

**IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)
JUDGMENT**

Case No: 30123/2011

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
OF INTERNATIONAL AFFAIRS AND CO-OPERATION
DIRECTOR-GENERAL OF THE DEPARTMENT OF
STATE SECURITY
CENTRE MANAGER FOR THE CROWN MINES
REFUGEE RECEPTION OFFICE**

1st Respondent

2nd Respondent

3rd Respondent

4th Respondent

5th Respondent

6th Respondent

7th Respondent

8th Respondent

9th Respondent

**THE CHAIRPERSON: THE STANDING COMMITTEE
FOR REFUGEE AFFAIRS
THE REFUGEE STATUS DETERMINATION
OFFICER RESPONSIBLE FOR GRANTING
REFUGEE STATUS TO THE TWELFTH RESPONDENT
FAUSTIN KAYUMBA NYAMWASA**

10th Respondent
11th Respondent
12th Respondent

MNGQIBISA-THUSI, J

- [1] The applicant sought leave to appeal to the Supreme Court of Appeal against the judgment and order handed down on 29 September 2014 dismissing an application to review and set aside the decision made on 22 June 2010 by the ninth and/or tenth respondent(s) and/or eleventh respondent, granting the twelfth respondent, Mr Faustin Kayumba Nyamwasa (“Mr Nyamwasa”) refugee status under the Refugees Act¹ (“the Act”); and other ancillary relief. The bases on which the applicant sought the review and setting aside of the decision was that the decision was irrational, unlawful and inconsistent with the Constitution and therefore invalid.
- [2] The applicant also sought direct access to the Constitutional Court, which application was opposed. On 12 November 2014 the Constitutional Court dismissed the application.
- [3] In brief, the applicant sought leave to appeal on the grounds mainly that the court erred in coming to the conclusion that there are no grounds leading to reason to believe that Mr Nyamwasa had committed crimes against humanity and should therefore not have been granted refugee status by the

¹ Act 130 of 1998 (as amended).

respondents; that the court erred in finding that the respondents were aware of the allegations made against Mr Nyamwasa; that the court erred in concluding that revealing the contents of the process and the information the respondents had when considering Mr Nyamwasa's application for refugee status would compromise the safety of not only Mr Nyamwasa but also other people involved or mentioned in his application.

[4] Counsel for the applicant urged this court to grant leave to appeal to the Supreme Court of Appeal on the ground that the granting of refugee status to Mr Nyamwasa was a matter of public interest and that, on the facts there are reasonable prospects that another court could come to a different conclusion.

[5] Section 17(1) of the Superior Courts Act² provides that:

- “(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-
- (a)
 - (i) the appeal would have a reasonable prospect of success; or
 - (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
 - (b) the decision sought on appeal does not fall within the ambit of section 16 (2) (a)³; and
 - (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.”

[6] The conclusion reached for dismissing the application to review and set aside the decision of the respondents to grant Mr Nyamwasa refugee status was

² Act 10 of 2013.

³ Section 16(2) reads as follows:“(2) (a)(i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone. (ii) Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs.

based mainly on the following factors. The Spanish and French indictments on which the applicant relied upon for arguing that the respondents had not applied the provisions of section 4(1) of the Act in granting Mr Nyamwasa refugee status were not sufficiently cogent for one to conclude that there is reason to believe⁴ that Mr Nyamwasa committed crimes against humanity. Secondly, if there was any substance in the information upon which these indictments were based, nothing could have stopped the International Criminal Tribunal for Rwanda from proffering charges against Mr Nyamwasa. Of particularly importance was the fact that the applicant conceded that if Mr Nyamwasa's refugee status was reviewed, he would be an illegal alien subject to deportation to Rwanda where in all probability he would face persecution from his erstwhile allies. Section 2 of the Act provides that:

"Notwithstanding any provision of this Act or any other law to the contrary, no person may be refused entry into the Republic, expelled, extradited, or returned to any other country or be subject to any similar measure, if as a result of refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where-

- (a) he or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or
- (b) his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or the whole of that country."

[7] Taking into account the vulnerability of Mr Nyamwasa in his country of origin and the fact that even when he is in this country attempts have been made to

⁴ In terms of section 4(1)(a) of the Act "A person does not qualify for refugee status for the purposes of this Act if there is reason to believe that he or she 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."

assassinate him by people suspected to be aligned to the Rwandan government, I am satisfied that the respondents properly granted Mr Nyamwasa refugee status in terms and that Mr Nyamwasa qualified for such status in terms of the provisions of section 3⁵ of the Act.

[8] I am of the view further, that the applicant has not shown sufficient evidence that the respondents did not consider the indictments and the background thereto when determining whether to grant Mr Nyamwasa the status of a refugee. Considering the circumstances under which Mr Nyamwasa left his country, one could surmise that the information he provided to the respondents when his application was being considered, is of such a sensitive nature that it could endanger his and his family's life, including any people who might have assisted him in leaving Rwanda. I was therefore satisfied that the confidentiality⁶ afforded to applicants for asylum could not be tempered with.

[9] I am of the view that the applicant's leave to appeal should not be granted in that it has no prospects of success. I am also of the view that there is no compelling reason why the appeal should be heard. Furthermore, inasmuch as the granting of refugee status to Mr Nyamwasa could of public interest, the applicant has not provided me with any other decisions, which are in conflict with the present matter. The issue of Mr Nyamwasa is of specific interest to


⁵ Section 3 of the Act reads as follows: "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, or, not having a nationality and being outside the country of his or her residence is unable or, owing to such fear, unwilling to return to it; or ..."

⁶ See in this regard section 21 (5).

him. In spite of the decision in *Biowatch Trust v Registrar, Genetic Resources and others*⁷, I am of the view that the respondents, and in particular Mr Nyamwasa, should not be burdened with the costs of opposing this application.

[10] Accordingly, the following order was made:

“Application for leave to appeal is dismissed with costs.”



NP MNGQIBISA-THUSI
Judge of the High Court

Appearances

For Applicant: Adv G Marcus SC

Instructed by: Wits Law Clinic

For 6th, 10th and 11th Respondents: Adv MTK Moerane SC (with Adv N Manaka)

Instructed by: State Attorney, Pretoria

For 12th Respondent: Mr HL Alberts

Instructed by: Kennedy Gihana Attorney

⁷ 2009 (6) SA 232 (CC).