REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No.: 23123/23

In the application between:

TSHIMABALANGA KABULA	First Applicant
MUDIAYI SYLVIE CIBIDI	Second Applicant
and	
THE STANDING COMMITTEE FOR REFUGEE AFFAIRS	First Respondent
THE DIRECTOR-GENERAL OF THE DEPARTMENT OF HOME AFFAIRS	Second Respondent
THE MINISTER OF HOME AFFAIRS	Third Respondent

Heard: 16 September 2024

Delivered: Electronically on 16 January 2025

JUDGMENT

MTHIMUNYE AJ:

Introduction

[1] The first applicant seeks an order for the review and setting aside of a decision of the Standing Committee for Refugee Affairs ("The SCRA") which is the first respondent, to withdraw the applicant's refugee status in terms of section 5(1)(e) and 36 of the Refugees Act 130 of 1998 ("the Act").

[2] The first applicant in his notice of motion sought an order in the following terms:

"1. The First Respondent's decision to withdraw the First Applicant's refugee status in terms of section 36 of the Refugees Act 130 of 1998 (the Act) is reviewed and set aside;

2. The Second Respondent's failure to make a decision on the Second Applicant's application in terms of section 29(2) of the Immigration Act 13 of 2002 within a reasonable or lawful time is reviewed and set aside;

3. The Second Respondent is directed to take a decision on the Second Applicant's application and to deliver such decision to the Applicant's within thirty (30) days from the date of this Court's order;

4. Condonation is granted for the late filing of the application for the relief sought in paragraph 1 above in terms of section 9 of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA");

5. The costs of this application are to be paid by the Respondents, jointly and severally, the one paying the other to be absolved; and

6. Further and/or alternative relief."

[4] As stated in prayer 4 of the Notice of Motions, the applicants also seek condonation for instituting the proceedings outside the 180-day period provided for by the Promotion of Access to Administration Justice Act 3 of 2000 ("PAJA") and for the late filing of their replying affidavit.

[5] At the commencement of the proceedings, the first and second applicant initially sought orders as stated in prayers 2 and 3 above, compelling the second respondent ("the DG") to make a decision in respect of their application in terms of section 29(2) of the Immigration Act 13 of 2002, in which the second respondent delayed or failed to make a decision within a reasonable time. However, this issue has been resolved by mutual agreement, as documented in the order issued on 7 February 2024. Therefore, no further attention from this court is required.

Issue to be determined

[6] The critical question that this court is enjoined to consider is whether SCRA's decision to withdraw the first applicant's refugee status should be reviewed and set aside as unlawful and unconstitutional. Before I can consider this question, I deem it expedient to set forth the background facts underpinning the reasons that fortify my conclusion.

Background

[7] The first applicant is Mr "Tshimbalanga Kabula" ("Kabula") an adult male, a medical doctor by profession, is married to the second applicant who is also a medical doctor. He studied for his medical degree at Kinshasa, but never permanently resided there. After completing his studies, he returned to his parents place of origin, South Kivu in the eastern DRC to work at the hospital with his mother and brother.

[8] Kabula fled from the eastern Democratic Republic of Congo ("DRC") allegedly due to him being in conflict with the DRC government. In refusing the governments instructions to either neglect or actively cause the death of rebels who attended the hospital where he was stationed he was victimised by the military authorities in the DRC. His father was subsequently murdered by the military and both his mother and brother burnt to death. After being detained by the government without trial Kabula managed to flee to the Republic of South Africa ("South Africa") where he was subsequently granted asylum in 2012 after which his refugee status was repeatedly renewed.

[9] Having resided in South Africa for about 6 years, the first applicant applied for certification of his refugee status in terms of section 27(c) of the Act which would entitle him to remain indefinitely in South Africa.

