THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case No: 185/2018

In the matter between:

THE REFUGEE APPEAL BOARD OF SOUTH AFRICA	**FIRST APPELLANT**
THE DIRECTOR-GENERAL: DEPARTMENT OF HOME AFFAIRS	**SECOND APPELLANT**
THE MINISTER OF HOME AFFAIRS	**THIRD APPELLANT**

and

PAUL JOSEPH MUTOMBO MUKUNGUBILA	**RESPONDENT**

Neutral citation: *The Refugee Appeal Board of South Africa and others v Mukungubila* (185/2018) [2018] ZASCA 191 (19 December 2018)

Coram: Maya P, Wallis, Mbha and Schippers JJA and Mothle AJA

Heard: 30 August 2018

Delivered: 19 December 2018

Summary: Immigration – Refugees Act 130 of 1998 – application for asylum – excluded by Refugee Status Determination Officer in terms of s 4(1)(*a*) and (*b*) of the Act – failure to make finding that asylum application rejected because it was

manifestly unfounded, abusive or fraudulent or rejected as unfounded under s 24(3)(*b*) or (*c*) of the Act and set out reasons therefor a reviewable irregularity – exclusion decisions under s 4(1)(1)(*a*) and (*b*) subject to the internal remedies of the Act and asylum seeker entitled to appeal to Refugee Appeal Board – requirements for the grant of declaratory relief restated – court not in as good a position as the Refugee Appeal Board to decide asylum application and matter to be remitted to it to determine appeal.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Maluleke AJ sitting as court of first instance):

1 The appeal succeeds to the extent that paragraphs 1, 3, 4, 5 and 6 of the order of the court a quo are set aside.

2 The matter is referred back to the Refugee Appeal Board to determine the respondent's appeal in terms of s 26 of the Refugees Act 130 of 1998.

JUDGMENT

Maya P (Wallis, Mbha and Schippers JJA and Mothle AJA concurring):

Introduction

[1] This is an appeal against the judgment of the Gauteng Division, Pretoria (Maluleke AJ). The court a quo reviewed and set aside the decision of the first appellant, the Refugee Appeal Board of South Africa (the RAB). The RAB declined to entertain an appeal lodged by the respondent, Mr Paul Joseph Mutombo

Mukungubila, an asylum seeker[1] from the Democratic Republic of Congo (the DRC). The court a quo then replaced the RAB's decision with one granting Mr Mukungubila asylum[2] in the Republic of South Africa and related declaratory relief. The appeal is with leave of the court a quo.

Facts

[2] According to the founding and supplementary affidavits, Mr Mukungubila is a citizen of the DRC who seeks asylum in South Africa in terms of s 21 of the Refugees Act 130 of 1998 (the Refugees Act).[3] He describes himself as a politician and a prophetic religious leader. His organisation, the Ministry for the Restoration from Black Africa, is based in the DRC and had over a thousand members. He has also worked for a Human Rights Organisation known as C.I.F.D.H. He alleged that he left the DRC out of fear that he would be persecuted and murdered by the DRC military and police forces. This had happened to some of his followers, who were savagely attacked and killed by the DRC security forces whilst unarmed and engaged in peaceful demonstration in an attempt to voice legitimate political protest. The attacks arose from his opposition to and public criticism of the DRC President, Mr Joseph Kabila, against whom he had previously contested presidential elections in the DRC. He alleged that he had on a number of previous occasions been a victim of Mr Kabila's militia.

[3] Mr Mukungubila entered South Africa on 6 January 2014. He applied for asylum and was issued with an Asylum Seeker Permit (the permit) on 27 January 2014 in terms of s 22 of the Refugees Act, pending the outcome of his asylum

[1] Defined in s 1 of the Refugees Act 130 of 1998 as 'a person who is seeking recognition as a refugee in the Republic'. A 'refugee' is defined in the same section as 'any person who has been granted asylum in terms of this Act'.
[2] Defined in s 1 of the Refugees Act as 'refugee status recognised in terms of the Act'.
[3] The section stipulates the procedure to be followed in respect of applications for asylum and requires, inter alia, that the application 'be made in person in accordance with the prescribed procedures to a Refugee Reception Officer at any Refugee Reception Office'.

application. The permit, which was valid for a period of 30 days at a time, was extended a few times up to 30 June 2014. On that date his asylum application was rejected by the Refugee Status Determination Officer (the RSDO), on the basis of the exclusions set out in s 4(1)*(a)* and *(b)* of the Refugees Act. Mr Mukungubila did not accept this decision and intended to exercise his right of appeal to the RAB under s 26 of the Refugees Act.[4]

[4] In preparation therefor, on 17 July 2014 he launched urgent proceedings against the second appellant, the Director-General of the Department of Home Affairs (the DG), and the third appellant, the Minister of the Department of Home Affairs (the Minister), in the Gauteng Division, Johannesburg. He sought to interdict the Department of Home Affairs from detaining him and instituting any proceedings against him on the basis of his immigration status and presence in South Africa until he had exhausted the internal remedies and, if necessary, judicial review and appeal processes available to him under the law. He also sought an extension of the permit pending his appeal to the RAB. He undertook to lodge the latter proceedings within ten days, and, thereafter launch judicial review proceedings against the RAB's decision within 30 days of its making, if the need arose. The urgent application was successful and on 25 July 2014 he was granted an order as prayed.[5]

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[4] These provisions entitle an asylum seeker to lodge an appeal with the RAB in the manner and within the period provided for in the rules if the RSDO has rejected the asylum application in terms of s 24(3)*(c)* of the Refugees Act ie on the basis that it is unfounded.

[5] The order was couched in the following terms:

'1. Pending the outcome of the processes contemplated in:

1.1 section 8 of the Immigration Act, 13 of 2002; and/or

1.2 section 26 of the Refugees Act, 130 of 1998; and

1.3 any subsequent judicial review to be instituted within 30 days of a final decision under the provisions of the aforesaid Acts.

