

IN THE HIGH COURT OF SOUTH AFRICA**(GAUTENG DIVISION, PRETORIA)**

CASE NO. 16418/2012

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO	YES/NO
(3) REVISED	✓
12/6/2015	<i>[Signature]</i>
DATE	SIGNATURE

12/6/2015

In the matter between:

STEPHEN CHIHOMBA**APPLICANT**

and

CHAIRPERSON: REFUGEE APPEAL BOARD**1ST RESPONDENT****REFUGEE STATUS DETERMINATION OFFICER:****MARABASTAD REFUGEE RECEPTION OFFICE****2ND RESPONDENT****THE MINISTER OF HOME AFFAIRS****3RD RESPONDENT****THE DIRECTOR GENERAL: HOME AFFAIRS****4TH RESPONDENT**

JUDGMENT

BOTES AJ

INTRODUCTION

1. The Applicant's status as a refugee, as is envisaged in the Refugees Act, No 130 of 1998 (hereinafter referred to as "*the Act*"), is at stake. The Applicant applies for an order in the following terms:
 - 1.1 Reviewing and setting aside the decision of the First Respondent made on 14 June 2011 dismissing his appeal;
 - 1.2 Substituting the decision of the First Respondent with an order declaring that he is recognized as a refugee in terms of Section 24(3)(a) of the Act and ordering the Second and Fourth Respondents to issue him with a formal recognition of refugee status permit in terms of Section 27(a) of the Act within 15 days; or
 - 1.3 In the alternative to the relief in paragraph 1.2 *supra*, directing that his appeal in his asylum application be reconsidered by the First Respondent and directing the Second to Fourth Respondents to re-issue him with a temporary asylum seekers permit in accordance with the provisions of Section 22 of the Act pending the final determination of the hearing contemplated herein.
2. The First, Second, Third and Fourth Respondents (hereinafter referred to collectively as "*the Respondents*") oppose the application on the following

basis:

- 2.1 The decision sought to be impugned was taken on 14 June 2011 and on the Applicant's own version, he became aware of this decision on or about 23 September 2011, on which day he ought to have departed South Africa with effect from that day;
 - 2.2 He decided to enter South Africa primarily as an economic migrant and not an asylum seeker;
 - 2.3 The application for asylum was not *bona fide* but simply opportunistic;
 - 2.4 This review application is an afterthought and a desperate attempt by the Applicant to escape the consequences of deportation; and
 - 2.5 The Applicant failed and omitted in his application for asylum to adduce sufficient facts in support of his application for asylum and to justify his sojourn in South Africa.
3. Ms Hobden appears on behalf of the Applicant and prior to the commencement of her argument she requested leave to hand up a further affidavit which was deposed to by the Applicant on 28 October 2014 in which the Applicant confirms that a temporary asylum seeker permit was issued to him by the Department of Home Affairs, in accordance with the provisions of

Section 22 of the Act, on 21 October 2014, which permit is valid until 21 April 2015. I accepted the Applicant's further affidavit provisionally and subject to the caveat raised by Mrs Manaka who appears on behalf of the Respondents.

3.1 Ms Hobden submits that the Applicant is entitled to sojourn in South Africa by virtue of the temporary permit that was issued to the Applicant and that he therefore enjoys the rights which asylum seekers have, as intended in the Act.

3.2 Mrs Manaka however raised a caveat pertaining to the validity of the temporary permit upon which the Applicant relies. Mrs Manaka doubts the authenticity and the validity of the temporary permit and it seems that she is not convinced that the temporary permit is authentic. I am not called upon to determine the validity of the temporary permit which seems to have been issued by the Department of Home Affairs on 21 October 2014 and I am prepared to accept, for purposes of this judgment, that the Applicant enjoys the status of an asylum seeker and that he is entitled to sojourn in South Africa until 21 April 2015.

4. It is the Applicant's case that:

4.1 The First Respondent misconstrued the burden of proof and "*real risk*";

4.2 The First Respondent failed to take into account relevant

considerations and improperly contextualised other considerations that were provided in his claim;

4.3 The First Respondent incorrectly require individual past persecution; and

4.4 The First Respondent relied upon sparse or no country of origin information.

THE FACTS PRESENTED AND RELIED UPON BY THE APPLICANT IN HIS APPLICATION FOR ASYLUM

5. The Applicant was born on 7 August 1982 and is currently 30 years old. He was born in Masvingo, Zimbabwe and originates from the Shona Ethnic group.

