

REPUBLIC OF SOUTH AFRICA

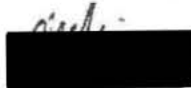


IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 2019/50597

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

29/04/2026
DATE


SIGNATURE

In the matter between:

MOLEMBO M

Applicant

and

THE MINISTER OF HOME AFFAIRS

First Respondent

THE DIRECTOR-GENERAL:

DEPARTMENT OF HOME AFFAIRS

Second Respondent

CHAIRPERSON OF THE STANDING COMMITTEE

FOR REFUGEE AFFAIRS

Third Respondent

The judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties' legal representatives by e-mail and uploading it to the electronic file of this matter on Caselines. The date and time of hand-down is deemed to be 10:00 on 29 April 2026.

JUDGEMENT

DE VILLIERS AJ:

INTRODUCTION

1. This application concerns the withdrawal of the applicant's refugee status and the refusal of his application for certification in terms of s 27(c) of the Refugees Act 130 of 1998. The applicant seeks the review and setting aside of both decisions. He seeks substitution, alternatively remittal.
2. The applicant is a citizen of the Democratic Republic of Congo. He was formally recognised as a refugee in South Africa in January 2003. On 13 March 2014 he applied for certification as a refugee indefinitely. The third respondent, the Standing Committee for Refugee Affairs, thereafter issued a notice of intention to withdraw his refugee status, received written representations, and on 13 July 2016 withdrew that status.
3. The matter turned in argument on a narrow but important issue. The applicant submitted that the SCRA considered only whether the circumstances originally giving rise to recognition as a refugee had ceased to exist, but failed to consider the further statutory enquiry required by s 5(1)(e), namely whether other circumstances had arisen which justified his continued recognition as a refugee.

4. The applicant also submitted that the enquiry had to be conducted with proper regard to ss 3(a) and 3(b) of the Act, the principle of non-refoulement, and the case law concerning the inquisitorial and protective character of refugee-status decision-making. The respondents submitted that the original basis for recognition had fallen away, that the later matters relied upon by the applicant were not the basis on which he had been granted refugee status, and that substitution was in any event not justified.

THE STATUTORY TEST

5. The legality of the impugned administrative decisions must be assessed under the Act as it stood when those decisions were taken. The later statutory framework and later SCRA Rules do not retrospectively determine whether the 2016 withdrawal decision was lawful. They are relevant only to the extent that the court must now craft an effective and competent remedy.
6. The pivotal provision is s 5(1)(e). It provides, in substance, that a person ceases to qualify for refugee status if he or she can no longer continue to refuse the protection of the country of nationality because the circumstances in connection with which he or she was recognised as a refugee have ceased to exist and no other circumstances have arisen which justify continued recognition as a refugee.
7. The word “and” is important. Section 5(1)(e) contains a conjunctive enquiry. The decision-maker must ask, first, whether the circumstances in connection with which the person was recognised as a refugee have ceased to exist. It must then ask, second, whether other circumstances have nevertheless arisen which justify continued recognition.

8. Section 36 permits withdrawal of refugee status where, after consideration of all relevant facts and subject to PAJA, the person ceases to qualify for refugee status in terms of s 5. Withdrawal under s 36 therefore depends upon a lawful and complete cessation enquiry under s 5.
9. Sections 3(a) and 3(b) remain relevant to that enquiry. Section 3(a) concerns a well-founded fear of persecution for a recognised ground. Section 3(b) concerns external aggression, occupation, foreign domination or other events seriously disturbing public order in part or the whole of the country of origin or nationality. In a cessation enquiry, "other circumstances" may therefore include circumstances engaging either s 3(a) or s 3(b), or the non-refoulement protection in s 2.

