HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 40010/2017

12/2/18

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.
(3) REVISED.
DATE 12/02/2018
SIGNATURE

In the matter between:

MULUGATA DANIEL JAMOLE Applicant

and

THE DIRECTOR-GENERAL HOME AFFAIRS First Respondent

THE MINSITER OF HOME AFFAIRS Second Respondent

JUDGMENT

DAVIS, J

[1] The applicant is an asylum seeker with a valid asylum seeker permit. The two Respondents are the Director-General of the Department of Home Affairs and the Minster of Home Affairs.

The applicant's position and the "rejection letters":

[2] The applicant came to South Africa in 2006 already, that is more than eleven years ago. He fled from Ethiopia due to political unrest at the time. He applied for asylum and was granted an asylum seeker permit.

[3] The permit, which has been extended from time to time is one issued in terms of Section 22 of the Refugees Act, No, 130 of 1998 (the Refugees Act) which provides as follows:

> "22(1) the Refugee Reception Officer must, pending the outcome of an application in terms of Section 21(1), issue to the applicant an asylum seeker permit in the prescribed form allowing the applicant to sojourn in the Republic temporarily ..."

[4] Section 21 of the Refugees Act is the section in terms of which asylum seekers apply for asylum. Such applications are then decided upon by a Refugee Status Determination Officer in terms of section 24 of the said act who may, in terms of section 24(3) grant asylum, reject the application or refer any question of law to the Standing Committee.

[5] In terms of the statutory regime in place at the time when the applicant initially entered the country it was either required of him or it was at least preferred that he maintain himself. For this purpose he managed to transfer his Ethiopian assets in excess of R2, 5 million to South Africa in order to establish a business.

[6] In 2011 he was issued with a valid business visa to conduct his own business, which he has been doing since. The business has been running for more than 10 years. This, the applicant says, proves its feasibility. It is a well-established business, employs 7 people of which four are South African citizens, and its capital investment complies with Reg 14 of the Immigration Regulations, 2014 and which capital investment has grown to over R5 million. The business is profitable and tax-compliant.

[7] Prior to the lapsing of the business visa, the applicant applied for an extension of the visa for a further period of 5 years to 2021. His application for extension forms part of the founding papers and comprises some 208 pages.

[8] On 29 June 2016 the applicant received a letter dated 14 June 2016 wherein he was advised by the First Respondent that his application for extension of his business visa was unsuccessful. The "rejection letter" simply stated as reasons the following:

> "Application is rejected. The reasons for the decision is the following: (1) comments: the applicant is not meeting the requirements in respect of feasibility and national interest."

[9] The applicant utilized the internal remedy available in terms of Section 8 (4) of the Immigration Act No 13 of 2002 (the Immigration Act) and appealed the rejection of his application for extension. His appeal also forms part of the founding papers.

[10] The appeal was also unsuccessful and in the "rejection letter" dated 25 August 2016 the reasons were simply noted as follows by the relevant official:

> "I refer to your appeal in respect of a Business visa application. I wish to inform you that I have decided to uphold the decision to reject your

> application for a temporary residence visa. Reason for rejection dated 2016-06-14 is still valid. According to the recommendation letter from Department of Trade and Industry is not recommending the business as according to them it does not meet the requirements in respect of the feasibility and national interest".

[11] Irrespective of the deficiencies of sensibility contained in the letter, the applicant again made use of the internal remedy available as advised in the aforesaid rejection letter and made written representations in terms of section 8(6) of the Immigration Act. These representations were made on 16 September 2016 and also form part of the founding papers.

[12] Yet again, the representations were unsuccessful and on 17 March 2017 the "rejection letter" in this regard advised the applicant as follows:

> "Application for review or appeal in terms of section 8(6) of the Immigration Act, 2002 Re: yourself.
>
> Your application for an Appeal bears reference.
>
> I wish to inform you that I have decided to uphold the decision to reject your application for Business Visa.
>
> - No person holding an asylum seeker permit is allowed to change status whilst in the country
>
> Your application for temporary residence is rejected."

[13] The lack of particularity of reasons as well as the disjunctive and conflicting contents of the three rejection letters prompted the applicant's present review application.

The review application

[14] The review application was brought on by way of a notice in terms of Rule 6 and not in terms of Rule 53. It was previously postponed for service on the Minister of Justice and Constitutional Development as a result of a constitutional point raised by the applicant with which I shall deal later.