2. The Respondents and their officers, and any other peace officers, upon presentation of a copy of this Order, are interdicted from:-

2.1 arresting and/or detaining the Applicant on the grounds of his immigration status;

2.2 instituting any proceedings against the Applicant in respect of his presence in the Republic of South Africa; and

2.3 deporting the Applicant.

3. The Respondents are directed to cause the Refugee Reception Officer, Marabastad to extend the Applicant's Asylum

[5] The success, however, did not extend to his appeal to the RAB, which he lodged on 24 July 2014. The RAB dismissed it on the basis that he lacked the locus standi to bring the appeal and that in terms of s 24(3)*(c)* and s 26(1) of the Refugees Act, read with the Refugee Appeal Board Rules, the RAB lacked the jurisdiction to entertain an appeal brought against the RSDO's rejection of an asylum application under s 4(1)*(a)* and *(b)* of the Refugees Act.

[6] As these processes were playing out, other proceedings, which ended up in the magistrate's court, were being pursued against Mr Mukungubila. Between February and May 2014, the Director of Public Prosecutions (the DPP) and the Minister of Justice and Constitutional Development (the Minister of Justice) were informed by Interpol and the DRC Attorney-General of an application by the DRC government for Mr Mukungubila's extradition.[6] On 5 May 2014 the Minister of Justice issued a notice in terms of s 5(1)*(a)* of the Extradition Act 67 of 1962.[7] The notice confirmed receipt of a request for the surrender of Mr Mukungubila from South Africa to the DRC to stand trial on various criminal charges – a charge of murder contrary to articles 43 and 44 of the Criminal Code of the DRC; a charge of intentional aggravated assaults contrary to article 43 of the Criminal Code of the DRC; a charge of malicious destruction contrary to articles 110 and 112 of the Criminal Code of the DRC; and a charge of arbitrary and illegal detention contrary to article 67 of the Criminal Code of

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Seeker Temporary Permit for such further periods as may be necessary to permit him to undertake the appeal processes contemplated above.
4. The process contemplated in paragraph 2 must be initiated within 10 days of the handing down of this Order.'

[6] In terms of the Southern African Development Community Protocol on Extradition of 3 October 2002.
[7] This section provides, in relevant part:
'(1) Any magistrate may, irrespective of the whereabouts or suspected whereabouts of the person to be arrested, issue a warrant for the arrest of any person–
(a) upon receipt of a notification from the Minister to the effect that a request for the surrender of such person to a foreign State has been received by the Minister; or
(b) upon such information of his or her being a person accused or convicted of an extraditable offence committed within the jurisdiction of a foreign State, as would in the opinion of the magistrate justify the issue of a warrant for the arrest of such person, had it been alleged that he or she committed an offence in the Republic.'

the DRC.

[7] Mr Mukungubila was subsequently arrested at the instance of Interpol on 15 May 2014 on the authority of a warrant for arrest issued pursuant to the provisions of s 5(1)*(a)* of the Extradition Act. But he was released on bail on the same day pending the outcome of an extradition enquiry in terms of s 10 of the Extradition Act.[8] Thereafter he sought to have the extradition enquiry stayed pending the finalisation of his asylum application. He also launched review proceedings to challenge the RAB's decision when it would not respond to his questions seeking clarity on the process it employed in making its determination. The DPP initially opposed the interim relief sought in the review proceedings, but subsequently agreed to a stay of the extradition enquiry pending finalisation thereof. The extradition process therefore remains suspended until this litigation runs its course.

Proceedings in the court a quo

[8] Mr Mukungubila sought relief under two headings in the review proceedings. In Part A of his Notice of Motion he sought interim relief, namely a stay of the extradition proceedings 'pending the outcome of the relief sought in Part B (including any subsequent appeal)'. It is in Part B that he sought the substantive review relief,

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[8] The provisions prescribe the nature of the enquiry where the relevant offence is committed in a foreign State as follows:

'(1) If upon consideration of the evidence adduced at the enquiry referred to in section 9(4)*(a)* and *(b)*(i) the magistrate finds that the person brought before him or her is liable to be surrendered to the foreign State concerned and, in the case where such person is accused of an offence, that there is sufficient evidence to warrant a prosecution for the offence in the foreign State concerned, the magistrate shall issue an order committing such person to prison to await the Minister's decision with regard to his or her surrender, at the same time informing such person that he or she may within 15 days appeal against such order to the Supreme Court.

(2) For purposes of satisfying himself or herself that there is sufficient evidence to warrant a prosecution in the foreign State the magistrate shall accept as conclusive proof a certificate which appears to him or her to be issued by an appropriate authority in charge of the prosecution in the foreign State concerned, stating that it has sufficient evidence at its disposal to warrant the prosecution of the person concerned.

(3) If the magistrate finds that the evidence does not warrant the issue of an order of committal or that the required evidence is not forthcoming within a reasonable time, he shall discharge the person brought before him.

(4) The magistrate issuing the order of committal shall forthwith forward to the Minister a copy of the record of the proceedings together with such report as he may deem necessary.'

inter alia, (a) the review and setting aside of the RAB's decision that it had no jurisdiction to entertain his appeal; (b) declarators that (i) a RSDO can determine whether or not asylum should be granted to an applicant notwithstanding the existence of an application for the extradition of such applicant; (ii) the RAB has jurisdiction to determine appeals in such matters from the RSDO; (iii) pending the outcome of an asylum seeker's application for asylum, and appeal therefrom, if prosecuted, no extradition of such applicant can take place; (iv) the decision to grant refugee status to an applicant is to be made independently of the fact of the existence of extradition proceedings; and (v) upon a finding of an applicant's qualification for refugee status in terms of the Refugees Act, no extradition of the successful applicant can occur; and (c) an order granting him asylum.