THE SCRA'S APPROACH

10. The SCRA was entitled to consider whether the original circumstances on which refugee status had been granted had ceased. That is the first part of s 5(1)(e). The difficulty lies in the manner in which it dealt with the second part.
11. The respondents' answering affidavit explains that the SCRA had regard to the applicant's original asylum material and treated the basis for recognition as being, in essence, that MLC rebels were capturing people and that women were being captured and given to rebels as wives. The SCRA then considered whether those conditions continued to exist in Kinshasa and Equateur Province. It concluded that they did not, or that the situation had materially improved.
12. The affidavit also records that the applicant's written representations referred to matters including suppression of freedom of expression and peaceful assembly, political instability, the risk of return, and the absence of family in the DRC. The respondents' answer, however, is essentially that those matters were not the basis

on which refugee status was originally granted and did not qualify the applicant to remain a refugee indefinitely.

13. That reasoning discloses the central problem. The fact that a circumstance was not the original basis for recognition does not make it irrelevant to s 5(1)(e). The second part of the section is concerned precisely with whether other circumstances have arisen which justify continued recognition. A functionary cannot answer that enquiry by saying that the later circumstances were not the original basis upon which refugee status was granted.
14. The applicant in paragraph 4 of the founding affidavit, sets out the alleged political history of his family, their association with Mobutu and later with Jean Pierre Bemba and the MLC, the death or disappearance of family members, and his fear of return. The respondents' answer to those allegations is limited. They state that they have no knowledge of the allegations and therefore cannot admit or deny them. They do not advance a positive contrary version.
15. It is not necessary to find that every factual allegation now contained in the founding affidavit was before the SCRA in precisely that form. The point is narrower. The material before the SCRA, including the original refugee record, the s 27(c) application and the later representations, raised broader issues than the single proposition that MLC rebels had formerly captured persons. Those issues required proper consideration under the second part of s 5(1)(e).
16. The reasons and the answering affidavit do not demonstrate that such consideration occurred. They show awareness of some later material, but not a reasoned assessment of whether that material, whether viewed under s 3(a), s 3(b), s 5(2) or s 2, justified continued recognition. The reasons instead return to the narrower conclusion that the original MLC-related circumstances had ceased.

THE CASE LAW

17. The authorities support this conclusion. In *FNM v Refugee Appeal Board and Others* 2019 (1) SA 468 (GP), the Court emphasised that refugee decision-making is not a narrow adversarial exercise. Even terse material may require further enquiry, and the decision-maker must consider whether the information before it engages s 3(a), s 3(b), or both.
18. In *Somali Association of South Africa and Others v Refugee Appeal Board and Others* 2022 (3) SA 166 (SCA), the Supreme Court of Appeal confirmed the inquisitorial and facilitative nature of refugee decision-making. The decision-maker must assist in obtaining as full a picture as the circumstances permit and must not approach the statutory grounds too narrowly.
19. *Mubala v Chairperson of the Standing Committee for Refugee Affairs* 2014 JDR 1205 (WCC) confirms that later-arising circumstances may be relevant to continued protection and that non-refoulement remains central where return may expose the person to harm.
20. Those cases do not mean that the applicant's assertions had to be accepted. They mean that the SCRA had to consider the full statutory enquiry and, where the material was terse but potentially material, to approach the enquiry with the care required in refugee matters. The SCRA did not do so.

REVIEWABILITY

21. I find that the SCRA materially misdirected itself. It considered the first leg of s 5(1)(e), namely whether the original circumstances had ceased to exist. It did not properly consider the second leg, namely whether other circumstances had arisen which justified continued recognition as a refugee.

