IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ***NO***

(2) OF INTEREST TO OTHER JUDGES: ***NO***

(3) REVISED: **NO**

Date: ***19 SEPTEMBER 2022*** Signature:

CASE NO: 11599/2019

In the matter between:

VALENTINE OKECHUKWU MMUONURUKOM Applicant

(ASSYLUM REFERENCE NO: PTANGA001750516)

And

THE MINISTER OF HOME AFFAIRS First Respondent

THE DIRECTOR-GENERAL, DEPARTMENT OF

HOME AFFAIRS Second Respondent

REFUGEE STATUS DETERMINATION OFFICER (RSDO)Third Respondent

THE CHAIRPERSON OF THE STANDING COMMITTEE

FOR REFUGEE AFFAIRS Fourth Respondent

THE CHIEF IMMIGRATION OFFICER HOME AFFAIRS

DEPARTMENT OF HOME AFFAIRS Fifth Respondent

JUDGMENT

NYATHI J

A. INTRODUCTION

[1] The Applicant is an asylum seeker who is aggrieved with the rejection of his application for refugee status which he had made at the offices of the Respondents. He now approaches court by way of review proceedings, applying for the following orders:

1.1 That the proceeding before the Fourth Respondent under file No: PTANGA001750516 in which the Fourth Respondent confirmed the decision of the Third Respondent regarding the Applicant's application for Refugee Status be reviewed and set aside.

1.2 That the matter be referred back to the Fourth Respondent for re-hearing on the basis that the rules of natural justice and the provisions of the promotion of Administrative Justice Act 3 of 2000 (PAJA) have to be complied with.

1.3 That the Department of Home Affairs be directed to re-issue the Applicant with a Temporary Asylum Seekers Permit within Fourteen (14) days from the date of this court order.

1.4 Directing the Respondents and/or any party that opposes the application to pay costs on an attorney and own client scale including costs of counsel.

B. **POINT IN LIMINE**

[2] At the inception of the hearing of this application, Counsel for the Respondents raised a point in limine.

[3] The objection relates to the fact that the Applicant's notice of motion and founding affidavit do not contain a prayer for condonation since this application for review has long lapsed/prescribed. In terms of provisions of the PAJA, on which Applicant relies, the review ought to have been launched within 180 days of the letter of rejection. At the very latest by 20 November 2016.

[4] In terms of section 7 (1) of PAJA the review should have been launched before the expiry of 180 days. Applicant has not dealt with the extent or length of the delay or tried to explain it in an acceptable way in his papers.

[5] The application is further opposed on the basis that the Applicant's application for refugee status was based on reasons that fell outside the scope of section 3 of the Refugees Act 138 of 1988 which contains three grounds upon which refugee status may be granted. The Applicant does not meet any of the grounds.

[6] The Applicant recorded on his own, without any undue influence, and while in his sober senses, on the eligibility form, that he came to South Africa because his uncle wanted to kill him over farmland. His uncle, according to him, also killed the Applicant's father. The Applicant's mother, siblings, and Applicant himself remained. The Applicant thereafter left for Lagos and thereafter to South Africa.

[7] It is evident that the Fourth Respondent considered all relevant information when confirming the rejection of the Applicant's application for refugee status.

[8] The Applicant's application for condonation is made from the bar. It is nowhere in the papers. Applicant has dismally failed to engage with the jurisdictional requirements of section 9 (1) of PAJA necessary to enable this court to exercise its discretion in his favour to grant him condonation in circumstances where he failed to pray for same in his notice of motion.

[9] It is trite that in motion proceedings the Applicant stands or falls by their papers.

[10] Through this belated application the Applicant is making a disguised attempt to delay the finalisation of this matter, which the Respondents eagerly await in the interests of justice to finalise his deportation to his native country since he is now an illegal immigrant.

[11] The Respondents contend that this application fails to get off the starting blocks and ought to be dismissed with costs.

C. **RESPONSE TO THE POINT IN LIMINE**

[12] In reply to the point in limine raised on behalf of the Respondents, it was submitted that the decision that is subject of this review application was taken on the 19 May 2016. The Applicant then returned to the Respondents' offices on the 24 November 2016 when he was given another document. He was then arrested on the 22 December 2016. He was advised to get an attorney but lacked funds to do so.

[13] He then launched a review application on 17 August 2017. His attorney was not helpful, so he terminated the mandate. He has now in the current attorney of records who assists him pro bono.

D. **APPLICANT'S FOUNDING AFFIDAVIT**

[14] The Applicant is an adult male Nigerian National who is an asylum seeker currently residing at Germiston.

