IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORI

Case No:94266/2019

(1) Reportable: No
(2) Of interest to other judges: No
(3) Revised: Yes
(4) 20 October 2024
…… ……. Signature Date

In the matter between:

SIBINDI CLEMENTINE MLAMBO	**Applicant**
And	
THE MINISTER OF THE NATIONAL DEPARTMENT OF HOME AFFAIRS	**First Respondent**
THE DIRECTOR-GENERAL OF THE NATIONAL DEPARTMENT OF HOME AFFAIRS	**Second Respondent**

JUDGMENT

LESO A.J

INTRODUCTION

1. Sibindi Mlambo brought a review application in this court on allegations that the Department of Home Affairs failed to make a decision and did not finalize herapplication for proof of Permanent Residence permit or exemption status which she lodged in September 2017 within a fair and reasonable time.

1. Before I deal with the merits of this case I wish to express my displeasure in how the parties dealt with this dispute. I am of the view that this matter could have been resolved between the parties. The respondents say there is an outcome that the applicant and her attorneys did not collect and the matter is finalized in 2018. The applicant says the Department did not finalize the application because she did not receive the outcome of her application This Division is overwhelmed with unnecessary litigation including matters that get settled after allocations and this matter is one of those that counts for unnecessary litigation.

2. The fact that the respondents are blaming the applicant for wasting the court's time and the applicant is blaming the respondent for engaging in frivolous and vexatious litigation because of its opposition makes matters worse.

3. It is frustrating when something straightforward gets tangled in bureaucracy. It shouldn't take so much effort to resolve issues, especially when they seem clear- cut.

BACKGROUND

4. The respondents are the government institution responsible for immigration decisions while the applicant is a Zimbabwean national seeking proof of permanent residence or exemption status in terms of Regulation 25 of the Immigration

Act[1] ((“the IA”) as amended.

5. The applicant made an application to be furnished with proof of Permanent Resident as she alleged that she lost her original Permanent Residence Permit. The dispute was before the court on 16 September 2020 where the Court directed the respondents to make a decision regarding the outcome of the applicant’s application, within a period of 30 (Thirty) days from the date of service of the order on the respondent and the determination of whether or not the inactions of the respondents to finalize the applicant’s application to be reviewed and set aside was postponed *sine die*.

6. The applicant has now enrolled the matter for the court to review and set aside the action or inaction of the respondents to finalize the applicant’s application within a reasonable time.

7. The applicant also seeks an order to compel the first and the second respondents to make a decision and finalize her application for proof of permanent residence or exemption status in terms of Regulation 25 of the Immigration Act, within a fair and reasonable time which the court deems fair and reasonable under the circumstance and to compel the respondents to confirm the applicant’s Permanent Residence (“PR”) status as valid and authentic, in terms of the provisions of the Immigration Act(as amended).

8. The basis of this application is due to the fact that the applicant is still not in possession of proof of Permanent Resident Permit (“PRP”) and she alleged that she was not provided with the outcome of his application.

9. The court had to first deal with the application for condonation for late filing of the applicant’s replying affidavit. The applicant raised financial constrained, COVID and the issues of late response from the respondents as reasons for late filing. The replying affidavit was accepted.

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[1] See Regulation 25 of the Immigration Act, Act No. 13 of 2002 (as amended)

COMMON CAUSE FACTS

10. The applicant obtained her Zimbabwean passport on 3 December 2002 with passport number A[…] with a validity period up to 2 December 2012. On 28 March 2012, the applicant was issued with the Green bar-coded identity document on 28 March 2012 and the validity of the ID is not an issue in this application.

11. The applicant is required to apply for Proof of Permanent Residence to prove that she indeed has a permanent residence status in South Africa before she can apply for naturalization(citizenship).

12. The applicant applied for PRP because she had applied for naturalization and a pre-requisite for naturalisation is that she must have a PRP in South Africa.

13. The respondents did not oppose the application brought by the applicant on 16 September 2020.

14. 28 February 2018 the respondents wrote 3(Three) letters informing the applicant that no record of her proof of PR can be traced, in the second letter the respondent is informed that she must attend to the Regional Office in Johannesburg to request the outcome of her proof PRP application. The third letter informed the applicant that no record of her PRP application could be found.

