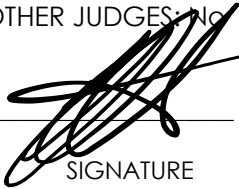


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	REPORTABLE: No
(2)	OF INTEREST TO OTHER JUDGES: No
<u>4/6/2021</u>	
DATE	SIGNATURE

Case No.: 2020/30056

In the matter between:

NKOSI, AZARIA NSIMBINI

Applicant

and

THE MINISTER OF HOME AFFAIRS

First Respondent

THE DIRECTOR-GENERAL
OF THE DEPARTMENT OF HOME AFFAIRS

Second Respondent

THE MINISTER OF SOCIAL DEVELOPMENT

Third Respondent

THE DIRECTOR-GENERAL
OF THE DEPARTMENT OF SOCIAL DEVELOPMENT

Fourth Respondent

THE MEMBER OF THE EXECUTIVE COUNCIL
FOR THE DEPARTMENT OF SOCIAL DEVELOPMENT,
GAUTENG PROVINCE

Fifth Respondent

SOUTH AFRICAN SOCIAL SECURITY AGENCY

Sixth Respondent

JUDGMENT

This judgment was handed down electronically by circulation to the parties' legal representatives by email and is deemed to be handed down upon such circulation.

Gilbert AJ:

1. The applicant, an unemployed adult male born in 1952 seeks a variety of relief directed principally at requiring the Director-General of the Department of Home Affairs ("the Director-General" and "the Department", used interchangeably) to take a decision whether to issue him with an identity document. The applicant seeks this relief as it appears that an identity document is required to enable him to apply for social assistance in the form of an older persons grant in terms of the Social Assistance Act, 2004.¹ The applicant also seeks relief against *inter alia* the sixth respondent effectively directing that he be given and paid social assistance within thirty days.
2. The applicant's complaint is that the Director-General has failed to make a decision in terms of the Identification Act, 68 of 1997 whether to issue him with a green bar-coded identity document. Although the decision that the Director-General failed to make is not referenced and the relief is not formulated with precision in relation to the applicable legislation in the notice of motion and founding affidavit, "[i]n constitutional litigation, where

¹ Regulation 11(1)(a) of the Regulations relating to the Application for and Payment of Social Assistance and the Requirements or Conditions in respect of the Eligibility for Social Assistance, published under GN R898 in GG 31356 of 22 August 2008.

*infringements of rights entrenched in the Bill of Rights are at issue, it is in any event inappropriate to adopt an overly technical attitude to the relief sought by an applicant”.*²

3. Section 15 as read with section 3 of the Identification Act requires every South African citizen and persons who are lawfully and permanently resident in the Republic who has attained the age of 16 years in the prescribed form and within the prescribed period to apply for an identity card. Although not positively stated in the Identification Act that the Director-General must then consider the application and come to a decision, this is necessarily inferred. While the Identification Act provides for the issue of ‘identity cards’, section 25 of the Identification Act provides for a transitional arrangement permitting the Director-General to continue to issue green, bar-coded identity documents. Although section 25(1) provides that the Director-General shall continue to issue the green, bar-coded identity documents in accordance with the previous Identification Act, 72 of 1986, the proper statute under which an applicant’s entitlement lies is the Identification Act, 1997.³

4. As the parties agreed during the course of argument before me as to principally the appropriate relief to be granted, effectively by consent subject to my formulation of an appropriate order encapsulating the relief and to my making a determination in relation to costs, it is unnecessary to detail at any great length the facts.

² *Fourie and another v Minister of Home Affairs and others* 2005 (3) SA 429 (SCA), para 100.

³ *Sibiya v Director-General: Home Affairs and Others, and 55 Related Cases* 2009 (5) SA 145 (KZP), para 12.