[9] The appellants and their erstwhile co-respondents opposed the application. But they filed no answering affidavit in respect of Part A of the Notice of Motion and it was consequently set down for hearing on the unopposed roll. On 14 November 2014 an enquiry in terms of s 10 of the Extradition Act, in respect of Mr Mukungubila. Makhubele AJ, in the Gauteng Division, Pretoria, granted an order 'pending the outcome of the relief sought in Part B (including any subsequent appeal) interdicting the [Additional Magistrate, Johannesburg and the Director of Public Prosecutions, Gauteng Local Division] from commencing with and conducting

[10] Part B was thereafter set down for adjudication before the court a quo. Mr Mukungubila challenged the RAB's decision on the grounds that it was procedurally unfair, materially influenced by mistakes of law, was taken on the basis of irrelevant considerations and disregarded relevant considerations, was taken under the wrongful dictates of an extraneous urgency, and was ultra vires the powers which the Refugees

Act vested in the RAB and obliged the RAB to entertain the appeal.

[11] The court a quo was persuaded by Mr Mukungubila's contentions. It dealt with the matter on the erroneous basis that the appellants had not filed an answering affidavit, which they had done, although they did not respond to the factual allegations made in the founding and supplementary affidavits. (Nothing turns on this misdirection as the facts and the court's findings thereon were not disputed.) In the court's view, the RAB's decision that Mr Mukungubila had no locus standi to launch the appeal was unlawful as it was made solely on the strength of Interpol's untested allegations against him, without affording him a hearing. The court found that the RAB's refusal to entertain the appeal was 'ultra vires its powers' because s 14(1)*(a)* of the Refugees Act obliges the RAB to hear and determine any question of law referred to it or any appeal lodged in terms of the provisions of the Refugees Act.

[12] The court a quo held that Mr Mukungubila posed no danger to South Africa, entertained a well-founded fear of persecution and that the appellants had deliberately and unlawfully hampered his efforts to exhaust the internal remedies afforded by the Refugees Act. In the court's view, these reasons and its finding that there was no evidence that a newly constituted RAB would be available to determine the appeal, if remitted, constituted exceptional circumstances warranting the substitution of the RAB's decision. The court a quo also found that Mr Mukungubila had made out a case for the grant of the interim relief as his asylum application was pending when the extradition proceedings were initiated.

[13] It is necessary in light of the decision I make to set out the order granted by the court a quo, to which I will return later, in full. It reads:

'1. Pending the outcome of the relief sought in Part B (including any subsequent appeal) the First and Third Respondents are interdicted from commencing with and conducting an inquiry in terms of Section 10 of the Extradition Act 76 of 1962 in respect of the Applicant.

2. The decision of the 4th Respondent, communicated in the letter addressed to the Applicant's attorney dated 21 August 2014, wherein the 4th Respondent refused to entertain the Applicant's appeal of the rejection by the Refugee Status Determination Officer (RSDO) at the Marabastad Refugee Reception Office on 30 June 2014, of the Applicant's application for asylum in terms of Section 21 of the Refugees Act 130 of 1998 ("the Refugees Act and/or the Act"), is declared to be inconsistent with the Constitution of the Republic of South Africa, unlawful and invalid; and is hereby reviewed and set aside.

3. The 4th Respondent's failure to have granted the Applicant asylum in terms of Section 3 of the Refugees Act; and to have ruled that the Applicant could not be instructed to leave the Republic of South Africa as advised on 7 July 2014, alternatively deported from the Republic of South Africa by virtue of Section 2 of the Refugees Act, is declared to be inconsistent with the Constitution of the Republic of South Africa, unlawful and invalid; and is hereby reviewed and set aside.

4. The Applicant is entitled to appeal his refused application for Refugee status and is hereby granted asylum.

5. That the Applicant cannot be instructed to leave the Republic of South Africa, alternatively be deported from the Republic of South Africa unless the State demonstrates that the circumstances set out in Section 2 of the Act no longer apply in respect of the Applicant.

6. It is hereby declared that:

6.1 a Refugee Status Determination Officer can determine whether or not asylum should be granted to an applicant therefore, notwithstanding the existence of an application for the extradition of such applicant;

6.2 the Refugee Appeal Board has jurisdiction to determine appeals in such matters from the Refugee Status Determination Officers of the fifth Respondent;

6.3 pending the outcome of an asylum seeker's application for asylum, and appeal therefrom, if prosecuted, no extradition of such applicant can take place;

6.4 the decision to grant refugee status to an applicant is a decision to be made independently of the fact of the existence of extradition proceedings; and

6.5 upon a finding of an applicant's qualification for refugee status in terms of the Act, no extradition of the successful applicant can occur.

7. The fourth, fifth and sixth Respondents are ordered to pay the costs of this Application including the costs of counsel, jointly and severally, the one paying the other to be absolved.'

On appeal before us

[14] The issues on appeal were whether (a) Mr Mukungubila was excluded in terms s 4(1) of the Refugees Act from obtaining asylum; (b) the RAB had jurisdiction to entertain his appeal against the decision of the RSDO; (c) it was permissible for the court a quo to grant Mr Mukungubila asylum; and (d) it was permissible for the court a quo to make the various declaratory orders. The nub of the appellants' argument was that the RSDO's decision was correct because the asylum application was manifestly unfounded ie was made on grounds other than those on which such an application may be made under the Refugees Act[9] as envisaged in s 24(3)(*b*) of the Refugees Act. This submission however mutated during the course of the hearing and it was contended that the application was not manifestly unfounded but abusive ie was made with the purpose of defeating or evading criminal or civil proceedings or the consequences thereof[10] as contemplated in the same provisions. It was argued further that even if this submission was wrong, the court a quo should nevertheless have remitted the matter to the Standing Committee or the RAB as it was not entitled to grant Mr Mukungubila asylum. The award of costs against the RAB was also challenged on the ground that it neither filed opposing papers nor participated in the proceedings in any manner, as it had to remain neutral as an independent body and should accordingly not have been mulcted with the costs of the proceedings.

[9] As defined in s 1 of the Refugees Act.
[10] As defined in s 1 of the Refugees Act.

[15] Mr Mukungubila defended the judgment of the court a quo for the reasons it gave. But the parties were agreed, rightly so, that the order made by the court a quo staying the extradition proceedings was incompetent and had to be set aside as the issue was not placed before it and the relief had already been granted. Mr Mukungubila accordingly abandoned the order.