15. On 24 May 2019 the applicant’s attorney requested the stated file and content of the applicant’s application from the respondents and the PAIA Office.

16. On 21 January 2021 the respondents indicated that the matter was already finalized in 2018.

THE MERITS

Applicants case

17. The applicant avers that she first entered South Africa on a temporary residence Visa(Visitors Visa) with the entry stamp in terms of section 10(6) of the Immigration Act and the passport also contains a general work permit, a temporary residence study permit.

18. According to the applicant section 31(2)(b) application in terms of the Immigration Act based on the fact that special circumstances to receive PR by way of exemption is not relevant to her as she had already applied for and received PR.

19. The applicant alleged that the SADC exemption did not apply to her because she entered the Republic for the first time in February 2003 at the age of 19 (Nineteen), on her first Zimbabwean passport issued on 03 December 2002. She said she was only 12 (Twelve) years old when the Cabinet of the Republic invited citizens to apply for such exemptions in 1996.

20. The applicant avers that in August 2017 she lodged an application for proof of her PRP in terms of Regulation 25 of the Immigration Act because she had applied for naturalisation following the Citizenship Act[2], based on her stated PR status. She said that she first had to proceed with an application for "proof" of her PRP in terms of Regulation 25 of the IA after the Regional Office refused to entertain her application and informed her that they could only entertain a naturalisation application if she had a PRP in South Africa.

21. The applicant avers that she had already lodged her application with the respondents on 08 September 2017, 6 (Six) years ago. To date hereof, the respondents

[2] See the Citizenship Act No. Act No. 88 of 1995 (as amended) by the Citizen Amendment Act, Act No. 17 of 2010 (''the Citizenship Act').

have failed, neglected and/or refused to provide the applicant with an outcome of her application and further to confirm her PR status as valid and authentic.

22. Applicant avers that she has been in court three times and the respondents are in contempt of court because the court has already granted judgment and ruled on the merits on 16 September 2020. I have to instantly indicate that this issue is only raised for argument in respect of the costs and the court will discuss it when dealing with costs.

23. In the answering affidavit, the applicant states that on 15 September 2020 the court had found that the respondent had not finalized the proof of Permanent residence application for exemption status in terms of Regulation 25 of the Immigration Act. She said that the court ruled that there is a “live” application that needs to be dealt with. This was not disputed by the respondents. The respondent however indicated that they did not participate in the proceeding.

24. The applicant denied that she already collected her permit and avers that he only collected the instruction letter on 04 April 2018 informing her that her proof of PRP application has been forwarded to the second respondent’s Department Regional office in Johannesburg and she should call the stated office and request outcome of proof of permanent residence application. On that basis, the applicant denies that the application has been finalized.

25. She stated that on 29 June 2018, 06 July 2018, 02 August 2018, 13 August 2018,06 September 2018 & 10 April 2019 the applicant’s attorneys requested the progress report of the applicant’s application. On 13 June 2019 & 02 July 2019 follow-up letters of 24 May 2019.

26. According to the applicant, there are reasons why the respondent failed to provide her with proof of PR except what is now alleged by the respondent in the opposing affidavit dated 25 February 2022.

27. The applicant argued that by failing to provide her with an outcome and issuing the proof of her PR exemption certificate, after it had already been issued to her in approximately December 2002, the respondents have infringed her rights to lawful administrative action.

28. The applicant further argued that by failing to provide her with an outcome and issuing the proof of her PR exemption certificate, after it had already been issued to her in approximately December 2002, the respondents have infringed her rights to lawful and administrative action.

29. The applicant stated that she misplaced her second passport containing the relevant endorsements to prove the legitimacy of her exemption certificate.

Respondents averments

30. The respondent avers that the applicant had two Zimbabwean passports, the one issued in December 2002 in Bulawayo, Zimbabwe which was to expire in December 2012 the second one issued in October 2012 in Harare which was to expire in October 2022, had it not been lost. I wish to state outright that the applicant did not provide similar detailed information as the respondents.

31. The respondents argued that It is highly improbable that the respondent could have endorsed a permanent residence permit issued on 29 November 1996 on a passport that was only issued in December 2002.

