELEVANT INFORMATION

38. Section 6 (2) (e) (iii) of Promotion of Administrative Justice Act, 2000 ("PAJA") provides that an administrative action is reviewable if-

"(e) *the action was taken –*

...

- (i) *Because irrelevant considerations were taken into account or relevant considerations were not considered;*

39. In dealing with a review under section 6 (2) (e)(iii) and 6(2)(f)(ii) Van Zyl J held in ***Stanfield v Minister for Correctional Services*** 2004 (4) SA 43 (C) at Para 102 that:

"If the decision in question points, on balance, to bad or flawed reasoning and such reasoning was of material or substantial significance in prompting the decision-maker to come to his decision, the decision would be invalid and liable to be set aside on review. This would, in my view, be consonant with the well-established values of justice, fairness and reasonableness. It would also accord with the requirements of good faith and public interest."

40. We have illustrated above on the basis of the common cause or undisputed facts that the appellant has conceded that General Nyamwasa should not be deported or returned to Rwanda or be extradited on the basis that there is likelihood that he will be subjected to persecution.
41. We have also demonstrated that the scheme of the Refugees Act and the asylum and refugee regime in general is to protect persons from violations of fundamental right by being subjected to persecution.
42. Accordingly, we are fortified in our submission that the appellant cannot legitimately pursue an argument that the impugned decision, on balance, is based on bad or

flawed reasoning and such reasoning was of material or substantial significance in prompting the respondents to come to such decision.

RATIONALITY OF THE IMPUGNED DECISION

43. The question whether the decision to grant or refuse asylum to a person who, owing to a well-founded fear of persecution fled his or her country of origin and is unwilling, on account of such fear, to return thereto, has been dealt with above. We submit that the ultimately test to measure the respondents' actions in granting General Nyamwasa refugee status, is the one of rationality.

Fedsure Life Assurance Ltd v Greater Johannesburg Traditional

Metropolitan Council 1998 (2) SA 374 CC at paras 56 – 59

Albutt v Centre for the Study of Violence and Reconciliation, and Others

2010 (3) SA 29 (CC) at paras 49 – 50

Democratic Alliance v President of South Africa and Others 2013 (1) SA 248
(CC)

44. No case can be made out that it is irrational to grant General Nyamwasa refugee status in circumstances where the eleventh respondent was satisfied that General Nyamwasa complied with the provisions of section 3(a) and 33 of the Refugees Act even after considering the exclusionary provisions of section 4 thereof.
45. Stated differently, it cannot be argued that it is irrational to grant a person refugee status in circumstances where it is undeniable that there is a well-founded fear of

persecution. It further cannot be said that the decision that the eleventh respondent took was one that no reasonable decision-maker in his position could have taken.

46. In the premises, we submit that the appeal is without merit and must fail.

CONFIDENTIALITY OF ASYLUM APPLICATIONS

47. Confidentiality of asylum applications is a principle recognised both in the Republic and internationally.

48. In the Republic, confidentiality of asylum applications is governed by the Refugees Act. Section 21 (5) of thereof provides that:

"The confidentiality of asylum applications and the information contained therein must be ensured at all times." [Emphasis added]

49. Section 21 (5) of the Refugees Act is phrased in peremptory terms. Most recently, the Constitutional Court dealt with the provisions of section 21(5) of the Refugees Act in *Mail and Guardian Media Ltd and Others v Chipu N.O. and Others* 2013 (6) SA 367 (CC) at para [94] and declared the provisions of section 21(5) of the Refugees Act to be inconsistent with the Constitution to the extent that it excludes members of the public or the media from attending proceedings of the Refugee Appeal Board in all cases and fails to confer a discretion upon the Refugee Appeal

Board to allow the public and media access to its proceedings in an appropriate case. (Our emphasis).

50. The fundamental objective of keeping asylum applications confidential is to create an atmosphere of confidence on the asylum system and to protect the asylum seeker and his or her families. The Constitutional Court has pronounced and accepted in principle, the significance of section 21(5) of the Refugees Act.

***Handbook on Procedures and Criteria For Determining Refugee Status:
Under the 1951 Convention and the 1967 Protocol Relating to the Status of
Refugees, Geneva 1992 pages 47 – 48 para 200***

Mail and Guardian supra at paras [55] and [59]

51. Regulation 6 of the Refugees Regulations deals with disclosure of information and provides that :

"6 Disclosure of information and surrender of documents

- (1) ...
- (2) 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).
- (3) **Sub-regulation 6(2) does not apply to disclosures to a government official or employee of the Republic who 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.

