



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA**

CASE NO.: 2996/2022

In the matter between:

CHIKA PAULINUS EMENAH

Applicant

and

MINISTER OF HOME AFFAIRS

First Respondent

DIRECTOR-GENERAL OF HOME AFFAIRS

Second Respondent

JUDGMENT

NONCEMBU J

[1] This is an application wherein the applicant seeks a mandamus directing the first respondent to consider and decide upon her internal review application which was submitted on 24 August 2021.

[2] The facts of the matter are common cause. The applicant came to South Africa in 2000 seeking asylum. In pursuance thereof he applied for refugee status in terms of the Refugees Act 130 of 1998 at the Refugee Reception office in Gqeberha.

[3] Pending finalisation of his application he was granted an asylum. Seeker temporary perming. The temporary permit was extended from the time by the Refugee Reception officer.

[4] On 9 January 2007, he got married to one Ayanda Dapu, a South African citizen from which union three minor children were born.

[5] During 2007 and as a result of his marriage to the said Ayanda, he applied for a visitor's Visa (Visa) in terms of the Immigration Act 13 of 2002 (the Immigration Act).

[6] The application was successful, and he was issued with a Visa, consequent upon his application.

[7] At a later stage he applied for an extension of his Visa with VFS offices in Johannesburg whilst he was temporarily residing there.¹

¹ VFS is the agent of the Department of Home Affairs responsible for providing Visa facilitation service to manage Visa and permit applications at various centres in South Africa.

[8] On 04 May 2021, he received a letter stating that his application for an extension was unsuccessful.

[9] The reason advanced for its rejection was that he had tempered with the Visa. No further particularity or specificity was provided in relation to the allegation of tempering.

[10] The letter further advised the applicant that he could within ten working days of receipt of the letter make written representations to the second respondent to review the decision by submitting an appeal through the VFS online portal at www.vfsglobal.com/dha/South Africa.

[11] The applicant only attempted to access the online portal on 4 June 2021, 23 working days after receipt of the rejection letter. The online portal was inaccessible by that time, and he could thus not lodge the internal review.

[12] On 24 August 2021, with the assistance of his current attorneys of record, the applicant made written representations to the first respondent. The reasons advanced for failure to make the review within 10 working days was due to having been in contact with a friend who had tested positive for Covid. He could only make the review at an internet shop where he would be assisted, but due to being in quarantine he could not make it there in time. After 10 days the online functionality had lapsed, and he could thus not access it.

[13] The review application was served by the sheriff on 2 September 2021 to one Mrs Kabini who is a legal clerk at the first respondent's office. Up to now he has not received any acknowledgment or response from the first respondent, hence, he lodged the current application.

[14] The respondents are opposing the application on the basis that the applicant has failed to exhaust the internal review process as provided for in terms of the Immigration Act. They contended that the application is premature.

[15] In support of the above contention, they place reliance on the provisions of Promotion of Administrative Justice Act, 3 of 2000 (PAJA) (Section 7(2), which provides that no court or tribunal shall review all administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

[16] To that end the respondents referred to a string of cases pertaining to review in terms of PAJA and failure to exhaust internal remedies.

[17] This reliance however, is misplaced. The applicant's case is not one for a review of the respondents' decision or such failure to decide, nor is it in terms of PAJA. The applicant is seeking a declarator that the first respondent considers his internal-review application. Put differently, he is seeking to enforce consideration of his review application in an effort to exhaust his internal remedies.

THE LEGISLATIVE FRAMEWORK

[18] Section 8(3) of the Immigration Act provides that any decision in terms of this Act other than the 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.

[19] In addition to the above, section 8 (4) provides that an applicant aggrieved by the 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.

[20] Section 8(5) provides that the Director-General shall consider the application contemplated in subsection (4), where after he or she shall either confirm, reverse or modify that decision.

[21] Section 8(6) states that an applicant aggrieved by a decision of the Director-General contemplated in subsection (5) may within 10 working days of receipt of that decision make an application in the prescribed manner to the Minister for the review or appeal of that decision. Lastly, section 8 (7) provides that the Minister

shall consider the application contemplated in subsection (6) whereafter he or she shall either confirm, reverse or modify that decision.