32. The respondent raised issues with the applicant's averments as follows:

33.1 the fact that the applicant did not divulge the details of her study visa;

33.2 the fact that the applicant did not mention the third passport in the application but a green bar-coded ID;

33.3 the fact that the applicant alleges that she was issued with a valid permit in 2012 despite her having a permanent residence permit that was allegedly issued on 29 November 1996.

33. Respondent contends that the last valid temporary residence visa issued to the applicant was in 2012 her passport expired on 02 December 2012 and her second passport which she lost did not have any endorsement. The respondent contends that if the applicant the permit acquired PR in the Republic 1996 it will be through the SADC exemption in terms of section 31(2)(b) and the then Aliens Control Act, Act No. 96 of 1991 ("the Aliens Control Act").

33. The respondent avers that the permit with the number(7342/96/E) issued to the applicant in 1996 is fraudulent and invalid because the permit was issued by the Edenvale office but the office stamp affixed to the permit is that of the Alberton office. According to the respondents, the applicant's permit was issued under reference number 7342/96/E, which cannot be correct because the highest number of exemption permits issued Edenvale office for SADC exemption is 987 and the last permit issued would be 987/1996/E. Respondent contends that the Edenvale office did not issue such a number(7342/96/E) in 1996. According to the respondent, the applicant would not have qualified for the permit because of the conditions attached to the exemption.

34. The respondent avers that upon investigations, the officials of the Department could not find any record of the applicant's application for the permanent residence permit. The respondent avers that this is because she never applied for the permit as she was in Zimbabwe in 1996 and only 12 years. The only record about the permanent residence application the respondents have is the applicant's application for proof of permanent residence.

35. The respondent contends that it made a decision by finalizing the application and the outcome was forwarded to the Department at the Johannesburg Office simultaneously with the letter advising that the outcome is ready for collection.

36. Although the applicant was issued with a green bar-coded identity book, does not on its own validate the authenticity of her PRP and/or status and the outcome of the applicant's application has been ready for collection at the Johannesburg Regional Office since February 2018; The Applicant is aware that her PRP is not valid nor authentic and she has been an illegal foreigner in South Africa since 2012.

37. The applicant opposed the application and raised points in limine as follows: and allege that the applicant never applied for an exemption permit and the PRP she was issued with, in approximately December 2002, is invalid.

ISSUES TO BE DETERMINED

38. Whether the applicant has made out a case for review of the respondent actions or non-action and /or the period within which the respondent took to take an action. outcome;

ANALYSIS OF EVIDENCE AND THE LAW

39. Section 1 of the Promotion of Administrative Justice Act[3] ("PAJA") defines administrative action as "any decision taken, or any failure to take a decision, by. "an organ of state, when "exercising power in terms of the Constitution or a provincial Constitution; or "exercising a public power or performing a public function in terms of any Legislation…

40. Section 6(2) of the PAJA sets out a list of "grounds" on which courts can

[3] See section 1 of the Promotion of Administrative Justice Act 3 of 2000("PAJA");

review administrative action as set out in section 1 of the PAJA above. The provision of section 6(2) of the PAJA empowers the court to perform the judicial functions as follows:

i. Review the decision taken by the organ of the state which was not authorized to do so by the empowering provision, in this case, the Immigration Act and the Citizenship Act.

ii. to review the decision taken by the organ of the state if the organ of the state acted under the delegation power which was not authorized by the empowering provision.

iii. *to review the decision of the organ of the state that was biased or reasonably suspected of bias when making a decision*.

41. It is clear that the applicant does not rely on any of the above-listed grounds nor does the applicant did not take issue with the process and procedure by the respondents in dealing with the application because she ultimately conceded that the respondent made a decision. The applicant does not dispute that the respondent 'decided to finalize her application for proof of permanent residence or exemption status in terms of Regulation 25 of the Immigration Act (as amended) in 2018. I therefore accept that indeed the respondents took a decision in 2018 because section 1 of PAJA refers to 'any decision' and any decision should account as an action to finalize the applicant's application. I noted that the communication to the effect that the matter was finalized in 2018 was only done after the court ordered that the respondent take a decision on the application. It was also common cause that that decision which was made in 2018 was not furnished to the applicant.