[10] In January 2019 the chairperson of the SCRA, Mr Karl Sloth-Nielsen handed a letter to Kabula informing him of the SCRA's intention to withdraw his refugee status. Kabula was further informed that he could file representations within six months to convince the SCRA to change its decision in respect of the certification application. Notwithstanding the representations filed by Kabula the SCRA on 3 February 2023, nearly 2 years after Kabula filed his representations refused to grant the certification and decided to withdraw Kabula's refugee status on the ground that the circumstances which justified the granting of the refugee status no longer existed. SCRA explained that the area where the first applicant resided in the DRC before applying for asylum had not experienced violence in the last ten years. Therefore, the first applicant would no longer be at risk if he returned to Kinshasa in the DRC.

[11] In June 2023 Kabula's attorney was contacted by the second respondent to arrange an interview of the second applicant regarding her application to the Director-General in which she sought the upliftment of her prohibition in terms of section 29(2) of the Act. Kabula at that stage believed that he could still have refugee status via his wife, the second applicant in terms of section 3(c) of the Act which provides that *"[s]ubject to Chapter 3, a person qualifies for refugee status for the*

purposes of this Act if that person … is a spouse or dependant of a person contemplated in paragraph (a) or (b).

[12] However despite numerous emails sent to the second respondent's officials regarding the application of the second applicant no response was received from the second respondent. Finally giving up hope in November 2023 of receiving any further engagement from the second respondent regarding the second applicant's interview and upliftment application, Kabula realised his error in not launching this application, and proceeded to launch his PAJA review application in December 2023.

Grounds of Review

[13] The first applicant's grounds for review are that:

13.1 The decision by the SCRA violates the maxim audi alteram partem in that the SCRA issued a withdrawal decision without affording the first applicant any prior notice of or hearing concerning the SCRA's decision to withdraw the first applicant's refugee status.

13.2 The SCRA failed to consider the first applicant's representations in respect of his certification application.

13.3 The SCRA erred in its decision in finding that the first applicant is from Kinshasa.

13.4 The SCRA failed to give adequate reasons for its decisions.

13.5 The SCRA was wrong in concluding that it was safe for the first applicant to return to the DRC.

13.6 The SCRA failed to have regard to the fact that the first applicant has a claim to refugee status via his wife, in terms of section 3(c) of the Act.

13.7 The SCRA failed to apply section 5(2) of the Act, which states:

"Subsection (1)(e) does not apply to a refugee who is able to invoke compelling reasons arising out of previous persecution to avail himself or herself of the protection of the country of nationality."

The Law applicable in this case

[14] Section 3 of the Act provides as follows:

"3 Refugee Status

Subject to chapter 3, a person qualifies for refugee status for the purpose of this Act if that person-

a) owing to a well-founded fear of being prosecuted 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
[Para.(a) substituted by s.4 of Act 33 of 2008 (wef 1 January 2020).]

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 place of habitual residence in order to seek refugee elsewhere; or
[Para.(b) substituted by s.4 of Act 33 of 2008 (wef 1 January 2020).]

c) Is dependant of a person contemplated in paragraph (a) or (b)"
[Para.(c) substituted by s.4 of Act 33 of 2008 (wef 1 January 2020).]

Section 3 came into effect on 1 January 2020 but is virtually identical to the section quoted above which was amended by section 4 of the Refugees Amendment Act 33 of 2008.

[15] Section 5 of the Act provides for cessation of refugee status as follows:

"5 Cessation of the refugee status

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

a) he or she voluntarily re-avails himself or herself in the prescribed circumstances 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 re-acquires 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 outside of which he or she remained owing to fear of persecution, or returns to visit such country; 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 a previous prosecution for refusing to avail himself or herself of the protection of the country of nationality.

3. The refugee status of a person who ceases to qualify for it in terms of subsection (1) may be withdrawn in terms of section 36."

[16] The Act also provides for the withdrawal of the refugee status under the following circumstances:

"Section 36 withdrawal of refugee status

Subject to the provisions of the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000), and after consideration of all the relevant facts, the Standing Committee may withdraw a person's refugee status if—

(a) such person has been recognised as a refugee due to fraud, forgery, or false or misleading information of a material or substantial nature in relation to the application;-

(b) such person has been recognised as a refugee due to an error, omission or oversight; or

(c) such person ceases to qualify for refugee status in terms of section 5.

