REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 19551/2020

DOH: 6 March 2023

1. REPORTABLE: **NO**/YES
2. OF INTEREST TO OTHER JUDGES: **NO**/YES
3. REVISED.

…… **SIGNATURE** 11 April 2023 **DATE**

In the matter of:

V A **First Applicant**

J P **Second Applicant**

I E N **Third Applicant**

D G N **Fourth Applicant**

And

MINISTER OF HOME AFFAIRS	**First Respondent**
DIRECTOR GENERAL, DEPARTMENT OF HOME AFFAIRS	**Second Respondent**
THE CHAIRPERSON OF THE STANDING COMMITTEE FOR REFUGEES	**Third Respondent**
THE CHAIRPERSON OF THE REFUGEE APPEAL AUTHORITY, PRETORIA	**Fourth Respondent**
REFUGEE STATUS DETERMINATION OFFICER, DESMOND TUTU REFUGEE CENTRE, S LETSIETSA N.O	**Fifth Respondent**
REFUGEE STATUS DETERMINATION OFFICER, DESMOND TUTU REFUGEE CENTRE, MS KGOAHLA N.O	**Sixth Respondent**

JUDGEMENT

THIS JUDGEMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE CIRCULATED TO THE PARTIES BY WAY OF E- MAIL / UPLOADING ON CASELINES. ITS DATE OF HAND DOWN SHALL BE DEEMED TO BE 11 APRIL 2023

BAM J

A. Introduction

1. On 20 June 2022, the respondents, to whom I shall refer collectively as the state respondents, launched the present application to rescind the order granted by this

court on 8 June 2020, per Mokose J. The application is opposed by the applicants. I should immediately mention that in terms of the order, the third and fourth applicants both of whom are minors, were confirmed as citizens of the Republic of South Africa. The application for rescission was eventually heard on 6 March 2023. As may already be apparent, I refer to the parties as they were in the underlying review application.

2. The issue is whether the respondents have shown good or sufficient cause.

B. Background

3. The background against which the application arises may briefly be set out as follows: On 17 March 2020, the applicants launched an urgent motion seeking partly urgent relief as set out in Part A of their Notice of Motion, and non-urgent relief, Part B. In terms of Part B, the applicants sought to review and set aside certain decisions made by the state respondents. On 8 June 2020, it appears that this court granted judgment in respect of both parts A and B by default in favour of the applicants.

4. According to the founding affidavit to the review application, the first and second applicants are of Rwandan origin. Their home languages are French and Kinyarwanda. English is a third language of the applicants. The first and second applicants' marriage, which was concluded in 2009 in Pretoria North, Gauteng, bore the third and fourth respondents, a boy and a girl who were ten and six, respectively, at the time the application was heard. The applicants reside in Mandela Village, KwaMhlanga in Mpumalanga, where the two children are said to be attending school.

5. The full account of the applicants' individual experiences of persecution, the brutal murders of the members of their families, the arrest of the second applicant and his subsequent release from prison, how the applicants individually fled from Rwanda and entered South African in 2006, in the case of the second applicant, and in 2008, in the case of the first applicant, are all set out in the first applicant's affidavit and confirmed in the supporting affidavit deposed to by the second applicant. The account includes presenting themselves to the Refugee Reception Office in Marabastad and further attendances to have their permits renewed.

6. In 2010, during the month of July and September, the applicants' applications for asylum were rejected as manifestly unfounded. They were each informed that they do not have a real risk of being persecuted in Rwanda. In the case of the first applicant, her appeal was also unsuccessful with the fourth respondent. Things came to a head on 4 March 2020, when the first applicant was informed she had to report to the Refugee Reception Office in Marabastad, on 18 March, in order to return to Rwanda. She was informed that should she not return to Rwanda, she would become an illegal immigrant in South Africa. As already stated, the applicants brought the urgent motion referred to paragraph 3 of this judgement.

