

Pro Bono & Human Rights

30 January 2026



South Africa

- Court grants order of substitution in long battle for refugee status



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On 15 December 2025, the High Court of South Africa, Gauteng Division, Pretoria, upheld a review application instituted by our Pro Bono and Human Rights Practice on behalf of a client, challenging the decision by the then Refugee Appeal Board (RAB) to reject our client's application for refugee status.

The court's decision is significant because it not only set aside the RAB's decision, but in a rare occurrence, held that exceptional circumstances existed in the matter, which warranted it exercising its powers under section 8(1)(c)(ii) of the Promotion of Access to Justice Act 3 of 2000 to substitute its decision for that of the RAB and grant our client refugee status – instead of remitting the matter back to what is now the Refugee Appeals Authority (RAA) for reconsideration.

Background facts and our client's grounds for applying for refugee status

Our client is a Congolese national who worked in the Democratic Republic of Congo (DRC) as a truck driver. In December 2002, his truck narrowly avoided colliding with a motorcade that was driving in the wrong direction on a one-lane national road. Although he was able to stop his truck just in time to avoid a collision, it turned out that the motorcade was transporting the then President, Joseph Kabilä.

Our client was arrested and beaten severely by the President's security guards. He was taken to hospital where authorities found out that his father had served in the regime of former President Mobutu Sese Seko as a senior security police officer.

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President Mabuto Sese Seko had been removed from power by Joseph Kabilu. Although our client had no direct involvement in politics, the mere fact that he was associated with the Sese Seko regime led to an unwarranted suspicion that our client had been involved in an attempt on President Kabilu's life.

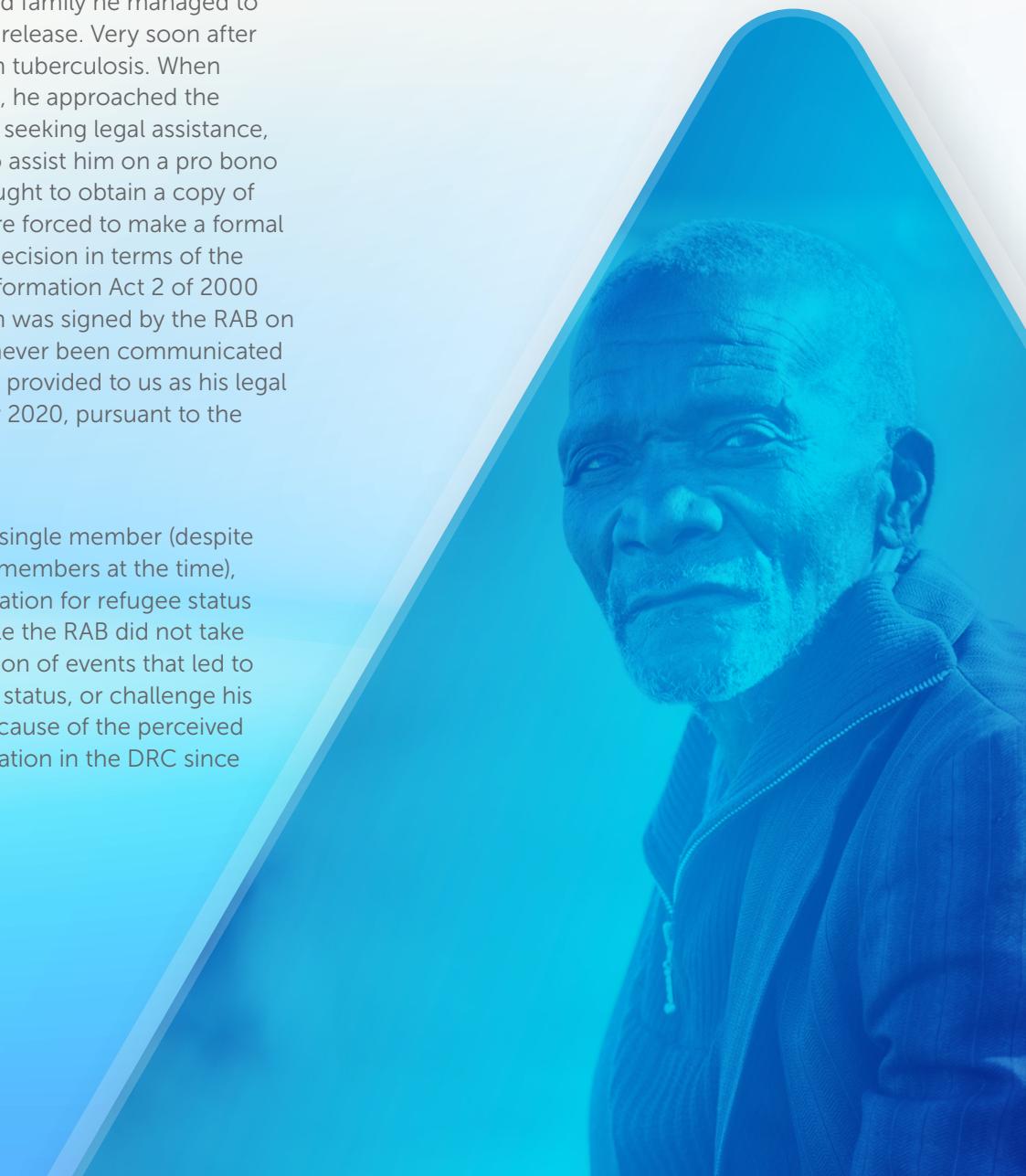
He was placed in military detention and informed that he would be tried for the capital offence of attempting to kill the head of state. Such offence carries the death sentence, which remains in force in the DRC. Although this charge was fabricated, our client feared for his life. With the assistance of his family, he managed to escape from detention and made his way to South Africa where he applied for refugee status in January 2003. His application for asylum was rejected, and he appealed this decision to the RAB, the internal appeal body that was mandated to hear appeals against decisions refusing refugee status at the time. His appeal was heard in January 2007, and he was told he would be advised of the RAB's decision in due course.