[15] When the matter again came before court on 13 October 2017, a representative of the respondent made an appearance in court, despite no notice of opposition having been filed. The matter was again postponed *sine die* and an order was by agreement made as follows:

> "2. The Respondents are ordered to consider and file an answer to the Applicant's application within 30 (thirty) days from the date of this order, failing which the Applicant is entitled to approach this court for an order on the same papers, duly supplemented.
>
> 3. The Respondents are ordered to pay the costs ..."

[16] The respondents have failed to comply with the aforementioned court order and no answering affidavits have been filed by any of them.

[17] Instead, the applicant received yet another "rejection letter" from the office of the First Respondent, the relevant part of which reads as follows:

> "Your application for an appeal dated 19 September 2016 bears reference.
>
> I wish to inform you that I have decided to uphold the decision to reject your application for a Business Visa Section 15.
>
> - Rejected: The decision is based on the fact that no person holding asylum seeker permit may apply for a change of status while in the Republic in terms of Sec 10 (6)(a) of the Immigration Act (Act no13of 2002) as amended

- Negative recommendation form the Department of Trade and Industry (application does not meet the requirements in respect of feasibility and national interest).

Your application for temporary residence is rejected. Kindly be informed that you are requested to leave the country within 14 working days."

[18] In response, not only did the applicant's attorneys point out to the respondents that they have failed to comply with a court order but the obvious questions were asked as to whether the letter, dated 9 November 2017 constituted their answer to the application, their reasons for the previous decision, a repeat of their previous rejection letters or simply a *bona fide* error (last mentioned question presumably based on the fact that the Respondents were clearly *functus officio* in respect of the 16 September 2016 Section 8 (6) appeal). Not surprisingly, no clarification was forthcoming and the Respondents remained both silent and in default until the matter came before me on 5 February 2018.

Relief claimed

[19] Apart from a review and setting aside of the decisions contained in the rejection letters dated 14 June 2014, 25 August 2016 and 13 March 2017, and the remittal thereof to the Respondents, the applicant also claims that the Respondents be "*directed to afford due weight to the factual and legal findings in this judicial review application when reconsidering the Business Extension Application of the Applicant*". It is this last-mentioned relief which necessitated this judgment (as opposed to the simple granting of relief on an unopposed basis by default).

[20] In addition, the Applicant claims:

> "1. That the directive which was issued by the First Respondent on the 3rd February 2016 and in terms of which the First Respondent withdrew circular no 10 of 2008 confirming the 11 November 2008 Dabone Court Order, is declared inconsistent with the constitution of the Republic of South Africa, 1996 and invalid and is set aside".

Analysis

[21] In order for administrative action to qualify for reviewability, the following seven elements must be present, namely that it must be:

- a decision
- by an organ of state (or natural or juristic person)
- exercising a public power or performing a public function
- in terms of legislation
- that adversely affects rights
- that has a direct, external legal effect and which does not fall under any of the listed exclusions.

See: Hoexter, Administrative Law in South Africa, Second Edition at 197 and the cases mentioned there.

[22] It is abundantly clear that the decisions sought to be impugned by the applicant do not fall in the listed exclusions (such as the exercise of executive power, legislative or judicial functions and decisions otherwise expressly listed in the Constitution) and otherwise satisfy all the above elements.

[23] In terms of the Promotion of Administrative Justice Act, No 3 of 2000 (PAJA), a court will have the power to review the decisions if, in the context of this application, the decisions were materially influenced by an error of law (s 6(2)(d)), were taken for a reason not authorized by the empowering provision (s 6(2)(e)(i)), were taken because irrelevant considerations were taken into account or relevant considerations were not considered (s 6(2)(e)(iii)) or were taken arbitrarily (s 6(2)(e)(iv)). The decisions may also be reviewed and set aside if they were so unreasonable that no reasonable person could have so exercised the power in terms of which the decisions had been taken (s 6(2)(h)) or where the decisions were otherwise unconstitutional (s 6(2)(i)).

[24] Despite the somewhat confusing and contradicting contents of the "rejection letters" as described above and in which both the decisions and their purported reasons appear, the decisions appear to be twofold, namely:

- the business visa extension application was refused
- any change in the applicant's status was refused.

[25] The reasons for the refusal of the business visa extension were simply that according to "comment" received from a different state department (the DTI), the applicant's business was judged to be not feasible and not in the national interest. As a reason for the second decision, the reason furnished was simply that the applicant may not, as the holder of an asylum seeker permit apply for a change of status while in the Republic.