Statutory framework

[16] The starting point is the purpose of the Refugees Act. The statute gives effect, within South Africa, to the relevant legal international instruments, principles and standards relating to refugees, provides for the reception of asylum seekers, regulates applications for and recognition of refugee status and the rights and obligations flowing from such status. It stipulates, in s 6, that its provisions must be interpreted and applied with due regard to the Convention Relating to the Status of Refugees of 28 July 1951 (1951 Convention), the Protocol Relating to the Status of Refugees of 4 October 1967, the Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa of 10 September 1969, the Universal Declaration of Human Rights, 1948 and any other relevant convention or international agreement to which South Africa is or becomes a party.[11]

[17] Section 2 provides a general prohibition of refusal of entry, expulsion, extradition or return to any country to any person where his or her life, physical safety or freedom would be threatened.[12] In terms of s 3 of the Refugees Act, subject to the lodgement of an application for asylum under s 21 thereof,

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[11] *Arse v Minister of Home Affairs & others* [2010] ZASCA 9; 2012 (4) SA 544 (SCA) para 13; *Gavric v Refugee Status Determination Officer, Cape Town & others* [2018] ZACC 38 para 16.

[12] The provisions read, in relevant part:

'2. 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 such

'. . . a person qualifies for refugee status for the purposes of [the] 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 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 events seriously disturbing or disrupting public order in either 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 elsewhere; or

(c) is a dependant of a person contemplated in paragraph (*a*) or (*b*).'

Cessation of a person's refugee status is provided for in s 5 of the Refugees Act.[13]

[18] Section 4 of the Refugees Act excludes certain categories of people from being granted refugee status. It provides:

'(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; or

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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. . . .'

[13] Section 5 reads:

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

(a) he or she voluntarily reavails himself or herself of the protection of the country of his or her nationality; or

(b) having lost his or her nationality, he or she by some voluntary and formal act reacquires it; or

(c) he or she becomes a citizen of the Republic or acquires the nationality of some other country and enjoys the protection of the country of his or her new nationality; or

(d) he or she voluntarily re-establishes himself or herself in the country which he or she left; or

(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.

(2) Subsection 1*(e)* does not apply to a refugee who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of his nationality.

(3) . . . .'

(b) has committed a crime which is not of a political nature and which, if committed in the Republic, would be punishable by imprisonment; or

(c) has been guilty of acts contrary to the objects and principles of the United Nations Organisation or the Organisation of African Unity; or

(d) enjoys the protection of any other country in which he or she has taken residence.

(2) For the purposes of subsection (1) *(c)*, no exercise of a human right recognised under international law may be regarded as being contrary to the objects and principles of the United Nations Organisation or the Organisation of African Unity.'

The object of these provisions, which are mainly modelled after article 1F(b) of the 1951 Convention, is to ensure that persons guilty of heinous acts and serious common crimes do not abuse the institution of asylum in order to avoid being held legally accountable for those acts.[14]

[19] Section 24 governs the procedure to be followed by the RSDO upon receipt of an application for asylum. It reads:

'(1) Upon receipt of an application for asylum the Refugee Status Determination Officer-

(a) in order to make a decision, may request any information or clarification he or she deems necessary from an applicant or Refugee Reception Officer;

(b) where necessary, may consult with and invite a UNHCR representative to furnish information on specified matters; and

(c) may, with the permission of the asylum seeker, provide the UNHCR representative with such information as may be requested.

(2) When considering an application the Refugee Status Determination Officer must have due regard for the rights set out in section 33 of the Constitution, and in particular, ensure that the applicant fully understands the procedures, his or her rights and responsibilities and the evidence presented.

(3) The Refugee Status Determination Officer must at the conclusion of the hearing-

(a) grant asylum; or

[14] *Gavric* fn 11 paras 23-25.

(b) reject the application as manifestly unfounded, abusive or fraudulent; or

(c) reject the application as unfounded; or

(d) refer any question of law to the Standing Committee.

(4) If an application is rejected in terms of subsection (3) *(b)*-

(a) written reasons must be furnished to the applicant within five working days after the date of the rejection or referral;

(b) the record of proceedings and a copy of the reasons referred to in paragraph *(a)* must be submitted to the Standing Committee within 10 working days after the date of the rejection or referral.'

[20] Section 25 of the Refugees Act empowers the Standing Committee to review any decision taken by a RSDO in terms of s 24(3)*(b)*. As previously indicated, s 26 entitles an asylum seeker to appeal against the decision of the RSDO that rejects his or her asylum application as 'unfounded', in terms of s 24(3)*(c)*, to the RAB, which may confirm, set aside or substitute the decision. The section reads:

'(1) Any asylum seeker may lodge an appeal with the Appeal Board in the manner and within the period provided for in the rules if the Refugee Status Determination Officer has rejected the application in terms of section 24(3)*(c)*.

(2) The Appeal Board may after hearing an appeal confirm, set aside or substitute any decision taken by a Refugee Status Determination Officer in terms of section 24(3).

(3) Before reaching a decision, the Appeal Board may-

(a) invite the UNHCR representative to make oral or written representations;

(b) refer the matter back to the Standing Committee for further inquiry and investigation;

(c) request the attendance of any person who, in its opinion, is in a position to provide the Appeal Board with relevant information;

(d) of its own accord make further inquiry or investigation;

(e) request the applicant to appear before it and to provide any such other information as it may deem necessary.

(4) The Appeal Board must allow legal representation upon the request of the applicant.'

Analysis

[21] Regarding the question whether s 4(1) of the Refugees Act excludes Mr Mukungubila from being awarded refugee status, it was contended for the appellants that he failed to qualify for asylum in terms of s 4(1)*(a)* because there was reason to believe that he had committed crimes against peace, as defined in the international instruments dealing with such crimes, and was further excluded in terms of s 4(1)*(a)* as there was reason to believe that he had committed crimes which were not of a political nature and which, if committed in South Africa, would be punishable by imprisonment.