C. Condonation

7. The respondents explain the delay in bringing this application in their founding affidavit as follows: According to the deponent to the affidavit supporting the rescission application, upon service of the application on the State Attorney, it was allocated to

a former employee, one Mr Nkondlo, on 23 March 2020. Mr Nkondlo left his employ with the State Attorney in August 2021 having written two letters to the Department of Home Affairs on 23 and 25 March 2020, both of which did not elicit any response from the department's officials. His replacement, a Mr Nkabini, was appointed in October 2021. Shortly after Nkabini joined the State Attorney, he went on leave on 6 December 2021 and returned in January 2022. In the meantime, in December 2021, the order granted on 8 June 2020 was served upon the State Attorney and to the remainder of the state respondents. There is some indication according to the papers that the order was served upon the second, third and fourth respondents by hand during September 2020.

8. The deponent, Mr Jacobus Meier, (Meier) is unsure of the exact date but he suggests that Nkabini upon being aware of the court order of 8 June wrote letters during January or February 2022 seeking further consultation with the Home Affairs officials. The first consultation was held only in April of 2022, after which counsel requested certain documents. A further meeting was held in May and following that consultation the papers for rescission were drafted. The respondents accordingly seek condonation for the late filing of this application.

D. *Bona fide* defence

9. In terms of the respondents' defence, the deponent starts off by making reference to Annexures VA 16 and VA 17, dated 9 March 2020, both of which were used as annexures in the review application. Annexure 16 is a membership card of the second

respondent in an organisation known as the Rwandan National Congress, (RNC). The RNC is referred to in the founding affidavit to the review application as an organisation established to resist the alleged oppressiveness and tyranny of the current Rwandan regime. Annexure 17 is an affidavit deposed to by the secretary of the RNC narrating the challenges and risks faced by the first applicant arising from the second applicant's membership in the RNC. The respondents point out that these documents were not before the respondents' officials when they made their decision.

10. The respondents then refer to the rejection of the applicants' applications for asylum. After a brief reference to Section 24 (3) of the Act[1], they conclude that they did not act unlawfully. They also conclude that they have a *bona fide* defence in that they will demonstrate that their decisions were lawful and rational. With regard to the internal appeal decision relating to the first applicant, the respondents state that the decision of the Status Determination officer was referred to the Standing Committee for Refugee Affairs to either confirm or set aside. Meier refers to Section 25 (3) (a) of the Act[2] and concludes that the decision to uphold the rejection of the appeal was lawful and rational. He also refers to the second applicant's internal appeal and, with reference to Section 26 (1)[3], concludes that the Appeal Board decided to uphold the decision of the Refugee Status Determination officer.

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[1] 'The Refugees Status Determination officer must at the conclusion of the hearing -
(a)…

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

[2] 'The Standing Committee may confirm or set aside a decision made in terms of Section 24 (3) (b).'
[3] Section 26 (1) deals with the period within which an appeal may be lodged.

E. The Law

11. It is trite that in order to succeed in an application for rescission of judgement granted by default, the applicant must show good cause. In *Colyn* v *Tiger Food Industries Ltd t/a Meadow Feed Mills Cape*, it was said:

> 'The Court's discretion must be exercised after a proper consideration of all the relevant circumstances.'
> With that as the underlying approach the courts generally expect an applicant to show good cause (a) by giving a reasonable explanation of his default; (b) by showing that his application is made *bona fide*; and (c) by showing that he has a *bona fide* defence to the plaintiff's claim which prima facie has some prospect of success…'[4]

12. In *Mothupi* v *MEC, Department of Health Free State*, the court, referring to *Madinda* v *Minister of Safety and Security* 2008 (4f) SA 312 (SCA) para 10, noted:

> 'Good cause looks at all those factors which bear on the fairness of granting the relief as between the parties and as affecting the proper administration of justice. In any given factual complex it may be that only some of many of such possible factors become relevant. These may include prospects of success in the proposed action, the reason for the delay, the sufficiency of the explanation offered, the *bona fides* of the applicant, and any contribution by other persons or parties to the delay and the applicant's responsibility therefore….[12]…Even if one takes a benign view, the inadequacy of this explanation may well justify a refusal of rescission on that account unless, perhaps, the weak explanation is cancelled out by the defendant being able to put up a *bona fide* defence which has not merely some prospect, but a good prospect of success…[5] '