[22] Notably, the section makes no provision for a time frame within which the Minister has to adjudicate an application contemplated in subsection (6). However, it has been accepted in a number of court decisions that in cases of this nature, where no time-limit is stated on the statute, a reasonable period is the standard for consideration.

[23] What constitutes a reasonable period will depend on the circumstances and facts of each case. In the present matter, at the time that the application was lodged, over a year had lapsed since the lodging of the internal review with the first respondent. Surely it can be accepted that a reasonable period had come and gone for the first respondent to consider and decide upon the applicant's review, even if that entailed a referral back to the second respondent, which was the alternative relief sought in the review. The first respondent failed to make a decision on the applicant's review.

[24] Discernible from the aforementioned legal framework, the issue for determination in this matter is two-fold. Firstly, whether or not the applicant's failure to first lodge a review with the Director-General as contemplated in subsection (4) renders his review to the Minister (first respondent) premature, and if so, whether that entitles the Minister to not consider the applicant's internal review.

[25] Secondly, whether or not the first respondent is obliged to consider and decide upon the applicant's internal review application against the second respondent's functionaries as contemplated in subsection (6).

[26] In answering this question, the applicant sought reliance in a decision from this Division where Pakade J stated the following:

“[9] The finding in the judgment is that the Director-General is the administrative head of the department and everybody below him is his assistant in the running of the administration of the department. He is quite distinct from the Minister who is the political head of the department. The court reasoned that an internal appeal against the decision of the administrative personnel cannot go to the Director-General as that is deemed to be his decision. The court opined that could never have been the intention of the legislature in enacting Section 8 (4) of the Immigration Act, 13 of 2002. The subsection is therefore, in the view of the court, in breach of the rules of natural justice especially the one which precludes a man from being a judge in his own cause. The legislature could never have intended to concentrate the powers of administration to one person. That is an absurdity so glaring which could never have been contemplated by the legislature. In light, of the foregoing, I find it difficult to buy the idea that another court may find differently in this matter.....”

[27] The above was confirmed by the full bench on appeal.

[28] From the above authorities, it is clear that the first respondent is the appropriate person who is obliged to deal with the internal appeal.

[29] Furthermore, in the internal appeal lodged with the first respondent,²the alternative relief sought by the applicant is the remission of the matter to the Director-General for consideration coupled with a condonation for failure to lodge the review within 10 working days.

[30] In the circumstances, I find it hard to understand the respondent's vigorous opposition to the application in what can be termed, in Pickering J's words, as being "baseless" "entirely unnecessary" and "cynical in the extreme".

[31] The second respondent acknowledges that after 10 days the online functionality which was to allow the applicant to make his internal review was disabled and as such, he could not access it. At no point did the respondents suggest the withdrawal of the application and that they would reinstate the online functionality so that it can accept the applicant's internal review, which evidently was an alternative prayer in the applicant's amended notice of motion.

[32] As a further display of the respondent's callous attitude in opposing the matter, it is only the second respondent who deposed to and filed an answering affidavit, this notwithstanding that no relief was sought against the second respondent.

[33] Whilst the deponent professes to have access to documents pertaining to the applicant in this matter and thus personal knowledge of the matter, nowhere in the affidavit does he say that he deposes to same also on behalf of the first

² Annexure "CPE010" to the founding affidavit.

respondent. There is simply no response from the first respondent whatsoever. In essence therefore, there is no opposition from the first respondent in this matter.

[34] A further concern that is worth noting, is that the second respondent, in his affidavit, does not even address the unmotivated, unreasoned rejection of the applicant's Visa application which the applicant raises.

[35] Furthermore, and significantly, as mentioned earlier in this judgment, the main opposition mounted by the respondents is based on a misconception that the application is one of judicial review. As demonstrated above, that is a baseless misconception which cannot be sustained on the papers.

[36] In the result the following order shall issue;

- (a) The first respondent is directed to consider and decide upon the applicant's internal review application within 30 days from date of service of this order.
- (b) The first respondent is ordered to pay the costs of the application.

V P NONCEMBU

JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the applicant : *A M Maseti*

Instructed by : Maci Incorporated
Gqeberha

Counsel for the respondents : *L Hesselman*

Instructed by : The office of the State Attorney
Gqeberha

Date of hearing : 31 August 2023

Date judgment delivered : 15 September 2023