[22] Section 4 requires the person considering the question of an asylum applicant's qualification for refugee status to be satisfied that there is reason to believe that the applicant has committed the crimes envisaged in the provision. The 'reason to believe' must be constituted by an objective factual basis giving rise thereto and a blind belief, or a belief based on such information or hearsay evidence as a reasonable man ought or could not give credence to, does not suffice.[15]

[23] But this aspect of the enquiry need not engage us in this matter. In my view, the appellants do not pass the first hurdle, which related to the findings and reasons therefor underlying the decision reached by the RSDO. It is necessary to cite from the decision extensively for proper context. The first part set out Mr Mukungubila's claim and his version of the events that he alleged caused him to flee his country. It reads:

'**INTRODUCTION**

[15] *Native Commissioner and Union Government v Nthako* 1931 TPD 234 at 242; *Hurley & another v Minister of Law and Order & another* 1985 (4) SA 709 (D) at 717A; *Tantoush v Refugee Appeal Board & others* 2008 (1) SA 232 (T) para 111.

The Applicant is an adult male born on the 25th day of December 1947 in Kisala, DRC. The Applicant mentioned that he is married. The Applicant mentioned further that he fled his country of origin on the 03rd day of January 2014 and arrived in South Africa on the 06th day of January 2014.

APPLICANT'S CLAIM

You claim that you flee your country of origin due to political problems. You alleged that you are a Prophet by profession and you were also working for Human Rights Organisation (C.I.F.D.H/D-ONGD.H) in your country of origin. You alleged further that you were concerned about the civilians who were being killed in North Kivu where you even [criticised] the President of the country in an open letter.

You alleged further that on the 5 day of December 2013 you wrote an open letter to criticise the President that he is the one who is killing the innocent people in North Kivu.

You alleged further that you gave two people [with instructions] to distribute the letter to the President Officer, Ministers Office and even to Embassy office.

You alleged further that your letter [caused] another conflict in your country of origin where many people were killed who were distributing the letter to the public.

You alleged further that one of the people [to] whom you gave the letter to [distributed it] to the [President's] office, Minister's Office and Embassy Office, the government soldiers went to his compound and [started] shooting at his house.

You alleged further that you were advised to run away because the government soldiers were coming to your place.

You alleged further that you did not want to run away because you would be betraying your people.

You alleged further that you saw it that it was serious and then [followed] the instruction of running away.

You alleged further that you ran away with few members of your family since it was an intense situation and unprepared one.

You alleged further that some of your family members were arrested in Zambia because you were in different vehicles.

You alleged further that you then decided to come to South Africa to seek refuge.'

[24] The RSDO then proceeded to deal with the merits of the application as follows:

‘THE LAW RELATING TO REFUGEES

Refugee Act 130 of 1998. The relevant provisions are summarized thereafter

1. A person qualifies as a refugee if:

[a] He or she has a well-founded] fear of being persecuted by reasons of his or her race, tribe, religion, nationality, political opinion or membership of particular social group or

[b] He or she was compelled to leave his or her habitual place of residence in order to seek [refuge] elsewhere owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either part or the whole of his or her country of origin or nationality.

[c] is a Dependant of a person contemplated in paragraph (a) or (b).

2. A person may not be removed from South Africa to any country where he or she may be subjected to persecution or where his or her life, physical safety would be threatened for reasons set out [in] 1 above.

BURDEN OF PROOF

The burden of proof is on the applicant to show that he or she is entitled to refugee status. The standard of proof is that of real “risk” and must be considered in the light of all the circumstances i.e. past persecution and a forward looking [appraisal] of risk.

FINDINGS

DR Congo “prophet” urges Kabila to quit after attacks kill 100

By Habibou Bangre (AFP) Dec 31, 2013

Kinshasa A self-proclaimed “prophet” and televangelist blamed for violence that killed more than 100 people in DR Congo’s two main cities Tuesday denied fleeing the country and called on the President to resign. Supporters of Joseph Mukungubila Mutombo, who describes himself as God’s “last envoy to humanity after Jesus Christ and Paul of Tarsus”, blamed the army for deadly unrest in Kinshasa and Lubumbashi which he called a “massacre”. The government said its forces had fought back a “terrorist offensive” on Monday, including attacks on the airport, the main army headquarters in the capital and in the second city of Lubumbashi. Government spokesman Lambert Mende said 103 people were killed – 95 attackers and eight members of the armed forces – and Mukungubila was now on the run. “The death toll is heavy, very heavy,” he told reporters. Mukungubila, who ran

for president in 2006, had charged in a December 5 open letter that President Joseph Kabila was colluding with the regime of neighbouring Rwanda and argued he should not remain head of state.

“He has, courageously, vanished,” Mende said. “He himself does not believe that his cause is right, a cause for which he is claiming responsibility in phone calls from a neighbouring country, or not too far away from ours. This man is a fugitive, he’s on the run,” he said. The preacher told AFP by telephone the allegation was incorrect, without saying more about his whereabouts, and demanded that Kabila step down.

“Let him resign, let him quit,” Joseph Mukungubila said.

“It is unacceptable that a foreigner should be the head of state. This is unacceptable,” he said, referring to claims by Kabila’s foes that he is Rwandan. The pastor also rejected the official version of Monday’s violence, which he called a “massacre”.

“They (the assailants) were empty-handed … How do you explain that?

Empty-handed! If you see the pictures of the bodies, there are no weapons.” After taking control early Monday of the national radio and television premises in Kinshasa and holding reporters hostage, some armed youths clearly stated they were acting for Mukungubila, whom they call “the prophet of the eternal”. His “Ministry of Restoration from Black Africa” said in an online statement published Monday that the armed forces had attacked the pastor’s home in Lubumbashi on Sunday, drawing armed reprisals. Pastor allied with foes of Kabila. They said tempers flared when the authorities in Lubumbashi arrested “children” handing out copies of the preacher’s open letter, in which he “told the truth that is to say we cannot have a foreigner at the head of the country.” Mukungubila, 66, has allied himself with foes of Kabila who assert that he is a native – and a puppet – of neighbouring Rwanda, which has long played a key role in the affairs of its vast western neighbour, as both invader and ally. This claim is unproven and denied by family members who say that Kabila was born in a rebel camp run by his late father, Laurent-Desire Kabila, who in 1997 ousted dictator Mobutu Sese Seko. In his New Year message, Kabila called for “all-out vigilance” in the wake of the recent wave of violence and said that “the victory of our troops against the forces of evil does not allow us to rest on our laurels”. The flare-up came after news Sunday the country’s top cop was dismissed and replaced by an ethnic Tutsi, sparking suspicion among some Kabila critics of Rwandan meddling.