5. It is common cause, alternatively not seriously disputed, that:
 - 5.1. the applicant applied on 24 October 2016 to the Director-General to be issued with an identity document;
 - 5.2. the applicant had applied simultaneously with his sister for the issue of an identity document. His sister was issued her identity document some seven months later on 12 June 2017 but he was not;
 - 5.3. he subsequently made various enquiries of the Department of Home Affairs, commencing on 14 June 2017, first personally and then through the assistance of attorneys, the most recent being by his present attorneys of record through a formal demand made on his behalf on 19 May 2020;
 - 5.4. although not entirely clear, during the course of these various queries the applicant ascertained that an investigation was underway in relation to his application, but no details were furnished by the Department. Although section 12 of the Identification Act provides for a verification of details by the Director-General by way of requests and investigations, it does not appear that these powers were formally invoked;
 - 5.5. on 8 October 2020 the applicant issued the present proceedings against *inter alia* the Director-General seeking to review under section 6(2)(g) as read with section 3(1)(a) of the Promotion of

Administrative Justice Act, 2000 (“PAJA”) the failure of the Director-General to take a decision on his application for an identity document;

- 5.6. the respondents delivered answering affidavits during November 2020, which included an answering affidavit on behalf of the Director-General in which it was stated under oath that an investigation is underway and that “*regrettably, such investigation took longer than expected and such delay has resulted to this application before this Honourable Court*”. During the course of argument, I was informed by the respondents’ counsel that the investigation was still underway;
- 5.7. the deponent for the Director-General states in the answering affidavit that there were discrepancies between the applicant’s application that he had submitted on 24 October 2016 and an application that the Director-General asserts the applicant submitted previously on 23 April 2003. Both the 2003 and 2016 applications are annexed to the answering affidavit, but these are barely legible. The copy of the 2016 application annexed by the applicant to his affidavit is illegible. A comparison between the various applications cannot be made. The Director-General does not disclose the circumstances giving rise to the Department uncovering and attributing to the applicant what the Department contends is the earlier 2003 application;
- 5.8. the applicant in his replying affidavit delivered on 30 November 2020 does not respond substantively to these discrepancies raised by the

Department of Home Affairs, but simply states that he notes the averments.

6. Notwithstanding the applicant having made application as long ago as 24 October 2016, the Department of Home Affairs' position is that some four and a half years later it is still investigating the matter. As far as can be gathered from the papers the first time that the Department gave any reason why an investigation was underway was in its answering affidavit in November 2020 with reference to its sketchy description of the discrepancies.
7. In my view, the applicant was justified in approaching the court for assistance to effectively compel the Director-General to make a decision. It does not appear from the respondents' affidavits as to when the Director-General would conclude the investigation and would make a decision in relation to the application. The Director-General does not proffer any substantiated explanation for the period already taken in relation to its investigation other than to contend, in argument, that the Director-General is inundated with applications, many of which are fraudulent, and therefore investigations take time. The averments that appear in the Director-General's affidavit appear to be largely generic, with little regard being given to the particular facts of this case. It is now four and a half years later and but for the applicant having engaged attorneys to launch these proceedings, the matter may have dragged on indefinitely and without the applicant even knowing that the Department was concerned about certain discrepancies.

8. The respondents contend that the applicant's difficulties are of his own making as he had previously made an application in 2003 with particulars that differed from that made by him in his 2016 application. But this presupposes that it was the applicant who made the application in 2003 and that the applicant was in some or other respect at fault. This determination cannot be made on the papers.
9. The respondents also argue that the applicant had various alternate remedies available to it such as approaching the Department to ascertain what the position was in relation to his application. But it is clear from the papers that numerous attempts were made, including through his attorney, to engage with the Department but to no avail. The Identification Act does not provide for an internal remedy.
10. The respondents further contends that the applicant prematurely approached court and that the applicant was aware that an investigation was underway, and he should therefore have awaited the outcome of the investigation. As is apparent from what is set out above these submissions have no merit in circumstances where but for the applicant approaching court, the investigation may have dragged on indefinitely.
11. On the other hand, the applicant has not taken either the court or the Director-General into his confidence by seeking to constructively and substantially engage with the discrepancies now raised, albeit belatedly, by the Department in its answering affidavit. Had he done so, a decision in relation to his application for an identity document may have been

significantly advanced, if not even made by the time the matter was to be heard on the opposed roll. It is somewhat strange for the applicant having sought an explanation from the Department for over four years when presented with the Director-General's difficulties to then not engage with those difficulties.