5.1 The Applicant completed his A-levels (equivalent to a matric qualification) in 1999 to pursue a career as a teacher in Zimbabwe.

5.2 His parents were divorced and he lived with his mother who resided in a rural village known as Bikita. Bikita seems to be a small village, but historically a strong hold of the Zanu-PF party presided over by President Robert Mugabe. President Mugabe has been elected to office during 1987.

- 5.3 The Applicant became politically active while being a teacher and publically supported the Movement for Democratic Change (hereinafter referred to as "*the MDC*") led by Mr Morgan Tsvangirai. The 2002 National Election was vigorously contested between the MDC and Zanu-PF. Agents and supporters of Zanu-PF assaulted and abducted MDC members and supporters, which resulted therein that Zimbabweans feared for their lives and sought refuge elsewhere in Zimbabwe and in neighbouring countries.
- 5.4 During 2002 the Applicant "feared" persecution by Zanu-PF security forces and left his teaching position in Masvingo and took refuge in New Marimba Park, a suburb of Harare, the capital of Zimbabwe.
- 5.5 The Applicant's mother's youngest sister is a qualified medical doctor and she practiced from a surgery in Harare. She also resided in Harare together with the Applicant's elder sister and his younger half brother. The Applicant worked as an aide in his aunt's medical practice.
- 5.6 The Applicant's aunt was an outspoken MDC supporter and she dedicated her medical practice towards the treatment of MDC supporters and members. Many victims of the violent election campaign were treated by the Applicant's aunt during 2002.

- 5.7 The Applicant's aunt received anonymous threats in the mail and by telephone, demanding that she should close her medical practice. The Applicant suspected that these threats were forthcoming from Zanu-PF supporters.
- 5.8 President Mugabe was re-elected as President of Zimbabwe during the 2002 elections. The Applicant remained in Zimbabwe after the 2002 elections but approximately two years later, during the winter of 2004, his aunt was arrested by three members of the Central Intelligence Organization (hereinafter referred to as "*the CIO*"). The CIO is a Government institution and operates as Zimbabwe's secret police force.
- 5.9 The Applicant's aunt was held in custody for several weeks in Harare, but after her attorneys became involved, she was released without any charges being laid against her.
- 5.10 The Applicant's mother remarried some years ago (whilst the Applicant was still a young boy) and from the said marriage a boy, named Tinesh, was born. Approximately a year after the Applicant's aunt was arrested by members of the CIO, Tinesh was abducted from the Applicant's aunt's medical practice. Tinesh also worked at the medical practice as an aide. Tinesh was allegedly murdered in 2005.

- 5.11 Tinesh's body was found a few weeks after the abduction in Harare's sewer system. Little is known about the circumstances of Tinesh's abduction and murder and it seems that the murderers are still at large.
- 5.12 The Applicant's aunt closed her medical practice approximately 2 years after Tinesh's murder and relocated to the United Kingdom during 2007.
- 5.13 Approximately two years after Tinesh's death (during the winter of 2007) the Applicant decided to return to his birthplace situated at Bikita, to visit his mother. As mentioned above, Bikita is a small rural village and Zanu-PF stronghold.
- 5.14 The news of the Applicant's return spread like a veld fire soon after he arrived and on the day of his return a neighbour warned the Applicant that Zanu-PF was "*coming for him*". The neighbour is known to the Applicant "*Esnat*".
- 5.15 The Applicant adhered to Esnat's advice and left Bikita the same day. He walked 25 km during the night to fetch a bus in a neighbouring township.
- 5.16 The Applicant returned to the house where he lived with his aunt, his

elder sister and Tinesh (now deceased).