Despite returning every few months for 11 years to the relevant refugee reception office (RRO) to renew his asylum seekers' permit while awaiting the outcome of his appeal, our client never received any word about the outcome. However, in January 2019, when he again went to the RRO to renew his asylum seekers' permit, he was arrested by staff at the RRO, locked in a room without explanation and then taken to a police station where he was detained for four days without being told the reason for his detention.

With the help of friends and family he managed to hire a lawyer to secure his release. Very soon after this he was diagnosed with tuberculosis. When he was finally well enough, he approached the organisation ProBono.Org seeking legal assistance, and our practice agreed to assist him on a pro bono basis. As a first step we sought to obtain a copy of the RAB's decision but were forced to make a formal request for a copy of the decision in terms of the Promotion of Access to Information Act 2 of 2000 (PAIA). The decision, which was signed by the RAB on 29 September 2009, had never been communicated to our client, and was only provided to us as his legal representatives in October 2020, pursuant to the PAIA request.

The RAB's decision

The RAB, constituted by a single member (despite legislation requiring three members at the time), rejected our client's application for refugee status on two grounds. First, while the RAB did not take issue with our client's version of events that led to his application for refugee status, or challenge his credibility, it found that because of the perceived change in the political situation in the DRC since



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our client fled, he would no longer be at risk of persecution upon return to the DRC. Second, it found that our client had failed to exhaust his "*internal remedies*" before fleeing the DRC.

The RAB relied on two so-called pieces of information in reaching the conclusion that our client would no longer face a risk of persecution if he were to return to the DRC. Neither piece of information was put to our client during the hearing, nor were they attached to the record filed with the court or attached to the answering papers filed in court by the respondents. Their actual existence and contents accordingly could not be verified.

The grounds of review

In our application we sought to challenge the RAB's decision on several grounds, including that the RAB had been improperly constituted, and that the proceedings were procedurally unfair because the flimsy evidence relied upon by the RAB to conclude that our client would not face a risk of persecution if he returned to the DRC, was not put to him during the hearing and he was not afforded an opportunity to respond thereto. Moreover, the RAB failed to consider the fact that there was a real risk that our client may face the death penalty and/or cruel and inhumane prison conditions if forced to return to the DRC.