Kabila was in the mining capital of Lubumbashi when a group of men stormed the set of a live programme by the state broadcaster in Kinshasa, nearly 1,000 miles away. His absence from the capital and the ensuing chaos sparked fears of a coup in the vast mineral-rich nation but Defence Minister Alexandre Luba Ntambo soon announced the situation was under control. “I was really frightened yesterday. I heard heavy gunfire while I was at the market with my two children… We fled,” household help Chantal said. The head of the United Nations mission in the country (MONUSCO) condemned the violence and called for the authorities to investigate. Shops that had closed and inhabitants who had stayed at home amid the confusion were back open and on the streets of Kinshasa Tuesday, an AFP correspondent reported. Monday’s statement by the preacher’s office described how a kind of divine shield allegedly protected Mukungubila’s residence from army shelling. “Then they began to shell the residence… The shells did nothing, they didn’t even damage vehicles,” it said.

Witnesses in Lubumbashi however told AFP Tuesday that the self-styled religious leader’s house had been largely demolished.

On his Ministry of Restoration website, Mukungubila is described as “the prophet of God, by whom the creator is speaking to us on this world today”. In another somewhat cryptic post, the website says Mukungubila’s birth on December 26, 1947 coincided with the fall of a star “of the same type as that of Bethlehem”.

DRC “prophet” accused of killings arrested in Johannesburg 2014-05-16 07:04.

Johannesburg – Police on Thursday detained for a few hours a self-proclaimed “prophet” who is wanted by Kinshasa over his role in violence that claimed more than 100 lives in the DRC’s two main cities.

Joseph Mukungubila Mutombo, who describes himself as God’s “last envoy to humanity after Jesus Christ and Paul of Tarsus”, was arrested at dawn at his house in Johannesburg.

“We managed to get him out on bail,” his South African lawyer Ashraf Essop told AFP, after an appearance before a Johannesburg court. The lawyer said that the charges against Mukungubila are outlined in an Interpol arrest warrant following a complaint by the Democratic Republic of Congo’s government.

The pastor has been accused of murder, intentional and aggravated assault, malicious destruction, as well as illegal and arbitrary detention, his lawyer said, without giving details of the specific incidents related to the charges.

The DRC has blamed Mukungubila for a spate of attacks in December on the airport, the main army headquarters in the capital and in the second city of Lubumbashi.

Government spokesperson Lambert Mende said then that 103 people were killed – 95 attackers and eight members of the armed forces – and that Mukungubila was on the run.

On Thursday Mende said: "What we are expecting now is his extradition so that he can answer for his crimes before justice."

The pastor's lawyer said, however, that South African Authorities cannot extradite him as he has filed an asylum request in the country.

Reached by telephone by AFP Thursday, the pastor said the 30 December attacks were "staged" to eliminate him.

Interpol

Kindly be informed that Mr Paul Joseph Mukungubila Mutombo has been investigated by this office based on the fact that the authorities of the DRC forwarded a request to this office to trace the fugitive. The fugitive is wanted for the following charges … The above mentioned fugitive was arrested on 2014/05/15 at his residential address no. 27 Carrol Avenue regents Park Johannesburg.

Your application for Asylum is accordingly assessed and approached both subjectively and objectively. Coming to objective test it comes to my attention that supporters or members who believed to be your followers were deliberately committing a crime against peace in your country of Origin, by taking Radio and Television presenters hostage and declare and mention your name that you are the one to free them from slavery of the Rwandan. This was not the right platform to take the government if the attackers were indeed your supporters or members, since you know very well the procedure of becoming a President in a democratic country. Again in Lubumbashi supporters or members who believed to be your followers were arrested for [crimes] against peace in the country again they mention your name as their leader. The government agency act under the scope of their duties to bring peace in the country. And coming to subjective test it comes to my attention that nothing happen to you that constitute persecution except that your house was attacked and largely demolished. The investigators were believed to ascertain whether there was a link between you and

the attackers believed to be your supporters or followers. You [fled] the country and [came] to South Africa to seek [an] Asylum permit.

Documents considered

* BI-1590

* Refugee Act 130 of 1998

* UNHR Handbook on Procedures and criteria for determination of Refugees Status.

CONCLUSION

After receiving a report from Interpol that there are criminal charges against you in your country of origin, I am left with no choice but to exclude your application for Asylum in terms of section 4 (1)(a) and (b) of Act No:130 of 1998.'

[25] A reading of this document shows that it records Mr Mukungubila's account of the events that led to his flight to South Africa. Under the caption 'FINDINGS', the document regurgitates the contents of what appears to be two media reports, the source of which is not particularly clear, and Interpol's warrant of arrest, which merely states that it has investigated Mr Mukungubila and sets out the charges which he would face in the DRC. Thereafter, the RSDO concluded that Mr Mukungubila's followers committed crimes against peace and that Mr Mukungubila was not persecuted and accordingly rejected the asylum application. Nowhere in this disjointed statement was there any a finding that Mr Mukungubila's application for asylum was manifestly unfounded, abusive or fraudulent or unfounded and why. One simply does not know why the RSDO rejected the application.

[26] The RSDO's rejection of Mr Mukungubila's asylum application, which constitutes administrative action,[16] and must be lawful, reasonable and procedurally fair,[17] should have been accompanied by adequate reasons satisfying the requirement

[16] Section 1 of the Promotion of Administrative Justice Act 3 of 2000.
[17] Section 33(1) of the Constitution of the Republic of South Africa, 1996.

of rationality.[18] Those reasons, when read in context, should have been intelligible and conveyed why the RSDO thought that his decision was justified.[19] They should have consisted of more than mere conclusions, and should have contained, in addition to the relevant facts and law, the reasoning processes leading to those conclusions.[20] The RSDOs execute functions of particular importance. They determine the fate of vulnerable asylum applicants who fear deportation, usually lack resources, legal representation, language and other meaningful skills to enforce their legal rights and face potentially catastrophic consequences if their applications are wrongly rejected.[21] Therefore, the need for RSDOs to properly exercise their powers and meticulously observe the principles of administrative justice in the execution of their functions cannot be overstated.