- 5.17 Shortly after the Applicant's return to Harare, the village heads of Bikita convened a public meeting during which the Applicant's mother was informed that her name would be removed from the local list of anti-retroviral recipients. The Applicant's mother was diagnosed as HIV positive some years ago and received anti-retroviral medication from the Zimbabwean Government.
- 5.18 Pursuant to the Applicant's mother's name being removed from the list of recipients of anti-retroviral medicine, she was compelled to travel to Masvingo in order to obtain the necessary medication from a public hospital.
- 5.19 The Applicant believes that his mother's perceived support for the MDC is the reason why she was removed from the list. The decision to remove her from the list was taken by the village heads after it became apparent that she (the Applicant's mother) refused to turn the Applicant over to local Zanu-PF militants during 2007. Be that as it may, the Applicant nevertheless decided to remain in Harare.
- 5.20 Approximately a year later, during March 2008, Presidential and Parliamentary Elections were held and violent crackdowns on the political opposition (the MDC) reached crisis levels. The Applicant

became more fearful than ever that he would be apprehended by Zanu-PF forces for his support of the MDC.

5.21 As a result of the violent crackdowns and persecution of MDC supporters during the run-up to the National General Election in March 2008, the Applicant decided to leave Harare and to seek refuge in South Africa.

5.22 The Applicant entered South Africa on 5 March 2008, through the Beitbridge Border Post. He obtained residence in South Africa and he currently resides in Benoni where he obtained a job as a security guard.

5.23 The Applicant lodged an asylum application at the Second Respondent and completed a BI-1590 eligibility form whereafter an interview was conducted with Mrs A Mabaso, Refugee Status Determination Officer. The application was apparently lodged on 12 June 2008, notwithstanding the fact that the BI-1590 form was completed and signed by the Applicant on 9 October 2008. I accept for purposes hereof that the date which appears on the aforementioned form is incorrect and that it was completed by the Applicant prior to 12 June 2008.

5.24 The Applicant confirms that the information, which appears in the BI-

1590 form, contains, in basic terms, the grounds for his application for asylum in South Africa. The Applicant formulates these reasons in his founding affidavit as follows:

-“I am from a small village in the district of Bikita, in the Masvingo Province of Zimbabwe. I am from the Shona Ethnic group.”

-“I fled my home country fearing persecution at the hands of members of the Zanu-PF due to my political opinions and activities.”

-“As a supporter of the leading opposition group, Movement for Democratic Change (“MDC”), since 2000 - 2001 and further, as a clerk at a medical centre which provided medical treatment and assistance to MDC members and activists, I was targeted by the Zanu-PF, as were members of my family who also gave their support to the MDC.”

- 5.25 The BI-1590 form which forms part of the record seems to be a second application form, and not the initial application form that was completed by the Applicant during June 2008, all of which are explained by the Applicant in a supplementary affidavit dated 8 August 2012.

5.26 In the application form which is attached to the Applicant's aforementioned supplementary affidavit the following questions and answers appear:

"Question: *Why are you applying for asylum?*

Answer: *Because the Zanu-PF Government has scrapped off my mother and my brother from the list of those who are getting the ARVs from the Government. This came because of me being sympathetic with the MDC."*

And:

"Question: *Which measures did you take to solve your problem?*

Answer: *I cross over to SA where I can further my education and also where I can afford of buying them drugs."*

And:

"Question: *Do you wish to return to your home country? If no, please give reasons:*

Answer: *Because the current situation is not conducive for*

me to go back."

5.27 I accept for purpose of this judgment that the Applicant completed the BI-1590 form in his own handwriting and that he, at the time, understood what was expected from him.

5.28 The Applicant has been residing in South Africa since 5 March 2008 and it seems that he hasn't been in Zimbabwe since then.

THE OUTCOME OF THE APPLICATION FOR ASYLUM AND THE FINDING OF THE REFUGEE APPEAL BOARD

6. Mrs Mabaso interviewed the Applicant on 12 June 2008, pursuant to him applying for asylum. Mrs Mabaso had regard to the following documents:

6.1 The Refugee's Act, No 130 of 1998;

6.2 The Handbook on Procedure and Criteria for Determining Refugee Status;

6.3 The BI-1590 application form;

6.4 The Country of Information for Zimbabwe (*sic*).

7. Mrs Mabaso formulated the reasons advanced by the Applicant for leaving Zimbabwe as follows:

-“You claim that the reason you left your country is because of the political situation.”

-“You claim that you were a supporter of MDC and Zanu-PF deprived your mother and younger brother to get ARV drugs from the Government.”

-“You claim that you came to South Africa to look for a job in order to take care of your family.”