The court's decision

Setting aside the decision

Stone AJ upheld all grounds of review relied upon and set aside the RAB's decision. Although he found that the RAB's improper constitution was decisive - because it meant that the decision was *ultra vires* and fell to be set aside without further enquiry, he also dealt with all the other grounds of review in a detailed and comprehensive judgment.

Key to his decision was his finding that even assuming that information relied upon by the RAB did in fact exist (which he was unable to determine because the documents/ sources referred to had not been placed before the court) and that it was credible, the RAB's sole reliance upon it to reject our client's application for refugee status was improper because this information was of a highly generalised nature and had no rational connection to the specific facts of our client's case.

Granting substitution

After comprehensive consideration of all the facts, Stone AJ concluded that exceptional circumstances existed in this instance which warranted the court making an order substituting its decision and granting our client refugee status, instead of remitting the matter back to the RAA for reconsideration.

Applying the test adopted by the Constitutional Court in *Trencon Consulting (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* [2015] (5) SA 245 (CC) Stone AJ found that in this case it would be just and equitable to grant an order of substitution for various reasons.

Importantly, he found that all relevant information concerning the client's claim for refugee status was before the court and our client's version of events and reasons for his application for refugee status had not been refuted. The court was therefore in as good a position as the RAA to decide the matter and the decision was a foregone conclusion. Remitting the matter could cause a variety of difficulties and would in all probability not result in a fair hearing.



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Stone AJ also considered the additional factors that the Constitutional Court held should be taken into account when determining whether exceptional circumstances justify an order of substitution, including delay and its implications, as well as whether there has been bias and incompetence on the part of the decision-makers.

As to delay, Stone AJ found that, given the history of the matter, these considerations took on a unique and compelling character in this case. More than two decades had passed since our client had made his application for refugee status and the matter still remained unresolved, with no cogent explanation

having been provided by the respondents for the various delays occasioned by their conduct, including the 11-year delay in communicating the RAB's decision to our client, as well as the subsequent delays by the respondents in defending the review application. These delays included a two-year delay in filing their heads of argument, which were only filed after an application to compel the filing of their heads and an application to strike out their defence had been brought by our client to ensure that the matter could progress. A remittal back could lead to further delays, which would be unjustified and unfair to our client.

Stone AJ also found that given the numerous spurious and prejudicial averments made against our client in both the respondents' answering papers and heads of argument, there existed a more than reasonable apprehension that our client would not receive a fair hearing if the matter was to be remitted back to the RAA, which had joined cause with the other respondents to actively defend and resist the review application (instead of simply choosing to abide by the decision of the court).

Finally, and importantly, Stone AJ also took into account our client and his family's circumstances, including the fact that he had now been in South Africa for approximately 23 years, during which time he had, to the best of his ability and in difficult circumstances, sought to comply with and abide by the provisions of the Refugees Act 130 of 1998 in asserting his right to asylum. During this time

our client built a life in South Africa and raised two children here. To return our client to the DRC in these circumstances – to a country that his children have never known – would be wholly unjust and inequitable. Given this, Stone AJ found that it was not in the interests of justice to require our client and his family to face such risk again after so many years.

Furthermore, having considered recent country reports placed before the court concerning conditions in the DRC, Stone AJ concluded that if our client and his family were forced to return, they would face uncertainty and danger. His children would be uprooted from their schools and forced to relocate to a country they have never visited, whose languages they do not speak, and where access to education, healthcare and other services appear to be precarious. Invoking section 28 of the Constitution, he found this would not be in their best interests. In all the circumstances Stone AJ found it was appropriate that an order of substitution be granted. He accordingly set aside the RAB's decision and replaced it with an order upholding our client's appeal and granting him refugee status.

We welcome this decisive victory after a long and unnecessarily protracted legal battle on behalf of our client and are delighted that justice has finally prevailed for him.

**Jacquie Cassette, Elgene Roos
and Pebetsi Letsoalo**



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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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