41. It became apparent during the arguments that the applicant did not take issue with the applicant issue with fact that she was directed to the Regional office of the respondent in Johannesburg to collect her outcome, her ground for review was that the outcome was only furnished in court after 6(Six) years hence her review based on the respondents' failure to finalize the application within a reasonable time.

42. The question is whether the court can review the respondents' action of late communication of the applicant's outcome of her PR proof of application.

43. I instantly point out that all the allegations of invalid documents and investigation on the illegibility of the applicant's permanent status or Citizenship in the country are pointless for this application. It became clear that the respondent had finalized the application and the outcome has been ready since 2018.

44. Section 33(1) of the Constitution lawful, reasonable and procedurally fair administrative action by the state organ by providing as follows:

> *(1) 'Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.*
>
> (2) *Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons*.'

45. Margeret Fuzeka Ngqongwana deposed an affidavit detailing the process the respondent took to verify the applicant's permanent residence and the finding. The findings dated 25 January 2022 are annexed to the affidavit. I will not give details of the affidavit because the process undertaken by the respondent and the reasons for the decision are not an issue before this court save to state that those findings were made after the court order and later after the applicant had collected the letter indicating that the outcome is ready for collection.

46. Sections 8 of the Immigration Act[4] dealing with the Adjudication and

[4] See the Immigration Act No. 13 of 2002, the act *intends to provide for the regulation of admission of persons to, their residence in, and their departure from the Republic and for matters connected herewith. The Act provides for the regulation of admission of foreigners to, their residence in, and their departure from the Republic and for matters connected therewith. The Immigration Act aims at setting in place a*

review procedures states as follows:

> *(1) An immigration officer who refuses entry to any person or finds any person to be an illegal foreigner shall inform that person on the prescribed form that he or she may in writing request the Minister to review that decision.*
>
> *(2) Any decision in terms of this Act, other than a decision contemplated in subsection (1), that materially and adversely affects the rights of any person, shall be communicated to that person in the prescribed manner and shall be accompanied by the reasons for that decision.*
>
> *(3) An applicant aggrieved by a decision contemplated in subsection (3) may, within 10 working days from receipt of the notification contemplated in subsection (3), make an application in the prescribed manner to the Director-General for the review or appeal of that decision*".

47. I have noted that the applicant is aware that the outcome of the application is that there were no records found hence she decided not to go collect however that does not take away the fact that the respondent should have communicated the decision with the reasons accompanying that decision, in a prescribed form as prescribed by section 8 of the Immigration Act because that decision adversely affected her Citizenship. The respondent did not dispute that Before the applicant could bring her application for citizenship via naturalisation, the applicant was to first launch an application for proof of PR for exemption status in terms of regulation 25 of the IA. The decision on her PRP application is therefore necessary.

48. To this end, the applicant correctly argued that the delay constitutes an unreasonable administrative action, violating principles of fairness and efficiency as he does not rely on any time frames or period prescribed for the administrator to take a decision. This is in line with Section 6(3)(a) PAJA which states that any person may rely

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new system of immigration control which ensures that—(a) visas and permanent residence permits are issued as expeditiously as possible and on the basis of simplified procedures and objective, predictable and reasonable requirements and criteria, and without consuming excessive administrative capacity…

on the administrator's failure to make a decision where-

(i) An administrator must make a decision;

(ii) no law prescribes a period within which the administrator is required to take that decision; and

(iii) the administrator has failed to take that decision,

49. In *Ruyobeza v Minister of Home Affairs and Others*[5] the court held that '*the committee had 'ignored' the applicant's request for a certificate for 3 months, despite a reminder; the committee had given no satisfactory explanation for the delay; and the delay had caused considerable prejudice to the applicant, who was effectively prevented from working as a result, a 3- month delay by the respondent to decide an application for a certificate of indefinite refugee status was unreasonable'*. It does not make sense that the findings on the application were in 2022 while the outcome was already made in 2018 and the reasons or the findings are only communicated in court 6 years later.