8. Mrs Mabaso found that the Applicant failed to prove that he will suffer persecution in future in the event that he return to Zimbabwe. Mrs Mabaso furthermore found that the Applicant's claim was politically motivated but with no fear of persecution. The Applicant's application for asylum was accordingly rejected.
9. The Applicant invoked his right of appeal and lodged an appeal with the First Respondent. The Refugee Appeal Board was presided over by Mr T Damstra and the hearing was held on 16 September 2009.
10. Mr Damstra dismissed the Applicant's appeal on 14 June 2011 by reason of the fact that he has failed to discharge the burden of proof. Mr Damstra classified the Applicant as an economic migrant and not a refugee in need of international protection. Refugee status was therefore declined by the First

Respondent.

11. It seems that the Applicant was notified of the First Respondent's decision on 23 September 2011. This application was issued by the Registrar of this Court on 20 March 2012, in terms of which the Applicant applies to have the decision of the First Respondent, issued on 14 June 2011, reviewed and set-aside.
12. The Applicant brings this application in accordance with the provisions of Rule 53 of the Uniform Rules of Court and Section 6 of the Promotion of Administrative Justice Act, No 3 of 2000.
13. A copy of the First Respondent's decision is attached to the Applicant's founding affidavit in support of this application, marked **Annexure "SC1"**.
The Applicant holds the view that:
 - 13.1 The notes which were taken by the First Respondent do not coherently record his claim for refugee status and the information pertinent to his claim is not included in the notes despite the fact that he recall presenting such information to Mr Damstra;
 - 13.2 With the correct information, which would include the fact that the Applicant's neighbour, Esnat, warned him that Zanu-PF were "*coming for him*" and that due to his presence in Bikita his mother and brother's

names were removed from the list of ARV recipients, the First Respondent would have come to a different conclusion;

13.3 The full and complete details of his situation and the basis for his asylum application were not recorded;

13.4 The First Respondent did not explicitly asked the Applicant what the true reason for his decision was to seek asylum in South Africa;

13.5 The reasons for his decision to apply for asylum are recorded in paragraphs 74 and 75 of his founding affidavit in support of this application; and

13.6 The First Respondent did not ensure that all the relevant facts were in front of it before it made the decision to dismiss his appeal.

14. The Applicant stated the following reasons for his decision to apply for asylum in South Africa in paragraphs 74 and 75 of his founding affidavit in support of this application:

-“I came to South Africa because I had a legitimate fear of being persecuted in Zimbabwe and did not feel safe anywhere in the country.”

-“I am informed that having secondary or surrogate considerations and motives for escape should not disqualify me from refugee status, so long as I also have a well-founded fear of being persecuted.”

**THE GROUNDS UPON WHICH THE FIRST RESPONDENT RELY IN ITS
OPPOSITION OF THIS APPLICATION**

15. Mr M Chipu was a member of the Appeal Board which considered the Applicant's appeal. Although Mr Damstra presided over the appeal, Mr Chipu confirms the information which are reflected and contained in the decision which is attached to the Applicant's founding affidavit, marked **Annexure “SC1”**.
16. Mr Chipu states that the First Respondent considered the provisions of the Act, more particularly Section 3 thereof, and was furthermore alive to what is meant by *“a well founded fear of persecution”*.
17. Insofar as the burden of proof is concerned the First Respondent referred to the Handbook on Procedures and Criteria for Determining Refugee Status where it is stated that *“it is a general principle that the burden of proof lies on the person submitting a claim”* and the standard of proof is a reasonable risk which was considered in light of the all the circumstances and is a forward-looking test.

18. The First Respondent furthermore considered the situation in Zimbabwe at the time of the hearing of the Applicant's appeal and found that the political situation in Zimbabwe has stabilized. The First Respondent came to the conclusion that the Applicant failed to prove the existence of a reasonable risk of persecution in the future.
19. The First Respondent concluded that the Applicant decided to travel to South Africa and to establish himself in South Africa to obtain a financial benefit and not because he feared persecution. The fact that his mother was taken off the list of patients who were eligible to receive anti-retroviral medication has nothing to do with his fear of persecution. The First Respondent could therefore not find any persecution pertaining to the Applicant and concluded that the Applicant, on his own version, came to South Africa to look for a job in order to support his mother and his brother. The First Respondent therefore classified the Applicant as an economic migrant and not a refugee in need of international protection.