[2] The Standing Committee must, in the prescribed manner, inform each affected person contemplated in subsection (1) of its intention to withdraw his or her status as a refugee, as well as the reasons for the withdrawal and such person may, within the prescribed period, make written submission with regard thereto: Provided that no such notice is required if the withdrawal is requested by the refugee concerned.

(3) In the event that the Minister has issued an order to cease the recognition of refugee status in respect of a category of refugees, the Standing Committee must implement such resolution by withdrawing the refugee status of such category as a whole by notice in the Gazette.

(4) A person whose refugee status is withdrawn in terms of subsection (1) or (3) must be dealt with as an illegal foreigner in terms of section 32 of the Immigration Act.

[S 36 subs by s 29 of Act 33 of 2008 wef 1 January 2020, am by s 11 of Act 12 of 2011 wef 1 January 2020, subs by s27 of Act 11 of 2017 wef 1 January 2020.]

The principle of non-refoulment

[17] The Constitutional Court in ***Saidi and Others vs Minister of Home Affairs and Others 2018 (4) SA 333 (CC)*** *para 28*, endorsed the protection of genuine refugees when said:

> *"The paramount importance of protecting genuine refugees from expulsion is highlighted in the introduction of the Refugee Convention, which says:*
>
> *'The principle of non-refoulement is do fundamental that no reservations or derogations may be made to it. It provides that no one shall expel or return ('refouler') a refugee against his or her will in any manner whatsoever, to a territory, where he or she fears threats to life or freedom."*

[18] Section 2 of the Refugees Act lies in the Universal Declaration of Human Rights ("Universal Declaration"), which guarantees refugees the right to seek and to enjoy asylum in other countries from persecution. Section 2 of the Act further provides that notwithstanding any provision of the Act or any other law, no person may be refused entry into the Republic of South Africa, expelled, extradited or returned to any other country or be the subject to any similar measure, if as a result of such measure, such person would be compelled to return to or remain in a country

where he or she may face any risks or dangers envisaged by the refugee definitions under the 1951 and 1961 OAU ("Organisation of African Unity") conventions.

[19] In ***Minister of Home Affairs and Others v Watchenuka and Another [2003] ZASCA 142; [2004] 1 All SA 21 (SCA)*** *at para 2* the Supreme Court of Appeal stated that the South African Refugees Act 'was enacted to give effect to South Africa's international obligations to receive refugees in accordance with standards and principles established in international law', and that section 2 of the Act , that sets out the principle of non-refoulment, exemplifies how the Act gives effect to such international obligations.

[20] In ***Adbi and Another v Minister of Home Affairs and Others [2011] ZASCA 2, 2011 (3) SA 37 (SCA)***, the Supreme Court of Appeal held that the appellants would face a real risk of suffering physical harm if they were forced to return to Somalia. The Court observed that it was obvious that no effective guarantee could be given to them against persecution or subjection to some form of torture, or inhuman degrading treatment if they were compelled to re-enter Somalia. Similarly, in this matter before me I find that there is no effective guarantee that the first applicant by returning to Kinshasa (DRC) would not be persecuted or be subjected to torture or human degrading violations. As stated in the representations made by the first applicant to the SCRA he was declared a wanted person in his country and had to flee from the DRC for his own safety or face death in the event of being captured by the government soldiers.

Condonation

[21] Section 7(1)(b) of PAJA stipulates that a review application must be instituted without reasonable delay and not later than 180 days after the applicant became aware of the administrative action sought to be set aside.

[22] The first applicant became aware of the decision during August 2023 yet this application was only issued during December 2023. The explanation proffered for the three-month delay is that the matter was complicated in that both the first and second applicants sought two distinct forms of review. The first applicant sought to

review the withdrawal decision whereas the second applicant sought to review the unlawful delay of her application to the Director-General.

[23] In addition, in June 2023, the applicants' attorneys were contacted by the Department of Home Affairs to arrange an interview of the second applicant and this led to reasonable inference that the second applicant's matter might be resolved amicably and litigation was placed on hold pending the outcome of the interview. However, this interview never materialised, which resulted in the legal representatives of the applicants launching this application during December 2023.