[15] On arrival in South Africa on 7 April 2016, he met a Nigerian national called Greg at the OR Tambo International Airport. Greg introduced himself as a collaborator with a Nigerian Non-Government Organisation

which he then realised had sponsored his ticket to South Africa. He stayed with Greg at the latter's house.

[16] On 19 May 2016, under the direction and assistance of Greg, he went to the Respondent's offices in Pretoria to apply for a refugee permit.

[17] He would face risk of persecution and danger to his life if he were to return to his country of origin.

[18] He brings the application in his own interest in terms of section 38 (a) of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution").

E. THE GROUNDS FOR JUDICIAL REVIEW; THE DECISIONS OF THE RESPONDENTS:

[19] This application relates to lawfulness, reasonableness and procedural fairness of the decisions of:

19.1 The Refugee Status Determination Officer ("RSDO") to reject Applicant's application for asylum.

19.2 The Standing Committee on Refugees Affairs ("SCRA") for dismissing Applicant's appeal against the decision of the RSDO:

19.3 The Director-General and the Chief Immigration Officer to detain Applicant for the purposes of deportation back Nigeria without offering him an opportunity to exercise his rights of review and appeal in terms of the Promotion of Administrative Justice Act (PAJA).

[20] The decisions of the Respondents fall within the definitional ambit of "Administrative action" as provided for in section 33 of the Constitution and as such are reviewable by this Honourable Court either in terms of the Constitution or section 6(2) of PAJA.

F. LEGAL PROVISIONS RELATING TO CONDONATION

[21] Before engaging with the detailed merits of this application it is apposite to consider the legal provisions applicable to condonation applications. The

principles applicable in applications for condonation are trite. The court may on good cause shown, condone the non-observance of the time frames in a matter.

[22] The leading case on condonation applications is Melane v Santam Insurance Co. Ltd 1962 (4) SA 531 (A). The court defined good cause as follows:

In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are:

a) the degree of lateness,

b) the explanation therefor,

c) the prospects of success and

d) the importance of the case

e) prejudice on the opposing party

[23] The court continued:

"Ordinarily these facts are interrelated, they are not individually decisive, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus, a slight delay and a good explanation may help to compensate prospects which are not strong. Or the importance of the issue and strong prospects may tend to compensate for a long delay. And the Respondent's interests in finality must not be overlooked"

[24] In *Obsidian Health (Pty) Ltd v Makhuvha [2019] JOL 46118 (GJ)* Windell J held that an Applicant must stand or fall by the allegations made in the founding affidavit and cannot make out its case in the replying affidavit.

[25] In *Northam Platinum Ltd v Ganyago N.O. (Case No. JR 2337/2007) ZALCJHB*, it was held that an applicant stands or falls by his grounds of review set out in its notice of motion.

[26] In *Jacobus Erasmus Johannes Van Der Merwe v Minister of Police (Case No 2530/2018)* it was stated at Paragraph 11 that: "This court is mindful of the fact that not only the explanation for the delay, but also the prospects of success in the main action, are important factors in determining whether condonation should be granted in a case. If strong merits or prospects of success are shown, it may mitigate the fault of the applicant in applications for condonation. A court may then exercise its discretion in favour of the applicant, despite a poor explanation for the delay."

G. **CONCLUSION**

[27] The procedure in the Refugees Act provides for internal remedies for an unsuccessful or dissatisfied applicant for refugee status. Such applicant may lodge an internal appeal within 10 days of the letter of rejection from the decision of the RSDO to the SCRA and onwards to the CIO. He may alternatively, take the matter up for review within 180 days of the rejection of his application.

[28] From the Applicant's founding affidavit, his rights of appeal and/or review were explained to him. Hence, he commenced the review process with his initial attorney. Due to tardiness on his part, he is now blaming his attorney for not handling his application properly. That excuse does not hold water. In *Colyn v Tiger Food Industries 2003 (6) SA 1 (SCA)* it was held that an Applicant cannot always escape liability for the default of the legal representative chosen by him. That is if at all that explanation ventured by the Applicant in this matter has any truth to it at all.

[29] From a careful perusal of the facts in this matter in their totality, I am not persuaded that the Applicant has any prospects of success in this matter at all. It would be an exercise in futility to grant condonation, which has not been sought by the Applicant at any rate.

[30] The review application is inordinately out of time and stands to be dismissed.

[31] Considering the circumstances in which the Applicant finds himself, making an order that costs should follow the cause would not serve any purpose.

[32] Accordingly, the following order is made:

(1) The application for condonation for the late filing of the review application is dismissed.

(2) The application for the relief as set out in the Applicant's Notice of Motion is dismissed.

(3) I make no order as to costs.

J.S. NYATHI

Judge of the High Court

Gauteng Division, Pretoria

Date of reasons for Judgment: 19 September 2022

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