



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 59404/2020

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

23 MAY 2024
DATE

SM MARITZ AJ
SIGNATURE

In the matter between:

GEORGE IROKWE

APPLICANT

and

**THE HONOURABLE MINISTER OF THE NATIONAL
DEPARTMENT OF HOME AFFAIRS**

FIRST RESPONDENT

**THE DIRECTOR-GENERAL OF THE NATIONAL
DEPARTMENT OF HOME AFFAIRS**

SECOND RESPONDENT

JUDGMENT

MARITZ AJIntroduction

- [1] The Applicant, George Irokwe (“the Applicant”) brought an application for review in terms of the Promotion of Administrative Justice Act, 3 of 2000 (“PAJA”), of the actions or lack thereof of the First and Second Respondents, being the Minister of the National Department of Home Affairs and the Director-General of the National Department of Home Affairs (“the Respondents”) to make a final decision and finalise the Applicant’s Permanent Residence application in terms of section 26(b) of the Immigration Act, 13 of 2002 (as amended) (“the Immigration Act”) within a fair and reasonable time period.

- [2] The Applicant further requested the Court to compel the Respondents to issue the Applicant with his Permanent Residence Permit in terms of section 26(b) of the Immigration Act within a reasonable time period or within such period that the Court deems fit and reasonable under the circumstances.

- [3] The Applicant additionally requested the Court to grant costs of the application against the Respondents, inclusive of the reserved costs of the application heard on 7 June 2022, presided over by Baqwa J.

- [4] The Respondents requested condonation for the late filing of their answering affidavit and an order dismissing the Applicant’s application with costs.

- [5] It is important to note from the outset that paragraph 14.6 of the Joint Practice Note included an additional remark regarding the relief sought by the Respondents. The Respondents acknowledged that it is a well-established principle that an order remains in effect until set aside. The Respondents expressed their intention to file a rescission application concerning the Court Order granted on 15 November 2021. While acknowledging that the rescission had not yet been formally filed, the Respondents aimed to do so before 5 February 2024. The Respondents emphasized the necessity for the rescission to precede the hearing of the current application or to be heard concurrently.

Both parties recognized that this might result in the matter being removed from the roll due to potential opposition. The Respondents' rescission application was uploaded on case lines on 6 February 2024 and served on the Applicant on 7 February 2024 (on the date of the hearing). The current application proceeded on 7 February 2024.

Issues in dispute

[6] Based on the Joint Practice Note, the common cause facts and the issues for determination are as follows:

- 6.1 Whether the Respondents are entitled to condonation for the late filing of their answering affidavit.
- 6.2 Should condonation be granted, the Court is required to consider whether the evidence provided in the answering affidavit would be admissible as the First Respondent failed to depose to the answering affidavit and/or whether it amounts to hearsay evidence.
- 6.3 The parties agreed that the Court has already adjudicated upon the merits of the matter and have granted an order on 15 November 2021 compelling the Respondents to make a decision within 30 days in respect of the issuing of the Applicant's Permanent Residence Permit in accordance with section 26(b) of the Immigration Act. The Court provided the Applicant with leave to approach the Court on the same papers to confirm the issuing of the Permanent Residence Permit, in the event that the Respondents do not comply with prayer 1 of the Court Order.
- 6.4 The Respondents have not complied with the Court Order up to date in that it has failed to consider and make a decision in respect of the Applicant's Permanent Residence Permit in accordance with section 26(b) of the Immigration Act.

- 6.5 The Court is accordingly approached by the Applicant to make a decision and grant a substituted order due to the breach of the Applicant's right to just administrative action as contained in section 33 of the Constitution and which section is given effect by PAJA, by compelling the Respondents to issue the Permanent Residence Permit in terms of section 26(b) of the Immigration Act (as amended).
- 6.6 The Court is furthermore required to decide the issue of costs of the application including reserved costs.
- 6.7 The Respondents submitted that the Court is required to decide whether the Respondents are to be heard on their rescission application prior to adjudication of the application to compel the issuing of the Applicant's Permanent Residence Permit in terms of section 26(b) of the Immigration Act (as amended).
- 6.8 In paragraph 18 of the Joint Practice Note it is stated that the parties agree that there are no other matters relevant for the efficient conduct of the hearing.
- [7] The Respondents raised in their practice note the following issues, which included various points *in limine*, for determination:
- 7.1 Firstly, that the Applicant has failed to make his application to review and set aside the Respondents' decision within six months of being aware or should have been aware that the decision was made.
- 7.2 Secondly, that the Applicant is seeking an incompetent order against the Respondents in that the Court cannot be asked to usurp the Respondents' administrative functions without any exceptional circumstances.
- 7.3 Thirdly, and on the merits, the Applicant never made the applications that brought him to Court and the subsequent applications that he (the