[24] It is trite that in instances where there has been a significant delay regarding non-compliance with section 7 (1)(b) of PAJA a full explanation such as an inability to file a review application timeously where an applicant has been represented at all material times by legal representatives is not adequate.

[25] In ***Madinda vs Minister of Safety and Security 2008 (4) SA 312 (SCA),*** the Supreme Court of Appeal said:

> *"Condonation is not to be had merely for the asking. A full detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the court to understand clearly the reasons and assess the responsibility. It must be obvious that, if the non-compliance is time related, then the date, duration and extent of any obstacle on which reliance is placed, must be spelled out."*

[26] In terms of Rule 27(3) of the Uniform Rules of Court, the court may, on good cause shown, condone any non-compliance with the Rules. This discretion may be exercised judicially on consideration of the facts of each case and subject to the requirement that the shows good cause for the default and the other party not suffering any prejudice.

[27] The Constitutional Court **in City of Ekurhuleni Metropolitan Municipality In re: Unlawful Occupiers 1 Argyle Street and Others v Rohlandt Holdings CC and**

Others [2024] ZACC 10, held that a court will consider the following factors in deciding whether the granting of condonation is in the interests of justice:

> *"the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospect of success. It is crucial to reiterate that both Brummer[11] and Van Wyk[12] emphasise that the ultimate determination of what is in the interests of justice must reflect due regards to all the relevant factors but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of those factors are relevant."*

[28] Applying these criteria, I am satisfied that the threshold set by the SCRA has been met by the applicants. A full explanation for the gap in time from when the applicant became aware of the SCRA's decision and when the application has been launched by their legal representative is fully contained in the founding papers and the supporting affidavits of the applicant's legal representatives. In addition, the relief sought by the first applicant raise not only an important issue but public interest dictates that matter be heard. Furthermore, it also not only deals with the first applicant's constitutional rights but for reasons that will become apparent, the first applicant prospect of success is strong. For these reasons and weighing the competing considerations, I find that it will be in the interests of justice to condone the late filing of the review application

[29] I now turn to consider the first applicant's application on the merits.

Analysis

[30] It is disputed that the first applicant was granted an opportunity to make representations to the SCRA after it had already made its final decision which had been brought before this court for review.

[31] The decision which was made after the said submissions is encapsulated in the letter to the first applicant from the SCRA dated 3 February 2023 contained in the Rule 53 bundle which states as follows:

> *"The Standing Committee for Refugee Affairs decided that it intended to withdraw your refugee status and you were notified of its decision in a letter dated 15 November 2018. You were afforded opportunity to make representation with regards thereto in terms of Section 36(2) of the Refugees Act, 1998 (Act 130 of 1998) which you did. Based on your representations the Standing Committee decided to withdraw your refugee status.*
>
> *The committee considered the above mentioned submissions and decided to withdraw your refugee status in terms of section 36 read with section 5(1)(e) and 5(3) of the said Act. The committee decided that you are no longer a refugee as the circumstances through which you were recognized as a refugee have ceased to exist and no other circumstances have arisen which justifies your recognition as a refugee.*
>
> *The circumstances with which you relied on when you applied for asylum have ceased to exist. You are from Kinshasa contrary to the representation arguing that you are from Eastern DRC. You will not be at risk if you return to your country of origin Kinshasa in DRC."*

[32] What the SCRA says is in contradiction to the applicant's submission in paragraphs 101, 102 and 103 in the founding affidavit,

> *"101. As explained above, no one in my family is from Kinshasa. Both my parents, and through them my extended family, are from the eastern DRC: specifically South Kivu and the Kasai Oriental province.*
>
> *102. It was only when I graduated and began my medical studies that I moved to Kinshasa, where I resided at the university residence. I was there solely for the duration of my studies.*

103. Kinshasa was never my home. I did not begin my career there, or buy property, or make any investments or commitments that a person makes when putting down roots and building a home."