[27] The RSDO's decision here was neither intelligible nor informative and came nowhere near the required standard. It did not tell Mr Mukungubila why his asylum application was rejected. This fundamental flaw clearly constituted a reviewable irregularity, as the appellant's counsel fairly and properly conceded. In the absence of any facts that even hinted at fraud, abuse or a manifest absence of merit of the asylum application, it must be accepted that the RSDO took his decision in terms of s 24(3)*(c)*. That was also the appellants' stance in the court a quo. This view is further bolstered by the RSDO's apparent failure to submit a record of the proceedings and a copy of his written reasons to the Standing Committee, within 10 working days after the rejection of the asylum application, as contemplated in s 24(4)*(b)*, which governs the procedure where an application is rejected in terms of s 24(3)*(b)*. In that case an

[18] *Gavric* fn 11 para 67.
[19] *Koyabe & others v Minister for Home Affairs & others (Lawyers for Human Rights as Amicus Curia*e) [2009] ZACC 327; 2010 (4) SA 37 (CC); 2009 (12) BCLR 1192 (CC).
[20] *Minister of Environmental Affairs and Tourism & others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism & others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA) para 40; *Gavric* fn 11 para 68.
[21] *Gavric* para 70.

appeal against the RSDO's decision lay to the RAB and the application before us was directed at compelling the RAB to hear such an appeal.

[28] We had reached that conclusion at the end of the hearing of the appeal, but while this judgment was in the course of preparation, the jurisdictional issue was settled squarely by the Constitutional Court in *Gavric*. There, dealing with this precise issue, the Court said:[22]

'[51] Manifestly unfounded, fraudulent and abusive applications are, after being rejected under section 24(3)(*b*), sent to the Standing Committee on automatic review. The nature of such applications is defined in the Act and an exclusion decision does not fall within these definitions. The Act does not define "unfounded applications". Unfounded applications could comfortably be read to include applications which have been excluded under section 4(1).

[52] A textual reading of the Act, along with a purposive interpretation of sections 24(3)(*c*) and 4(1) that gives due regard to the constitutional right to fair administrative action would support an interpretation that an application excluded under section 4 falls within the ambit of section 24(3)(*c*). In addition, such an interpretation is aligned with international best practice and guidelines.

It follows that exclusion decisions are thus subject to the internal remedies of the Act and an applicant may appeal to the Refugee Appeal Board.' (Footnotes omitted.)

[29] In sum, whether the RSDO's decision here fell under s 24(3)*(b)* or 24(3)*(c)* of the Refugees Act, the exclusion decision would be subject to the internal remedies provided in the Act. And, as explained at paragraph [27] above, it can only be surmised on the available material that Mr Mukungubila's application was rejected in terms of s 24(3)*(c)*. In that case he was entitled to appeal to the RAB.

[22] Ibid, paras 51-53.

[30] The next question is whether it was competent for the court a quo to grant Mr Mukungubila asylum instead of remitting the matter to the RAB. He sought an order setting aside the RAB's decision that it had no jurisdiction to hear his appeal. Logically therefore, the matter needed to be referred back to the RAB to hear and dispose of the appeal. Instead Mr Mukungubila confusingly sought to set aside the RAB's 'failure' to grant him asylum, something it had never considered, and asked that the RAB be required to entertain his appeal. The latter order would not have constituted a problem were it not that he also sought an order short-circuiting the appeal process and granting him asylum. In effect, therefore, he was asking the court to take the decision of the appeal out of the hands of the RAB. Section 7(2) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) obliges a court to require that internal remedies be exhausted before it can review an administrative action. It is only where exceptional circumstances exist exempting the concerned person, who must apply for such exemption, from the obligation to exhaust internal remedies, and the interests of justice demand it, that a court may entertain review proceedings before internal remedies are exhausted, as envisaged in s 8(1)*(c)*(ii) of PAJA.[23]

[31] The doctrine of separation of powers requires courts to exercise judicial deference in applying their constitutional powers to avoid trespassing on the terrain of other organs of state where they are exercising their powers appropriately. The Constitutional Court described the enquiry to be conducted by a court asked to make an order of substitution as follows in *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd & another*:[24]

'. . . [G]iven the doctrine of separation of powers, in conducting this enquiry there are certain factors

[23] See for example *Koyabe* fn 19 above paras 37-38.
[24] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd & another* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) para 47.

that should inevitably hold greater weight. The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances.'

[32] It was contended for Mr Mukungubila that the facts established 'a carefully choreographed attempt to achieve' his extradition 'by refusing to grant him refugee status and truncating his internal remedies'. The DG and the Minister were accused of 'direct interference in the work' of the RAB, which was in turn accused of bias. The refusal by officials of the Department of Home Affairs to obey the court order of 25 July 2014, which had allegedly been taken by consent, until contempt proceedings were launched against them, and a subsequent institution of an appeal against that order, were the basis of this charge and constituted 'the exceptional circumstances' relied upon for a substitution order.

[33] I have, however, found no indication on the papers of any bias or incompetence on the part of the RAB in the manner contemplated in s 6(2)*(a)*(iii) of PAJA.[25] To my mind, it simply misconstrued its powers and laboured under the misapprehension that it had no jurisdiction to adjudicate Mr Mukungubila's appeal. Neither is there any evidence that pressure was brought to bear on the RSDO to render a negative decision against Mr Mukungubila. Nor, for that matter, that the outcome of the matter, if remitted to the RAB, is a foregone conclusion.

[25] Which empowers a court to 'judicially review an administrative action if … the administrator who took it … was biased or reasonably suspected of bias'.