(4) ...”

Forms and Procedure Published under Government Notice R366 in Government Gazette 21075 of 6 April 2000 as amended by Government Notice R938 Government Gazette 21573 of 15 September 2000 (“the “Refugees Regulations”)

52. The appellant never sought or obtained the consent of General Nyamwasa or his wife pursuant to sub-regulation 6(2) of the Refugees Regulations. Further, the appellant is neither a government official nor an employee of the Republic as contemplated in sub-regulation 6(3) of the Refugees Regulations.

53. It is not the appellant's case that the provisions of section 21 (5) of the Refugees Act or the provisions of sub-regulations 6(2) and 6(3) respectively are unconstitutional. We submit that these provisions form part of our law and the respondents are enjoined by the Constitution to apply the law.

54. Accordingly, the respondents are prohibited by operation of law from disclosing information contained in an asylum application and elicited at the hearing without the written consent of General Nyamwasa.

55. In the case of General Nyamwasa, in particular, it is undisputed that he was the victim of at least two assassination attempts, in at least one of which occurred before the grant to him of refugee status, he suffered bodily injuries.
56. For these reasons, we submit that the appellant is once again incorrect in contending that it is entitled to disclosure of any information for which sub-regulations 6(2) and 6(3) respectively, sought to sanction.

COSTS

36. The Constitutional Court has stated that a party should not have a privileged status simply because it is acting in the public interest or happens to be indigent. What matters is not the nature of the parties or the causes they advance but the character of the litigation and the parties' conduct in pursuit thereof.
37. There has been no failure on the part of the respondents to fulfil their constitutional and statutory responsibilities. In this case, the respondents have complied with their constitutional mandate towards asylum seekers both under international and domestic law.
38. In the circumstances, we submit that the Court *a quo* properly exercised its discretion in awarding costs order against the appellant.

39. In the premises, we submit that the appeal be dismissed with costs, such costs to include those occasioned by the employment of two counsel.

ADV M T K MOERANE SC
ADV N MANAKA
Chambers - Durban and Maisels III (JSA)
13 July 2016

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA CASE NO: 992/2015

NGHC CASE NO.30123/11

In the matter between:

CONSORTIUM FOR REFUGEES AND
MIGRANTS IN SOUTH AFRICA

Appellant

and

PRESIDENT OF THE REPUBLIC
OF SOUTH AFRICA

First Respondent

THE MINISTER OF HOME AFFAIRS

Second Respondent

THE MINISTER OF INTERNATIONAL
RELATIONS AND CO-OPERATION

Third Respondent

THE MINISTER OF STATE SECURITY

Fourth Respondent

THE DIRECTOR – GENERAL OF THE
OFFICE OF THE PRESIDENCY

Fifth Respondent

THE DIRECTOR – GENERAL
DEPARTMENT OF HOME AFFAIRS

Sixth Respondent

THE DIRECTOR - GENERAL OF THE
DEPARTMENT OF INTERNATIONAL
RELATIONS AND CO-OPERATION

Seventh Respondent

THE DIRECTOR - GENERAL OF THE
DEPARTMENT OF STATE SECURITY

Eighth Respondent

CENTRE MANAGER FOR THE
CROWN MINES REFUGEE
RECEPTION OFFICE

Ninth Respondent

THE CHAIRPERSON: THE STANDING
COMMITTEE FOR REFUGEE AFFAIRS

Tenth Respondent

THE REFUGEE STATUS DETERMINATION
OFFICER RESPONSIBLE FOR GRANTING
REFUGEE STATUS TO THE TWELFTH
RESPONDENT

Eleventh Respondent


FAUSTIN KAYUMBA NYAMIWASA

Twelfth Respondent

SECOND; SIXTH; NINTH; TENTH AND ELEVENTH RESPONDENTS'
RULE 10 CERTIFICATE

I, MARTIN MTHETHO, attorney representing the Second, Sixth, Ninth, Tenth and Eleventh Respondents in this appeal, herewith certify that Rules 10 and 10A have been complied with in the preparation of the heads of argument.

Signed at Pretoria on this the 13th day of July 2016 .


Mr M Mithetho
Attorney for the 2nd; 6th; 9th to 11th Respondents
Office of State Attorney: PRETORIA
SALU Building, Ground Floor
316 Thabo Sehume Street
PRETORIA, 0001
Ref no: 3306/2011/z79/js