THE LEGAL PRINCIPLES APPLICABLE TO THIS APPLICATION

20. In terms of Section 3 of the Act, a person qualifies for refugee status 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 formal 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 a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere.”*

21. The determination of refugee status as set out in the Act appears to be governed by objective factors.

21.1 Thus, in the Handbook on Procedures and Criteria Determining Refugee Status published in terms of the United Nations 1951 Convention relating to the status of refugees, together with the 1967 Protocol, a person is considered to be a refugee as soon as he or she fulfils the criteria contained in the definition.

21.2 This would necessarily occur prior to the time at which his or her refugee status is formally determined.

**See: Harerimana v Refugee Appeal Board 2014(5) SA 550
(WCC) at par 11.**

22. Hathaway *"The Law of Refugee Status"* 2005, provides further guidance as to the concept of refugee status. He contends that it is reasonable for groups and individuals to *"disengage from fundamentally abusive national communities"*, at which point refugee law provides protection.
23. The Act furthermore provides for the determination of refugee status:
 - 23.1 An asylum seeker presents himself at the office of the Second Respondent, where an officer assists him in the application for asylum.
 - 23.2 This application is evaluated by the Second Respondent who, in terms of Regulation 10(1), must conduct a non-adversarial hearing to elicit information bearing on the Applicant's eligibility for refugee status and must ensure that the Applicant fully understands the procedures. Section 24(2) of the Act states that the Second Respondent is obliged to have due regard to the rights referred to in Section 33 of the Constitution of the Republic of South Africa, 1996, particularly to ensure that the Applicant fully understands the procedures, his or her rights and responsibilities and the evidence presented.

- 23.3 The Second Respondent is then obliged to make a decision as to whether or not the Applicant is in fact a refugee and entitled to protection from South Africa.
- 23.4 In terms of Section 24 of the Act the Second Respondent may grant or refuse refugee status and asylum. An application may therefore be rejected as "*unfounded*" or "*manifestly unfounded*".
- 23.5 An Applicant whose application is rejected as unfounded may then lodge an appeal with the First Respondent.
24. Section 26 of the Act provides some guidance to the First Respondent and its activities:
- "(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 in 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 enquiry 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 enquiry or investigation; and*
- (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."*

25. The status and approach to be adopted by the First Respondent were scrutinized and examined in **Tantoush v Refugee Appeal Board & others** 2008(1) SA 232 (T).

25.1 In paragraph 86 of the aforementioned judgment Murphy J, on the basis of Section 12(3) of the Act, noted that the First Respondent must function without bias and must be independent.

25.2 Not only is it required to be impartial in its decisionmaking, but, in addition, it must be independent.

DID THE FIRST RESPONDENT ERR IN FACT OR IN LAW AS ALLUDED TO BY THE APPLICANT IN PARAGRAPHS 15 AND 55 OF HIS FOUNDING AFFIDAVIT?

26. The Applicant relies on the grounds or reasons alluded to in paragraph 55 of his founding affidavit in support of this application. The high water mark of the Applicant's case is to be found in paragraphs 40 and 41 of the founding affidavit where the Applicant states the following:

"40. I am fearful of returning to Zimbabwe because of the continuing political violence and instability. Based on my personal experience as well as the experiences of family members, I believe I am at risk of persecution on the basis of my political opinion and activities if I am compelled to return to my country of origin.

41. I remain fearful of returning to Zimbabwe because I am informed and do verily belief that the country remains dangerous and unstable and that I will not be safe from members and supporters of Zanu-PF. I believe it remains unsafe for me in my village, where my mother resides, because I will be quickly recognized and remembered as an MDC supporter and suffer

adverse consequences at the hands of local Zanu-PF forces."

27. On a proper analysis and interpretation of the evidence adduced by the Applicant in his founding affidavit, it seems that supporters of the MDC were persecuted in Zimbabwe by virtue of their outspoken support for the MDC. It seems that supporters of the MDC are persecuted by reason of the fact that they do not support the ruling Zanu-PF party.
28. The chronology of events is, for purposes of this judgment, significant:
 - 28.1 The Applicant feared persecution by Zanu-PF security forces during 2002 when he left his position as teacher and took refuge in Harare.
 - 28.2 His mother's sister (his aunt) was arrested sometime in the winter of 2004.
 - 28.3 His younger half brother, Tinesh, was abducted and murdered during 2005.
 - 28.4 The Applicant returned to his village of birth, Bikita, in the winter of 2007. Esnat warned the Applicant that *"the Zanu-PF were coming for him"*, whereafter he decided to leave the village and to travel back to Harare.