The effect of the late outcome or findings is that the applicant is unable to appeal for internal administrative review in terms of section 8 of PAJA. The internal remedies are not available to her because she has no outcome to appeal or decision to review. The right to administrative justice is premised on the principle on review of the administrative decision is that the administrative decision should be final before they are reviewed. Clear and direct communication with reasonswill entitle the applicant to explain her side of the story in the event the outcome is not in her favour, this is in line with the *Audi rule* and fair administrative procedures. In *Sokhela and Others v MEC for Agriculture and Environmental Affairs*[6] with reference to *Zondi and Others v Administrator Natal and*

[5] *Ruyobeza v Minister of Home Affairs and Others* [2003] 2 All SA 696 (C) at 708 .
[6] See [2009] ZAKZPHC para 55

Others[7] Judge Wilis said the following '*Where a person has a right to be heard before a decision is taken it is important that whatever the form of the hearing, the subject matter of the hearing or opportunity to make representations is made clear to the affected parties so that the right to make representations may be effective*.

50. The third prayer to compel the Department to confirm the applicant's Permanent Residence ("PR") status as valid and authentic in terms of the provisions of the Immigration Act(as amended) involves evaluating the eligibility of the applicant because Regulation 25 of the Immigration Act outlines the criteria and procedures for obtaining proof of Permanent Residence or exemption status. decision to grant permanent residence involves discretionary powers by the respondent that should not be compelled by the court and granting this relief without allowing the respondent to consider all relevant facts will untenable.

51. In *Sibiya v D-G : Home Affairs*[8], para 14, Wallis J found that failure to supply an identity document to a citizen for whatever reason affects the rights of that person and has a direct legal effect on him or her and *Sokhela* matter the same Judge judge held that *The court cannot make a declaration on the validity of the application because the applicant must go through the administration processes*…'

52. I am inclined to agree with the applicant that the letter that he collected from the respondent is not a decision. The issues raised by the respondent might be valid regarding irregularities and their suspicion is valid as the court also raised the issue regarding the 1996 permit, however, that does not count in favour of the respondents. They had an obligation to make a decision and communicate that decision and the reasons to the applicant because she has a right to be provided with the reasons in terms of section 33 (1) of the constitution. The decision to send the applicant to another office to collect an outcome is not in line with Batho Pele (People First principle) which complements PAJA. The purpose of Public Service is to serve ALL the

[7] *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) 589 (CC), para 112.
[8] Sibiya v Director-General: Home Affairs and Others [2009] ZAKZPHC 6; All SA

people in our country (black or white, South Africans and non- South Africans)

CONCLUSION

53. It's been years since the outcome was ready and it's surprising that the applicant hasn't collected it yet. There might be reasons behind this, but it shouldn't require court intervention to resolve something so simple. The respondent can just call the applicant and give her the outcome. That should not be a complicated exercise.

54. The right to a lawful and fair administrative action of the applicants has been adversely affected by not having been provided with the outcome and the absence of the reasons the applicant will not know why her application was not successful.

55. The processes of the department should be improved to a clearer communication or a more streamlined approach to inform applicants of their permit status and not to refer them from another office.

COSTS

iv. I do not agree with the applicant's submission that the applicant was duty-bound, having no alternative remedy and/or option than to approach the Court for the necessary relief as sought. I have already made my point at the beginning of this judgment.

6. The respondent is not innocent. Nothing has been put before this court as to why the Department could not discover the outcome for the applicant and her attorney since 2018. The respondent did not even bother to produce that outcome in court but insisted that the attorneys should collect it. This is absurd to say the list.

7. None of the litigants before me is entitled to the costs because this litigation was not necessary.

THEREFORE, I MAKE THE ORDER AS FOLLOWS:

ORDER

1. The decision of the respondent(s) to refer the applicant to another office to collect her outcome is reviewed and set aside.

2. The matter is remitted back to the respondent with the following directions:

a. The respondents are to directly communicate the outcome of the application of proof of PRP with reasons to the applicant personally and to her attorneys of record by email within 5 days of the service of this court order.

b. The applicant must be allowed to late appeal or administrative review in the event there are time frames set for such process has passed should the applicant be inclined to exercise any of the above reliefs

2. Each party is to bear their costs.

J.T LESO
ACTING JUDGE OF THE HIGH COURT, SOUTH AFRICA

Date of Hearing: 27 February 2024
Date of Judgment: 26 October 2024

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