[26] Section 33(2) of the Constitution gives every person adversely affected by a decision the right to be furnished with written reasons for such a decision. Section 5(2) of the PAJA requires these reasons to be "adequate". Almost fifteen years ago already the Supreme Court of Appeal had in Minister of

Environmental Affairs & Tourism v Pambili Fisharies (Pty) Ltd 2003 (6) SA 407 SCA laid down that adequate reasons should be specific, be written in clear language and be of a length and detail appropriate to the circumstances. It should not be in the form of vague generalities and should set out facts which lead to the conclusion. Decisions such as Kiva v Minister of Correctional Services (2007) 28 ILJ 597(E), Commissioner, South African Police Service v Maimela 2003 (50 SA 480(T) and Nomala v Permanent Secretary, Department of Welfare 2001 (8)BCLR 844(E) all lead one to the conclusion that, dependent on the circumstances of the case, the nature and complexity of the decision, the reasons furnished should be in such a form and contain such detail so that the person affected knows exactly why his application had failed.

[27] In the present matter, neither the applicant not the court knows what the comment of the DTI entailed, what it was based on, why the existing and flourishing business was not deemed to be feasible, whether the non-feasibility related to size, turn-over, profitability, number of employees or extent of investment and neither does one know what yardstick was utilized to determine "national interest" or in what measure or fashion did the business not satisfy such interest.

[28] The lack of adequate reasons, both in itself and as purported justification for the decision, renders the decision, when weighed against the facts set out by the applicant arbitrary, irrational and so unreasonable that no reasonable person would have made the same decision. Alternatively, relevant considerations have either been ignored or not been given their due weight. All the requirements of PAJA for reviewability mentioned above have therefore been satisfied.

[29] I now turn to the issue of whether a person such as the applicant, holding an asylum seeker permit may legally apply for a change of status while in the Republic.

[30] It must at the outset be remembered that, in terms of section 22(5) of the Refugees Act once an asylum seeker leaves the Republic without the consent of the Minister of Home Affairs, his or her asylum seeker permit lapses. Apart from this, the very reasons why asylum seekers fled to the Republic are often the main reason why they don't want to leave the Republic and any applications regarding their status or any change thereto are therefore often made from within the Republic.

[31] An asylum seeker permit issued in terms of section 22 of the Refugees Act is, by its nature, temporary. It lapses once the application for asylum itself, made in terms of section 21 of the said Act is granted by the Refugee Status Determination Officer in terms of section 24 (3) (a) or when the application has been rejected and all the appeal processes against such rejection have been exhausted as provided in Chapter 4 of the said Act.

[32] A person's status changes from that of an asylum seeker to that of a refugee once asylum has been granted (s.1 of the Refugees Act). After such change, a refugee may then apply for an immigration permit in terms of section 27(c) of the same Act after five years continuous residence in the Republic calculated from date of the granting of asylum and if the Standing Committee certifies that he will remain a refugee indefinitely. This enabling provision is mirrored by sec 27 (d)of the Immigration Act which provides that the First Respondent "*may subject to any prescribed requirements, issue a permanent residence permit to a foreigner of good character who ... is a refugee referred to in section 27(c)of the Refugees Act*".

[33] The First Respondent contends that, because of the existence of the enabling provision contained in section 27 (c) of the Refugees Act, "*no change of condition or status should be premised on the provisions of the Immigration Act for a holder of an asylum seeker permit which claim to asylum has not been formally recognized by SCRA*" (last-mentioned being a reference to the Standing Committee for Refugees Affairs, established in terms of section 9 of the Refugees Act).

[34] The First Respondent's above quoted view is contained in "Immigration Directive No 21 of 2015". In addition to the aforesaid view, this directive states that the "*management and issuance of asylum seeker permits is administered through the Refugees Act while the management and the regulation of admission of foreigners ... is done through the Immigration Act*". The directive further determines that "Departmental Circular no10 of 2008" is "officially" withdrawn. (It also mentioned that the circular has "fallen away since 26 May 2014" but no detail, nor facts supporting this alleged "falling away" have been placed before the court).

[35] Departmental Circular No 10 of 2008 was a circular issued by the First Respondent on 18 April 2008 whereby an unreported judgment of the Cape Provincial Division (as it was then known) in Dabone & Others v Minister of Home Affairs and Another case no 7526/03 was made policy in the Department and which replaced a previous passport instruction. I was not furnished with a copy of the unreported judgment but could trace the order itself on the Legal Resources website. It provided that the Respondents in that matter (the same respondents in this matter) may no longer require that asylum seekers cancel their permits issued in terms of section 22 of the Refugees Act in order to apply for permanent residence in terms of section 26 and 27 of the Immigration Act and that the Respondent's may no longer require that asylum seekers or

refugees posess a valid passport in order to be issued with a temporary residence permit or to apply for and be issued an amendment to such permit. The contents of this order was incorporated in Department Circular 10 of 2008 and forwarded to all stakeholders, including the Standing Committee for Refugees.