- 28.5 Shortly thereafter the Applicant received information that his mother was informed that her name was removed from the local list of anti-retroviral recipients.
- 28.6 Shortly before the National Presidential and Parliamentary Elections in March 2008, the Applicant fled to South Africa.
- 28.7 The Applicant settled in Benoni where he obtained a job as a security officer.
29. The First Respondent found the Applicant to be a credible witness. The Applicant testified in a honest, frank and open manner and was consistent with his previous statements.
- 29.1 From the Applicant's testimony it was clear that his aunt, the medical doctor, was harassed by security forces and detained for a period of 3 weeks prior to the National Elections during 2004.
- 29.2 His younger half brother was abducted and murdered in 2005.
- 29.3 The Applicant was, prior to March 2008, not persecuted by Zanu-PF members or the Zimbabwean security forces.
- 29.4 In his evidence before the Second Respondent, the Applicant

mentioned that he came to South Africa to find employment in order to support his mother *et al.*

29.5 The First Respondent therefore came to the conclusion that the Applicant's motive to travel to South Africa was motivated by economic reasons and not for the fear of persecution by the Zimbabwean authorities.

29.6 The First Respondent therefore found that the Applicant has failed to discharge the burden of proof.

30. The objective facts and inherent probabilities constitute a hurdle which is difficult for the Applicant to overcome.

30.1 I accept, for purposes of this judgment, that the Applicant became worried and uncomfortable during the winter of 2007 when he visited his mother's village situated in Bikita.

30.2 I furthermore accept that the Applicant feared to be persecuted after he received news from Esnat that Zanu-PF was hot in pursuit.

30.3 The Applicant left Bikita in the middle of 2007 (during the winter months of June/July) and returned to Harare. The Applicant was, on his own evidence, not subjected to any harassment or persecution by members

of the Zimbabwe Security Forces or Zanu-PF upon his return from Bikita.

- 30.4 I furthermore accept that supporters of the MDC were nervous and that they feared persecution shortly before the National Elections in 2008.
- 30.5 The National General Elections were held in Zimbabwe on 29 March 2008. President Mugabe managed to secure 85,5% of the votes and Mr Tsvangirai obtained 9,3% of the votes. 233 000 votes cast their vote in favour of Mr Tsvangirai.
- 30.6 The most recent National General Elections were held in Zimbabwe on 31 July 2013. President Mugabe won 60% of the vote whilst Mr Tsvangirai finished second with 34% of the vote. President Mugabe therefore claimed a seventh term as President of Zimbabwe. More than 1,1 million people in Zimbabwe voted for the MDC, whilst Zanu-PF secured just more than 2,1 million votes.
- 30.7 Reports by the Zimbabwe Election Support Network Monitoring Group said as many as one million people, mostly in urban areas (which tend to favour the MDC), were unable to cast their votes. Other reports suggested that people had been forced to vote for President Mugabe.
- 30.8 The African Union also had monitors in place and said the election

could have been handled better, but reports indicated a fair election had occurred. Western Groups were not allowed to send monitors to Zimbabwe.

30.9 It seems that members and supporters of the MDC were allowed a reasonably fair opportunity to participate in the National General Elections which were held on 31 July 2013.

CONCLUSION

31. The Applicant challenges the decision of the First Respondent on the ground that it is inconsistent with the principle of non-refoulement envisaged in the Act.

31.1 It does not appear from the application why the Applicant still, after more than 6 years, requires protection. Nothing appears from the application why he is unable to re-avail himself to his country of origin so long after he feared persecution shortly before the 2008 National General Elections.

31.2 On the probabilities the circumstances which gave rise to the Applicant's fears have long since ceased.

31.3 The fact that his mother was deprived of anti-retroviral medication does

not give rise to "*a well-founded fear of being persecuted*", envisaged in Section 3(a) of the Act.