Applicant) made and never mentioned in his application, the Respondents made the decision(s) and dismissed the Applicant's applications as made in terms of section 26(b) of the Immigration Act on 20 June 2018, 7 January 2015 and on or about 11 June 2019 for reasons that there was no marriage of good faith between the Applicant and his purported spouse.

Rescission Application

- [8] As previously stated, the Respondents served their rescission application on the Applicant on 7 February 2024, coinciding with the day of the current application's hearing. The Court denied the Respondents request to postpone or suspend the hearing of the current application pending the rescission application's determination, clarifying that a rescission application does not automatically postpone and/or suspend an order. Instead, a separate mostly urgent application is necessary to suspend the order's execution or the current application's hearing until the rescission application is decided. Therefore, an application to rescind, correct, review or vary an Order of Court does not automatically suspend the operation and execution of a decision or Court Order. Where a decision or Court Order has not been suspended the execution thereof will be carried out even if there is a pending application before Court to rescind, correct, review or vary such a decision or Court Order. A decision or Court Order can only be suspended by resorting to the provisions of rule 45A of the Uniform Rules of Court, which the Respondents did not pursue. Consequently, the Respondents' request was dismissed and the current application proceeded. [See: *Erstwhile Tenants of Williston Court and Others v Lewray Investments (Pty) Ltd and Another (GJ)* (unreported case no 17119/15, 10-9-2015) ; *Pine Glow Investments (Pty) Ltd and Others v Brick-On-Brick Property and Others* 2019 (4) SA 75 (MN)].

Previous Legal Proceedings

[9] Before dealing with the issues in dispute it is necessary to state the chronology of the previous litigation proceedings in which the same relief was sought, which are as follows:

- 9.1 The Applicant served his Notice of Motion and Founding Affidavit on the First Respondent on 2 February 2021 ("the main application").
- 9.2 Accordingly, the First Respondent had until 16 March 2021 to file a Notice of Intention to Oppose and until (if a Notice of Intention to Oppose had been filed timeously) 13 April 2021 to file an Answering Affidavit.
- 9.3 The Applicant's Notice of Motion and Founding Affidavit was served on the Second Respondent on 1 March 2021.
- 9.4 Accordingly, the Second Respondent had until 12 April 2021 to file a Notice of Intention to Oppose and until (if a Notice of Intention to Oppose had been filed timeously) 10 May 2021 to file an Answering Affidavit.
- 9.5 The Final Notice of Set Down, in respect of the application set down for 15 November 2022, indicates that the Notice of Set Down was served on 15 October 2021 and 19 October 2021, on the Respondents.
- 9.6 Despite service of the Notice of Set Down and despite being acutely aware of the Court date of 15 November 2021, the Respondents did not take any positive action in relation to these proceedings, nor did they file a Notice of Intention to Oppose or make contact with the Applicant's attorney of record.
- 9.7 Pursuant thereto, the application was set down on the unopposed motion roll of 15 November 2021. On 15 November 2021 the Honourable Madam Justice Molopa-Sethosa J, after considering the documents filed

and hearing Counsel on behalf of the Applicant granted the following order:

1. *"The First Respondent is compelled to consider the Applicant's application regarding the finalisation of the applicant's Permanent Residence application in terms of Section 26(b) of the Immigration Act 13 of 2002 (as amended) within 30 days of service of this order;*
2. *In the event that the First Respondent does not comply with the first prayer, the Applicant is authorised to approach the Honourable Court on the same papers, duly supplemented, for an order compelling the Respondents to issue the Applicant with a Permanent Residence (sic) in terms of Section 26(b) of the Immigration Act 13 of 2002 (as amended)."*

9.8 From prayer 1 of the Court Order it is clear that a positive obligation was put on the Respondents to perform within thirty (30) days from date of service of the Court Order. In the Joint Practice note (par 16.3) the parties conceded that the Court has already adjudicated upon the merits of the matter. The Court will deal with this aspect below. From prayer 2 of the Court Order it is clear that the Court granted the Applicant leave to approach the Court on the same papers, duly supplemented, to confirm the issuing of the Permanent Residence Permit, in the event that the Respondents do not comply with prayer 1 of the Court Order.