F. Analysis

13. The review application was served upon the State Attorneys in March 2020 and was allocated to Nkondlo on 23 March. On the same day, Nkondlo wrote a letter to the

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[4] (127/2002) [2003] ZASCA 36; [2003] 2 All SA 113 (SCA) (31 March 2003), paragraph 11.
[5] (20598/2014) [2016] ZASCA 27 (22 March 2016), paragraph 14.

department of Home Affairs seeking a consultation. Nkondlo wrote one more letter on 25 March. It would appear that for one year and five months, whilst Nkondlo was still employed at the State Attorney, nothing happened in the file. The neglect continued until his replacement, Nkabinde, wrote to the department of Home Affairs in January or February 2022 seeking a consultation with the officials from that department. Accepting as one must that in January 2022, Nkabinde became aware of the order granted by this court, there is no satisfactory explanation why the twenty days' provided for in the Rules could not be observed in bringing the application for rescission. The explanation provided by Meier suggests that there is no system of monitoring, diarising and following up on court processes. It takes uprightness to admit to this level of dereliction of duty. The delay has not been satisfactorily explained.

14. On the question of *bona fide* defence, the respondents drew the court's attention to annexures VA 16 and VA 17 in the review application. There is no dispute that this information was not presented to the respondents' officers at the time they made their decision. Aside from the two annexures and the applicants' reference to them in their founding affidavit, the respondents do not have anything to say about the remainder of the applicants' case, other than thin references to the law, without explaining how they came to the decision and what precisely led to their decision. What is more, the complaints raised by the applicants include allegations of procedural unfairness against which the respondents proffer no defence. As against the citizenship of the two children, the respondents have not attempted to demonstrate any *bona fide*

defence. I do not think it unreasonable to call the supposed *bona fide* defence for what it is, bare conclusions of the law. The respondents have failed to demonstrate a *bona fide* defence.

15. The shortcomings I have pointed out in this judgement lend credence to the applicants' suggestion that the entire pursuit of this application by the respondents was to ward off the contempt of court allegations set out in the applicants' application for contempt. That the application is not *bona fide* is demonstrated by the respondents' apparent inability to set out their defence coupled with the reliance on circular arguments such as, the respondents have a *bona fide* defence in that they will demonstrate that their decisions were lawful and rational. The rationality and lawfulness of the respondents' actions can only be inferred from the actual details of the defence, which the respondents have so far failed dismally to disclose. Despite having had more than 18 months to gather the necessary details of the case, the respondents, demonstrably make no case for rescission of the judgement in this case. They have no *bona fide* defence against the citizenship of the two minor children yet they persist in their conclusions that they have a *bona fide* defence. Discussing prejudice to both parties, Meier says there is no prejudice to the applicants but to the respondents in having to adhere to a decision arising from court proceedings they had no opportunity to participate in. First of all, it is incorrect of the respondents to claim they had no opportunity to participate in the review case. They were properly served. It is up to the respondents to design systems of diarising, monitoring and following up once an application has been allocated to a member of staff. Secondly, I do not agree

that the applicants will suffer no prejudice. Undoing the decision of this court will mean that whilst the state takes its time to have the matter finalised, the applicants have no permits and cannot lawfully participate in any economic activities for as long as they cannot provide valid permits for their presence in South Africa. The respondents cannot cry prejudice after having been derelict towards their work for almost two years. In the result, the respondents have failed to show good cause. Their application must fail.

G. Order

16. The application is dismissed with costs.

NN BAM

JUDGE OF THE HIGH COURT,

PRETORIA

Appearances:

Applicants:	**Adv Makhani**
Instructed by:	State Attorneys
Respondents:	**Adv L Pretorius**
Instructed by:	Kennedy Gihana Attorneys