[36] The applicant stated in his founding affidavit that "*the dispensation which followed after the Dabone judgment recognized the merit of the principle that once an asylum seeker's circumstances changed so that he/she is no longer a refugee he/she could otherwise qualify for a residence visa*". He further accuses the Respondents of adopting a "formalistic approach".

[37] Conceivably, the Respondents may be concerned about foreigners entering the Republic in the guise of asylum seekers only to gain entry with the intention, not of seeking asylum, but of obtaining residence. This concern is however already statutorily catered for by section 24(3)(b) of the Refugees Act which provides that an application for asylum may be rejected if found to be "manifestly unfounded, abusive or fraudulent". On similar grounds the asylum seeker permit itself may be withdrawn in terms of section 21 (6)(b) or when a person ceases to be a refugee as provided for in section 5 of the same Act.

[38] There is however a fundamental difficulty with the Respondents' position to which neither the applicant nor its counsel had referred me to and it is this: in a well researched judgment of Sher AJ, *inter alia* reported as Ahmed v Minister of Home Affairs and Another 2017 (2) SA 417 WCC, the Immigration Directive No 21 of 2015 has been declared to be inconsistent with the Constitution and invalid and has been set aside. I have perused this judgment and the cases referred to therein and am in respectful agreement with the learned

judge in the conclusions reached. Consequently, any reliance on this Directive as justification for the Respondents' decisions falls away.

[39] Furthermore, and even in the absence of a declaration of invalidity (or even if some appeal might be pending against it, of which the Respondents have failed to inform the court) the applicant in this matter is in an even stronger position than the applicants in the Ahmed-case. The applicants in the latter were failed asylum seekers, whilst the present applicant is, pending a decision on his asylum application not. His (current) position is therefore less precarious than that considered in particular in paragraphs [49] – [53] in the Ahmed-case.

[40] The judgment and order in the Ahmed-case were given on 21 September 2016. The Respondents must have been aware of this, having been parties thereto. Despite this and insofar as the Respondents rely on the rejectment letter of 13 March 2017 (and, in their latest letter of 9 November 2017, insofar as this may also constitute a decision to be reviewed and not merely reasons for prior decisions), on the contention "*that no person holding an asylum seeker permit may apply for a change of status while in the Republic in terms of ... the Immigration Act*" (and not on the Directive itself), such a contention is clearly in itself wrong in law and unconstitutional. The grounds of unconstitutionality applicable to the Immigration Directive 21 of 2015 as set out in the Ahmed-case are equally applicable to this ground of justification for the rejection of the applicant's application. I do not find it necessary to repeat the contents of the said judgment, save to confirm that, as in the Ahmed-case, the Frist Respondent's decisions offend against the applicant's right to dignity in terms of s.10 of the Constitution. Insofar as the impugned Immigration Directive has already been set aside by a court, it is not necessary to do so again as requested by the applicant in paragraph 1of its notice of motion

Costs:

[41] The conduct of the Respondents, both in the manner in which they dealt with the applicant's appeals contrary to an existing judgment of the High Court and in dealing with this application in this court by failing to comply with a court order made by consent, merit a punitive costs order.

[42] Order

1. The decisions by the Respondents, dated 14 June 2016, 25 August 2016 and 13 March 2017 respectively (including, insofar as either of the Respondents may seek to rely on a decision contained in the letter dated 9 November 2017, such decision as well) in terms of which the Business Permit Extension Application (and the appeals / reviews in respect thereof) of the Applicant had been rejected, are hereby reviewed and set aside and remitted to the Respondents for reconsideration.

2. The Respondents are directed to accord due weight to the findings expressed in this judgment when reconsidering the Business Permit Extension Application of the Applicant.

3. The Respondents are ordered to pay the costs of the application on the scale as between attorney and client.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 5 February 2018

Judgment delivered: 12 February 2018

APPEARANCES:

For the Applicant:	Adv. J Willemse
Attorney for Applicant:	McMenamin Van Huysteen & Botes Inc
For the Respondents:	No appearance
Attorney or respondents:	State Attorney, Pretoria