9.9 It is evident from the documents filed that the Court Order was served on the Respondents and the Office of the State Attorney on 24 November 2021, 29 November 2021 and 1 December 2021. Thus, the Respondents had until 31 December 2021 to consider the Applicant's application and are therefore in contempt of the Court Order from 1 January 2022 onward.

- 9.10 Despite being served with the Court Order the Respondents to date did not act/comply in terms thereof. The Respondents failed to explain their contempt and why they did not act within the thirty (30) days period since becoming aware of the Court Order alternatively which steps they took in order to try and comply with the Court Order.
- 9.11 As a result of the Respondents' failure to take a decision regarding the Applicant's Permanent Residence Permit within the stipulated time frame provided for in the above Court Order, the Applicant set the matter down on the unopposed motion role for Tuesday, 7 June 2022. The Final Notice of Set Down, in respect of the application set down for Tuesday, 7 June 2022, was served on 11 May 2022.
- 9.12 The Respondents only entered a Notice of Intention to Oppose on Monday, 6 June 2022 (one day preceding the hearing of the application set down for 7 June 2022). The Notice of Intention to Oppose was therefore filed 15 months late (in relation to First Respondent) and 14 months late (in relation to the Second Respondent).
- 9.13 On 7 June 2022 the Honourable Justice Baqwa J granted the following order:
- "1. *The matter is postponed sine die;*
 2. *The First and Second Respondents are hereby ordered to serve and file its opposing affidavit together with a substantive condonation application within a period of 15 (fifteen) days from date of service of this order;*
 3. *In the event that the First and Second Respondents do not comply with prayer 2 (Two) above, the Applicant is duly authorised to approach the Honourable Court on the same papers, duly supplemented, for an order compelling the Respondents to issue the Applicant with a permanent residence permit in terms of*

section 26(b) of the Immigration Act, Act No. 13 of 2022, as amended and;

4. *Costs reserved."*

- 9.14 The above Court Order was served on the Respondents' attorneys on 15 July 2022 albeit being uploaded on case lines on 13 July 2022. The Respondents Answering Affidavit was served on the Applicant's attorney of record in July 2022, which is not within the 15 (fifteen) days' time period as stipulated in the above Court Order.
- 9.15 From prayer 2 of the above Court Order it is clear that the Respondents were ordered to serve and file their opposing affidavit together with a substantive condonation application within 15 (fifteen) days from service of the order.
- 9.16 The only logical interpretation of prayer 2 of the above Court Order, concerning the service and filing of the Respondents' opposing affidavit and substantive condonation application, is that condonation should address the entire period of delay for filing an opposing affidavit from 13 April 2021 until July 2022 for the First Respondent, and from 10 May 2021 until July 2022 for the Second Respondent. This is because in the current Answering Affidavit the Respondents oppose the merits of the Founding Affidavit in the main application. The Court will address the issue of condonation below, if needed.
- 9.17 However, the Court will address whether the course of action followed by the Respondents on 7 June 2022, and the subsequent order granted was competent in law. This consideration takes into account that the Court Order granted on 15 November 2021, was a final judgment, was not complied with, and had not been rescinded at that time.

- 9.18 It is trite that once a Court Order is granted, a Court has no power to alter or change the Order so granted (See: *Firestone SA Ltd v Gentricuco* 1977 (4) SA 298 (A) at 306).
- 9.19 All Court Order will be valid and binding unless set aside (See: *Department of Transport v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC)). It is common cause that the Court Order granted on 15 November 2021 has not been rescinded.
- 9.20 The Court agrees with the submissions made by Counsel for the Applicant in his heads of argument that once an Order is granted, the litigants are bound to the specific order and a litigant cannot ‘oppose’ the Court Order after it has been granted, as is the case with the Respondents in the current application.
- 9.21 If the Respondents wish to challenge/oppose the Court Order granted on 15 November 2021, they should have pursued the appropriate legal process. They should have applied to the Court to rescind the Order and sought leave to oppose the application afresh. The Respondents cannot circumvent their difficulties by simply filing an Answering Affidavit in Court, for an existing and competent Court Order, and thereby disregarding its binding nature. Consequently, the Respondents’ application for condonation for the late filing of their Answering Affidavit is also not competent. The Respondents, in the Joint Practice Note, have acknowledged that “*an order remains in force until set aside*”. They have also indicated their intention to file a rescission application in the Joint Practice Note, for the Court Order granted on 15 November 2021, which was indeed filed on the day of the hearing of the current application.

