

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 42417/2020

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

3rd November 2022

.....

Date

.....

ML TWALA

In the matter between:

**KUL:
APPLICANT**

JOYCE

KAY

NAMWAN

(ID NO: [...])

And

**THE MINISTER OF HOME AFFAIRS
RESPONDENT**

JUDGMENT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the judgment is deemed to be the 3rd of November 2022

TWALA J

[1] This is an application brought by the applicant who seeks an order against the respondent in the following terms:

- 1.1 Ordering the respondent, within ten days of the service of this order, to take all steps necessary, to issue a South African identity document to the applicant;
- 1.2 Ordering the respondent, within ten days of the service of this order, to take all steps necessary, to issue a South African passport to the applicant;
- 1.3 Ordering the respondent to pay the costs of this application on an attorney and client scale.

- [2] The applicant was born in South Africa on the 18th of February 1999. The applicant was issued with a birth certificate and when she was six years old she was issued with a South African passport. In 2005, apparently the applicant was left in the care of the family of Mvita, who were family friends at the time, by his father who informed the Mvitas that he was going through a bitter divorce with the mother of the applicant who had already left the Country. To date neither of the parents came back to fetch the applicant after she was left in the care of the Mvitas. After some time at the home of the Mvitas, she was taken in by her father's cousin, Watshibangu Tshibangu. She has no recollection of her parents and has never seen them since. Both the Mvitas and Tshibangus never followed the process of formally adopting her.
- [3] When she turned sixteen years of age, Mr Mvita accompanied her to the offices of the respondent to apply for an identity document but she was turned back for, as a minor, she was required to be accompanied by her parents or legal guardian. When she turned twenty-one years old, she again went to apply for an identity document but she was again refused on the basis that, as a first time applicant, she must be accompanied by her parents or guardian. She engaged the officials of the respondent on this issue but they refused to assist her. She engaged the service of her attorneys but the officials of the respondent were adamant that she needed the assistance of her parents or guardian.
- [4] At the outset the respondent testified in its answering affidavit that it is not opposed to issuing the applicant with the identity document but stressed that, in order to prevent fraud, which the respondent has to deal with on a daily basis, due process must be followed before the applicant is issued with the identity document. Furthermore, the respondent is still busy with its

investigation in this matter and therefore the application is premature. The applicant should have approached the Court with a review application since the decision of the respondent to not issue the applicant with an identity document or its failure to decide whether or not to issue the applicant with an identity document is an administrative decision.

[5] Furthermore, the respondent testified that it was still investigating the circumstances of the applicant's application in that on the 1st and 2nd of November 2018 the parents of the applicant attended at offices of the respondent and signed an affidavit for the late registration of the birth of the applicant. On the 22nd of August 2019 the father of the applicant attended at the offices of the respondent and collected the document known as "F/B.F062M". Faced with these discrepancies, that the applicant was abandoned by its parents and they never came back to fetch her and or that they have left the country, it cannot be said that the respondent is unreasonable in requesting more information from the applicant which the applicant has failed and or refused to provide or to co-operate with the respondent. The persons who attended at the offices of the respondent as parents of the applicant gave their address in Cape Town and the applicant refuses to investigate these persons at the given address.

[6] To put matters in the proper perspective, it is necessary to restate the provisions of the relevant legislation in this case which is following:

"The Promotion of Administrative Justice Act, 3 of 2000 ("PAJA")

Section 1

Administrative action means any decision taken, or any failure to take decision by –

(a) An organ of state, when-

- (i) *Exercising a power in terms of the Constitution or a provincial constitution; or*
 - (ii) *Exercising a public power or performing a public function in terms of any legislation.*
- (b).....

Section 3

- (1) *Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.*

Section 5

- (1) *Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.*
- (2) *The administrator to whom the request is made must, within 90 days after receiving the request, give that person adequate reasons in writing for the administrative action”.*

Section 6

- (1).....
- (3) *If any person relies on the ground of review referred to in subsection (2)(g), he or she may in respect of a failure to take a decision where –*
- (a)(i) *an administrator has a duty to take a decision;*

- (ii) *There is no law that prescribes a period within which the administrator is required to take that decision; and*
- (iii) *The administrator has failed to take that decision, institute proceedings in a court or tribunal for judicial review of the failure to take the decision on the ground that there has been unreasonable delay in taking the decision;*

[7] It is trite that one of the constitutional responsibilities of a Minister, like the respondent in this case, is to ensure the implementation of legislation. This responsibility is an administrative one and ordinarily constitute administrative action.