[33] The quoted submission indicates not only in that submission but at all material times, the first applicant who is from the eastern DRC, specifically South Kivu and the Kasai Oriental province where he was born as indicated on the marriage certificate at page 76 of record, did not mislead the South African government at the time when he applied for refugee status in 2012. The fact that the submission made by the first applicant that he only resided at the university residence in Kinshasa while studying there is not disputed by the respondents in their answering papers. The first respondent merely states that this a new set of facts introduced by the first applicant in his founding papers, but fails to elaborate as to how he comes to that conclusion.

[34] The respondent's stance is that the decision is not reviewable because the first applicant was given an opportunity to make representations whereupon the submissions he made were based on new, incorrect facts in the matter. They however do not dispute that in his representations, the first applicant clearly sets out his historical background and origin. In addition, that the first applicant also sets out the terror and fear that he experienced while helping to medically treat rebels in the DRC resulting his life being in danger from the government and that he is still fearing persecution on return to his country of origin.

[35] The Refugee Status Determination Officer (RSDO) in her report at page 49 of the Rule 53 record, from the onset in 2012 found that there was a real risk that the first applicant would suffer persecution in the future if he were to return to his country of origin. Further, she found that the first applicant had discharged the burden of proof that his life was in danger according to his country's information. No report to the contrary was subsequently filed by the RSDO to show that the first applicant's circumstances have changed to substantiate the decision taken by the SCRA in withdrawing the first applicant's refugee status.

[36] This court is called upon to review the proceedings that took place before the SCRA and what is contained within the Rule 53 record. It is apparent that the first applicant was honest in his application. The application form clearly shows that the first applicant honestly indicated that his place of birth was the DRC and that his residency during the last ten years when he applied for asylum was 5[…] K[…] street, Kindale, Kinshasa and 1[…] M[…] street, Alberton, Johannesburg.

[37] During his interview with the RSDO he stated that his place of birth was Mbujimai. Based on all the information he had supplied during his interview the RSDO found that the first applicant had discharged the burden of proof and subsequently his asylum application was approved.

[38] The Rule 53 record suggests that the respondent made an erroneous decision by failing to adequately consider the representations, the applicant's prior applications, and the reports from the Refugee Status Determination Officer (RSDO) prior to the withdrawal of the first applicant's refugee status. The assertion that the circumstances under which the first applicant was recognized as a refugee have ceased to exist, without a comprehensive explanation, is not only illogical but also unconstitutional. There is a lack of satisfactory reasoning regarding the basis for this conclusion, and the respondent has not provided any documentation demonstrating consultation with the RSDO to establish a full understanding of whether the first applicant's safety would be assured upon returning to his country of origin.

[39] More importantly, the explanation for the withdrawal of the first applicant’s refugee status, him being from Kinshasa is unsubstantiated in that upon the first applicant’s initial application attached to the Rule 53 record the applicant has always been from the DRC, its capital being Kinshasa. In his original application form at page 21 and 24 of the Rule 53 record the first applicant has at all time indicated that he is from the Capital City of Kinshasa.

[40] In my view, when the decision was made to withdraw the applicant’s refugee status, there was no other report filed contrary to the one submitted by the RSDO which led the RSDO to conclude that the applicant’s life was at risk. As a result,

there is basis in law, or in fact, for the SCRA to come to a different conclusion as such a conclusion is not supported by any report or objective facts.
Given all these considerations, I am of the view that the applicant's application must succeed.

[41] In the result, I make the following order:

41.1 The application to review and set aside the first respondent's decision to withdraw the first applicant's refugee status in terms of section 36 of the Refugees Act 130 of 1998 is granted.

41.2 The decision to withdraw the first applicant's refugee status is referred back to the SCRA for proper re-consideration.

41.3 Each party shall pay its own costs.

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MTHIMUNYE AJ
JUDGE OF HIGH COURT

Counsel for the Applicants: Adv D Simonz

Counsel for the Respondent: Adv P Mhlana

Attorneys for the Applicants: De Saude Darbandi Attorneys Inc

Attorneys for the Respondent: State Attorneys

Argument took place on 29 August 2024
Date of judgment: 16 January 2025