Court’s Finding

- [10] Although the Court did not postpone the matter pending the hearing of the rescission application, it finds now that after reviewing the founding affidavit,

answering affidavit, and replying affidavit, along with their annexures, it cannot ascertain the true and correct situation due to various unsubstantiated allegations made by both parties.

- [11] Despite the Court raising concerns about previous Orders granted, it has no power to alter or change the Order(s) so granted. The Court noted that when the Order was granted on 15 November 2021, the matter was unopposed. An answering affidavit has now been filed, correctly or incorrectly so, and the Court was obliged to perused/review all affidavits submitted. The Court has considered the submissions made in the Joint Practice Note that the Honourable Court on 15 November 2021 disposed of the merits of this matter and the 180-day period for bringing an application for review in terms of PAJA of the decision of the Respondents. However, the Court is uncertain whether the Honourable Judge condoned non-compliance with the provisions of PAJA in the event that the Applicant failed to comply with the provisions of PAJA and/or failed to file a condonation application, as the matter was unopposed at that stage.
- [12] As previously stated, during the hearing on 15 November 2021, the matter was unopposed, and no opposing affidavit was before the Court, which is not the case in this current application. The Court is also requested to review the Respondents' failure/lack of taking a decision regarding the Applicant's Permanent Residence application. Therefore, the Court needs to look at the merits of the matter and make sure of the true and correct position before making any decision regarding the Applicant's Permanent Residence Permit. From the answering affidavit, it appears that various decisions have been taken by the Respondents before the matter proceeded to Court on 15 November 2021. Based on the information before this Court it cannot ascertain what the true and correct situation is.
- [13] There are various discrepancies, which appear as factual disputes between the parties, such as the date when the Applicant made his first and last application for his Permanent Residence Permit, the nature of the marriage relationship between the Applicant and his ex-spouse, allegations of alleged fraudulent

affidavits by the Applicant on behalf of his ex-spouse, allegations of a alleged fraudulent signature on a document, allegations that the Applicant allegedly fraudulently obtaining a letter of good cause, allegations that the Applicant allegedly provided false information during the application process regarding his marital status after his divorce, allegations that the Applicant failed to attach and/or mention previous applications, and allegations that the Applicant did not honour his 2019 appointment. Neither party requested the Court to refer these matters to trial.

- [14] In order for the Court to consider the Respondents' condonation application it must have regard to the merits of the application to ascertain the Respondent's prospects of success. For reason stated above, the Court is not in a position to make an informed decision.
- [15] Furthermore, the Respondents have not provided defined reasons for rejecting the Applicant's applications on the basis that there was no marriage of good faith between the Applicant and his ex-spouse. There is no information of the time, date, and nature of the investigations conducted by the Respondents before rejecting the Applicant's previous applications, nor details on when and how the previous decisions were conveyed to the Applicant.
- [16] For reasons stated above, the Court finds that postponing the current application pending the hearing of the rescission application will best serve the interests of justice.

THEREFORE, the following order is granted:

1. The application is postponed *sine die* pending the hearing of the Rescission Application;
2. The Applicant to file and serve his Notice of Intention to Oppose within 5 (five) days from date of service of this Order;

3. The Applicant to file and serve his Answering Affidavit within 15 (fifteen) days from date of filing and serving his Notice of Intention to Oppose;
4. The Respondent to file and serve its Replying Affidavit within 15 (fifteen) days from date of the filing and serving of the Applicant's Answering Affidavit.
5. Cost to be reserved.

SIGNED ON THIS 23rd DAY OF MAY 2024.

BY ORDER



SM MARITZ AJ

Appearances on behalf of the parties:

Counsel for Applicant	:	Adv S Kroep
Instructing Attorneys for Applicant	:	Burgers Attorneys
Counsel for Respondents	:	Adv MN Kgare
Instructing Attorneys for Respondents	:	State Attorney, Pretoria

Date of Hearing : 7 February 2024

Date of Decision : 23 May 2024