22. That error was material. Section 5(1)(e) does not permit withdrawal merely because the original basis for recognition has fallen away. It also requires a finding, properly reached, that no other circumstances justify continued recognition.
23. The respondents' heads of argument assert that all relevant considerations were taken into account. But heads of argument cannot cure what is absent from the reasons provided and the answering affidavit. The court must assess the decision on the basis disclosed in the record and the affidavits, not on the basis of a broader formulation later advanced in argument.
24. The withdrawal decision must therefore be reviewed and set aside.
25. The refusal of certification under s 27(c) is not a separate self-standing decision unaffected by the flawed withdrawal reasoning. On the respondents' own version, the s 27(c) application was considered together with the question whether the applicant had ceased to qualify as a refugee. The SCRA reasoned that because the original circumstances had ceased to exist, the applicant could not be certified as a refugee indefinitely and his refugee status should instead be withdrawn.
26. The refusal of certification therefore depended on the same cessation enquiry under s 5(1)(e). Once that enquiry was materially defective because the SCRA failed properly to consider whether other circumstances justified continued recognition, the refusal of certification is also tainted. The court cannot uphold the refusal of certification while setting aside the withdrawal decision, because both outcomes rest on the same incomplete application of s 5(1)(e). The certification decision must accordingly also be reviewed and set aside.

REMEDY

27. The applicant seeks substitution. He submits that the outcome is a foregone conclusion and that the court has sufficient material, including country information, to grant final relief.
28. Substitution is competent in appropriate cases, but it remains exceptional. The relevant considerations include whether the court is in as good a position as the administrator, whether the outcome is a foregone conclusion, and whether substitution would be just and equitable. That is the approach reflected in FNM and in the Constitutional Court's decision in *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* 2015 (5) SA 245 (CC).
29. This is a strong review case. But I am not persuaded that certification is the only lawful outcome. The SCRA has not yet undertaken the full enquiry required by s 5(1)(e). A proper reconsideration will require assessment of the applicant's personal circumstances, the relevance of his alleged political associations and family history, the current country information, and whether those matters justify continued recognition or certification. Those are matters within the statutory competence of the refugee authority.
30. Remittal is competent. The respondents' reliance on *functus officio* does not establish the contrary. There is a distinction between an administrator reopening its own decision and a court setting aside an unlawful decision and remitting the matter for reconsideration. *Somali Association* is instructive in this regard: after the 2020 amendments had come into force, the Supreme Court of Appeal nevertheless remitted refugee matters to the competent authority under the amended framework. The later legislative scheme therefore does not bar court-ordered remittal.

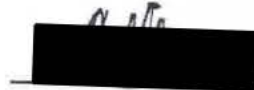
31. The appropriate remedy is review and remittal, with directions designed to ensure that the same error is not repeated. The applicant must be afforded a reasonable opportunity to supplement his representations and to respond to adverse material upon which the competent authority intends to rely. The time for a fresh decision should run from receipt of the applicant's final representations, so that procedural fairness is preserved without an open-ended extension mechanism.
32. The applicant has been substantially successful and therefore costs should follow the result.

ORDER

33. The following order is made:

- 33.1 The decision withdrawing the applicant's refugee status is reviewed and set aside.
- 33.2 The decision refusing the applicant's application for certification in terms of s 27(c) of the Refugees Act 130 of 1998 is reviewed and set aside.
- 33.3 The matter is remitted to the competent refugee authority for reconsideration.
- 33.4 Before making a fresh decision, the competent authority must afford the applicant a reasonable opportunity to make supplementary written representations, to place updated relevant material before it, and to respond to any adverse material upon which the competent authority intends to rely.
- 33.5 A fresh decision, with written reasons, must be furnished within 90 days after receipt of the applicant's final representations.
- 33.6 Pending the fresh decision, the applicant may remain in the Republic of South Africa and may continue to work on the same terms as applied before the impugned withdrawal decision.

33.7 The respondents are ordered to pay the applicant's costs on scale B, jointly and severally, the one paying the others to be absolved.



C DE VILLIERS
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances:

Counsel for the Applicant	:	Adv L Pretorius
Instructed by:		Kennedy Gihana & Associates
 Counsel for the Respondent	 :	 Adv D Senyatsi
Instructed by:		The State Attorney, Pretoria

Date heard:	23 April 2026
Date of Judgment:	29 April 2026