31.4 The principle of non-refoulement addresses *bona fide* Applicants for asylum and is incapable to cover economic migrants who enter South Africa to benefit financially.

32. The political situation in Zimbabwe has settled down over the years and most Zimbabwean Nationals who travel to South Africa do so for economic reasons. In the premises the Applicant has failed to discharge the onus of proof and the First Respondent's decision is not susceptible for review.
33. The First Respondent afforded the Applicant a reasonable opportunity to present his case and correctly came to the conclusion that no evidence was adduced by the Applicant to support his fear for persecution in Zimbabwe.
34. Persecution is defined as the sustained or systemic violation of basic human rights demonstrative of the failure of State protection. The Applicant was not subjected to any form of persecution and the fact that his mother was denied anti-retroviral medicine in 2007 is of little assistance for purposes of this application.

See: Fang v Refugee Appeal Board & others 2007(2) SA 447 (T).

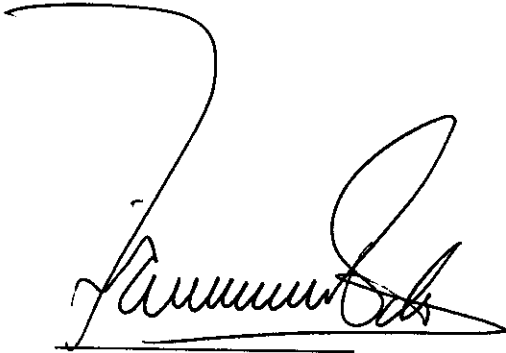
35. The grounds relied upon by the Applicant in paragraph 55 of his founding affidavit are in my view unfounded and not supported by the objective facts and evidence. The First Respondent therefore came to the correct conclusion and took into consideration all the relevant facts which were presented to it.
36. This application should therefore be dismissed. I am mindful of the fact that the Act provides for a procedure in terms of which the Applicant is entitled to pursue his remedies as provided for in the Act. The Applicant has been in South Africa since March 2008 and he laboured under the misapprehension that he was entitled to asylum in accordance with the provisions of Section 3 of the Act.
- 36.1 The Applicant's conduct was honest, reasonable and fair. He decided to travel to South Africa in order to obtain gainful employment. His mother was dependent on anti-retroviral medication and she was dependent on the Applicant for financial assistance after her name was taken off the list by Zanu-PF members.
- 36.2 The Applicant's brother was also diagnosed with HIV and he was also dependent on the Applicant for financial support. It does not appear from the affidavits whether the Applicant's mother and his brother are still alive or not. I have sympathy for the Applicant and his personal circumstances. The provisions of the Act are mandatory and the Applicant's personal circumstances are to a large extent irrelevant in

the determination of an application of this nature. It only comes into play insofar as costs are concerned.

37. The Applicant obtained gainful employment in South Africa as a security guard and I accept for purposes hereof that he is dependent on his income to make ends meet. The Applicant's conduct was not unreasonable or unjustified. He perceived the situation in Zimbabwe, during 2008, to be hostile and he feared persecution. Persecution suffered by friends, family or other similarly situated individuals may be sufficient to establish a well-founded fear of persecution on the part of the Applicant. Although the Applicant must normally provide a compelling reason for why he individually fears persecution, the experiences of similarly situated or close connected individuals may be evidence that the Applicant's personal fear of becoming a victim of persecution is well-founded. There is no requirement that the Applicant must have been "*singled out*" for persecution. His fears were unfortunately not well-founded as provided for in Section 3(a) of the Act.
38. I am mindful of the Applicant's personal circumstances and the fact that he has been in South Africa for more than 7 years. I am therefore not prepared to burden the Applicant with the costs of this application.

In the premises I make the following order:

- 1. The application is dismissed.**
- 2. No order is made as to the costs of this application.**

A handwritten signature in black ink, appearing to read 'F W Botes', written over a horizontal line.

**F W BOTES
ACTING JUDGE OF THE HIGH COURT**

Heard on: 31 October 2014
For the Appellant: Adv. F HOBDEN
Instructed by: LAWYERS FOR HUMAN RIGHTS
For the Respondent: Adv.: N MANAKA
Instructed by: STATE ATTORNEY
Date of Judgment: 12 June 2015