[34] The important point to bear in mind is that the RAB is a specialist body constituted by members, who possess the expertise, qualifications and experience necessary for the performance of the functions of that body. Of further critical importance is the fact that the RAB is vested with appellate jurisdiction in the wide sense. Thus, it is in the same position as the RSDO and is not bound to decide the merits of the appeal within the confines of the latter's record. It is at large to make its own enquiries and even gather evidence, if necessary. This is so because s 26(3) of the Refugees Act specifically entitles it, inter alia, to invite the United Nations High Commissioner for Refugees to make oral or written submissions; request the attendance of any person who, in its opinion, is in a position to provide it with relevant information; of its own accord make further inquiries or investigation and request the applicant to appear before it and to provide any such other information as it may deem necessary. In addition to the RAB's specialist composition and experience, it has access to these invaluable sources of relevant information and expertise, which courts do not have and may well be needed in this case. I say this as I am not certain that there is sufficient, objective information on Mr Mukungubila's personal circumstances and the events which occurred in the DRC on the papers. This Court and the court a quo cannot, therefore, be said to be in as good a position as the RAB to decide the matter.

[35] It should also be mentioned that, as previously indicated, among the various orders sought by Mr Mukungubila in his Notice of Motion was a declarator that the RAB has the jurisdiction to entertain his appeal and a remittal of the matter for determination by a newly constituted Board. At the hearing of this appeal too, his counsel was not averse to a remittal of the matter for determination by the RAB as

long as he was protected from removal from South Africa before his asylum application is finalised, relief which he already has. And it goes without saying that his permit would remain valid until such time. A remittal would therefore not shield administrative process from judicial scrutiny or frustrate Mr Mukungubila's attempts to challenge the RSDO's decision, a risk which was cautioned against in *Koyabe* where courts rigidly impose the duty to exhaust internal remedies in the face of exceptional circumstances.[26] I am in any event not convinced in the light of the factors mentioned above that exceptional circumstances were established. I cannot find that the substitution order granted by the court a quo was just and equitable.

[36] I turn to deal with the general declaratory relief granted in paragraph 6 of the court a quo's order. Whether or not the orders were competent largely depends on the meaning of s 21(1)*(c)* of the Superior Courts Act 10 of 2013, which reads:

'A Division [of the High Court] has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power … in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.'

This Court has construed the substantively similar predecessor of these provisions, s 19(1)*(a)*(iii) of the now repealed Supreme Court Act 59 of 1959.[27] The Court found that the provisions envisaged a two-stage enquiry: in the first leg the court must be satisfied that the applicant has an interest in an 'existing, future or contingent right or obligation' establishing the conditions precedent for the exercise of the court's

[26] Fn 19 paras 38-39.
[27] See for example, *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 (6) SA 205 (SCA) paras 16-18.

discretion; in the second leg the court exercises its discretion by deciding either to refuse or grant the order sought.[28]

[37] The contention advanced on Mr Mukungubila's behalf in support of the declarators was that they were necessary 'to ensure that with clarity, refugees are not subject to the ongoing and studied obtuseness that they meet in their encounters with the officials called upon to determine their cases' and that 'they are tailored directions to the Immigration authorities'. The purpose for seeking the relief therefore was to obtain from the court guidelines charting the future conduct of officials of the Department of Home Affairs in executing their statutory functions. The appellants pointed out the trite position in our law that courts do not give litigants advice, express opinions or make orders which are academic or abstract when there is no live controversy in respect of a dispute requiring adjudication and decision by the court. I will assume that Mr Mukungubila's own interest 'in a contingent right' establishes the condition precedent (ie it is permissible) for this Court to exercise its discretion by considering whether or not to fix general directions for State functionaries as sought. The declaratory orders granted by the court a quo would be bad for reasons other than the one advanced by the appellants. The order granted in paragraph 6.1 was unnecessary as it restated the provisions of the Refugees Act, in particular the general prohibition of extradition or return of persons to other countries in certain circumstances contained in s 2 thereof. As for the rest of the orders, the relief sought would flow *ex lege* in the proper case. But their competence would depend on the particular facts of each case brought before a court and could never be granted in the wide and general manner in which they are presently crafted.

[28] Ibid para 18.

[38] Turning to the last question concerning the costs order made against the RAB in the court a quo, I see no reason to interfere with that court's discretion in this regard. The RAB was included in all court processes filed by the State Attorney, by whom it was represented in the proceedings, which involved its decision. No notice to abide was filed on its behalf. That said, however, I am not inclined to make any order of costs in respect of the appeal having regard to the nature of the case.

[39] To sum up: For the reasons set out above, only the orders in paragraphs 2 and 7 of the order of the court a quo which, respectively, set aside the RSDO's decision that it had no jurisdiction to deal with Mr Mukungubila's appeal, and mulcted the appellants with costs, survive the appeal. As previously stated, the order in paragraph 1, which granted Mr Mukungubila interim relief, was incompetent because the issue was not before the court a quo and the relief had already been granted in other proceedings. The order in paragraph 3, which ostensibly reviewed and set aside the RAB's failure to grant Mr Mukungubila asylum, was superfluous. The order in paragraph 4 granting Mr Mukungubila asylum pre-empted the enquiry to be conducted by the RAB and was, therefore, incompetent. The relief granted in paragraph 5 was unnecessary in light of the order granted by Makhubele AJ in the court a quo on 14 November 2014, which protected Mr Mukungubila from extradition until his asylum application and all litigation relating thereto had been finalised. And the declaratory orders granted in paragraph 6 were incompetent.

[40] In the result I make the following order:

1 The appeal succeeds to the extent that paragraphs 1, 3, 4, 5 and 6 of the order of the court a quo are set aside.

2 The matter is referred back to the Refugee Appeal Board to determine the

respondent's appeal in terms of s 26 of the Refugees Act 130 of 1998.

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MM MAYA

PRESIDENT OF THE SUPREME COURT OF APPEAL

APPEARANCES:

APPELLANTS:	W R Mokhari SC (with him MP Mdalana)
	Instructed by:
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	State Attorney, Bloemfontein
RESPONDENT:	DJ Vetten
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