[8] The essential question in this case is whether or not the conduct of the respondent through its officials can be described as administrative action as contemplated in section 33 of the Constitution of the Republic of South Africa, Act 108 of 1996 which provides as follows:

“Section 33 Just Administrative Action

- (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.*
- (3) National legislation must be enacted to give effect to these rights, and must-*
 - (a) Provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;*

- (b) *Impose a duty on the state to give effect to the rights in subsection (1) and (2); and*
- (c) *Promote an efficient administration.*

[9] In *President of the Republic of South Africa and Others v South African Rugby Union and Others* (CCT 16/98) [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059 (10 September 1999) the Constitutional Court stated the following:

“Paragraph 139 It can be seen from these provisions that members of the executive in the national and provincial spheres have a range of responsibilities: for preparing and initiating legislation; for developing policy; for co-ordination of government departments; for implementing legislation and for implementing policy. A similar range of responsibilities is conferred upon the executive councils of municipalities. One of the tasks of the national and provincial executives (and municipal executives) is therefore to ensure that legislation and policy are implemented. The process of implementation is generally carried out by the public service. Members of the executive, of course, have other functions as well, such as the development policy and the initiation and preparation of legislation, which are not directly concerned with administration.

[10] The Court continued to state the following:

“Paragraph 141 In section 33 the adjective ‘administrative’ not ‘executive’ is used to qualify ‘action’. This suggests that the test for determining whether conduct constitutes ‘administrative action’ is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is

administrative or not. It may well be, as contemplated in Fedsure, that some acts of a legislature may constitute ‘administrative action’. Similarly, judicial officers may, from time to time, carry out administrative tasks. The focus of the enquiry as to whether conduct is ‘administrative action’ is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising”.

- [11] It is apparent in this case that the applicant has applied to the respondent to be issued with an identity document and a passport. It is also plain that the issuance of the identity document is dealt with by the respondent in the execution of its constitutional functions and duties. It follows ineluctably therefore that the conduct of the respondent, through its officials which are part of the public service, is an administrative action as contemplated in section 33 of the Constitution. It is therefore not open to the applicant to approach this Court with an applicant to compel the respondent to issue an identity document and passport without first exhausting the procedures laid down in PAJA.
- [12] There is no merit in the applicant’s contention that PAJA would only be applicable if the respondent had failed or refused to issue the identity document and passport. In this case the respondent has not made a decision whether to issue these documents or not. According to PAJA, if an organ of state takes any decision or fails to take any decision and such decision or failure to take a decision materially and adversely affects the rights of an individual, the affected individual has the right to ask for written reasons for that decision and to proceed to Court, should need be, to seek an order that such a decision or failure to decide be reviewed and set aside.

[13] It is my considered view therefore that the applicant has its remedies under PAJA and not by way of an interdict for it fails to meet all the three requirements of an interdict, which are, a clear right, reasonable apprehension of harm and no other remedy available in due course. The applicant fails on the third requirement of an interdict for there is another remedy available to it under PAJA, which is the review of the decision taken or failure to take a decision by the respondent and its officials. The unavoidable conclusion is therefore that the application falls to be dismissed.

[14] Even if I am wrong on the point that the applicant should have followed PAJA in this case, the application is still unmeritorious in that the respondent is entitled by statute to investigate and ascertain, in order to avoid fraud which has engulfed the respondent's department in recent times, that all processes are followed. Section 12 of the Identifications Act, 68 of 1997 provides that the Director-General ("DG") may request any person to furnish it with proof of the correctness of any particulars which have been furnished in respect of such person and may investigate or cause to be investigated any matter in respect of which particulars are required to be recorded in the population register. The applicant has furnished certain particulars to the DG and the DG is entitled to investigate the correctness thereof.

[15] As indicated above, the respondent has requested the applicant to furnish certain information and documents and the applicant's simple answer is that she does not have those documents. The applicant even refused to assist the respondent in tracing the persons who attended at the respondent's offices and made themselves out as the applicant's parents. It is quite disturbing that the applicant, who alleges that she does not know much about her parents whom she alleges abandoned her, would not want to trace these people when she is given their names and address by the respondent. It is further

surprising that the applicant would not want to meet its parents and find out why and how was it abandoned.

[16] I do not agree with the applicant that she does not need to bring her parents or legal guardian to the offices of the respondent because she is now a major and was initially issued with the birth certificate and passport by the respondent. In terms of section 7 of the Births and Deaths Registration Act, 51 of 1992, the respondent is still entitled to require the person who has furnished any particulars, like the applicant in this case, to furnish proof of the correctness of such particulars and to afford the respondent such time to investigate the correctness of such information or particulars.

[17] It is undisputed that in November 2018 the respondent received information from people who completed forms and registered the birth of the applicant as her parents. The applicant has been furnished with the particulars of these people but refused to confront the situation and clear the air that these persons are not her parents that abandoned her when she was only six years old. Faced with this conflicting information, it would be absurd to deny the respondent an opportunity to investigate the correctness of such information. Furthermore, it cannot be said that the delay in the investigation is unreasonable for the applicant refuses to participate and assist to speed up the process. It is my respectful view therefore that the process followed by the respondent in this case is fair and reasonable and the application falls to be dismissed.

[18] In the circumstances, the following order is made:

The application is dismissed with costs.

TWALA M L

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of Hearing: 24th October 2022

Date of Judgment: 3rd November 2022

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