12. Whatever delays may have been experienced, the Department has now under oath in its answering affidavit raised its concerns in justification as to why an investigation is underway. As the applicant has not engaged with those concerns, it would be premature to consider mandatory relief requiring either the Director-General to issue the applicant with an identity document or the Department of Social Development to provide the applicant with social assistance. The Department has raised its difficulties and the applicant needs to engage with those difficulties, so that the investigation can be finalised and a decision made by the Director-General.
13. It is in these circumstances that the parties during the course of argument agreed that it would be appropriate that after the applicant was furnished a suitable period in which to make submissions, the Director-General make a decision in relation to the applicant's application for an identity document. To this end, the parties agreed that the applicant should be afforded thirty days to make submissions to the Director-General whereafter the Director-General would be afforded sixty days to complete whatever investigation was underway and to make a decision.

14. Given the form of the relief that was agreed, and is to be granted, condonation for any late launching of these review proceedings does not appear necessary. Nonetheless, having regard to the facts described above and in the affidavits, and that the applicant does seek condonation, and that it is a matter of some nicety as when the clock starts ticking in relation to an applicant reviewing a *failure* to take a decision where no period is stipulated within which the decision was to be taken,⁴ I grant such condonation in terms of section 9(2) of PAJA.
15. The only outstanding issue related to costs.
16. In my view, the applicant was justified in approaching the court given the unreasonable delay of the Director-General in dealing with the applicant's application. The applicant, who is unemployed, was compelled to engage the services of legal practitioners to assist him to assert what may well be his constitutional rights to be issued with an identity document and to obtain social assistance if he so qualifies. The applicant asserts that he is a South Africa citizen (he asserts that he was in October 2016 issued with a South African identity number and his foreign birth registered, which the respondents do not appear to squarely challenge, at least at this stage). I do not make any positive finding in this regard other than to find that the applicant was entitled to far more expedition from the Director-General than he received and that he was justified in bringing the application.

⁴ See *Sibiya* above, para 16 and 17.

17. On the other hand, once the applicant was aware of the Director-General's concerns as set out under oath in the answering affidavit, he has had an opportunity to substantively deal with those concerns, either in approaching the Department or substantively in his replying affidavit. The Director-General in its answering affidavit expressly records that "*it is in the interests of justice that the applicant must explain the discrepancies between the 2003 and 2016 identity document applications, before a valid identity document can be issued*". Notwithstanding this invitation, the applicant did not do so.
18. In my view, an appropriate costs award is that the first and second respondents be ordered to pay the costs of the application up until and including the delivery of their answering affidavit on 16 November 2020 and that there be no order of costs thereafter.
19. Although the applicant has not obtained any form of substantive relief against the remaining respondents in relation to the relief directed at obtaining social assistance, given that the applicant was seeking to vindicate what he contends are his constitutional rights and as all the respondents are represented by the State Attorney, in my view no costs should be granted in relation to those respondents.
20. The following order is made:
 - 20.1. Condonation is granted to the applicant in terms of section 9(2) of the Promotion of Administrative Justice Act, 2000;

- 20.2. The applicant is afforded thirty (30) court days from the date of this order to make such representations as he wishes, if any, to the second respondent in relation to his application to the second respondent for the issue of an identity document, whether in the form of an identity card as provided for in the Identification Act, 1997 or a green, bar-coded identity document as referred to in section 25 of that Act.
- 20.3. The second respondent is directed to make a decision in relation to the application within sixty (60) court days of the expiration of the period in the preceding sub-paragraph. The second respondent is entitled to exercise its powers of verification as provided for in section 12 of the Identification Act and/or such other powers that it may have in relation to the application provided that it does so within the stipulated period of sixty days and provided that it nevertheless makes its decision within the period of sixty days.
- 20.4. The second respondent is to inform the applicant of its decision within five (5) days of making the decision, by way of notification to the applicant's attorneys Dlamini Legal Inc and Matlale Matladi Attorneys.
- 20.5. There is no order of costs, save that the second respondent is to pay the applicant's costs up to and including the first and second respondents' answering affidavit of November 2020.



Gilbert AJ

Date of hearing: 3 June 2021

Date of judgment: 4 June 2021

Counsel for the Applicant: Mr B M Khumalo

Instructed by: Dlamini Legal Inc (Tsakane)

Counsel for the Respondents: Ms B S Maphosa

Instructed by: The State Attorney, Johannesburg