

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



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

CASE NO: 065931/2023

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

DATE 02/04/2024
LENYAI J

In the matter of:

B[...] G[...] S[...]

First Applicant

T[...] A[...] Y[...]

Second Applicant

AND

**THE MINISTER OF HOME AFFAIRS FOR
THE REPUBLIC OF SOUTH AFRICA**

First Respondent

**THE DIRECTOR GENERAL: DEPARTMENT
OF HOME AFFAIRS
Respondent**

Second

**MOTSOALEDI PAKISHE AARON
Respondent**

Third

This matter has been heard in terms of the Directives of the Judge President of this Division dated 25 March 2020, 24 April 2020, and 11 May 2020. The judgment and order are accordingly published and distributed electronically. The date and time of hand-down is deemed to be 14:00 on 02 April 2024

J U D G M E N T

LENYAI J

[1] This is an application to review the decision of the Department of Home Affairs taken on 15th August 2022. The decision pertains to the refusal by the Department of Home Affairs to grant a spousal visa to the second respondent, on the basis that at the time of making the application, the applicants had not been in a permanent spousal relationship for at least two years.

[2] The applicants aver that the matter originated in the urgent court but was not enrolled as the court held that it was not urgent. This resulted in the matter being enrolled on the normal roll. The applicants are seeking the following orders from the court, that:

2.1 The decision of the Department of Home Affairs (DHA) dated 15th August 2022, to refuse second applicant's application for a change of status based on a spousal relationship with first applicant be set aside and the DHA be ordered to issue second applicant with a visa under section 11(6) of the Immigration Act 13 of 2002 which visa is to provide

for the unlimited and unrestricted right to work and do business, and which is to endure until second applicant, within three months of so qualifying, applies for and is granted permanent residence or as might otherwise be ordered by the High Court or any other higher court;

2.2 The refusal of the Director General of the DHA (DG) to consider the appeal that was served on the DG by Sheriff on the 26th September 2022 be declared to be unlawful, irregular and unconstitutional and in as far as might be necessary be set aside and the DG as well as the Minister are directly ordered to issue the visa as set out above or to see to it that the said visa is issued forthwith;

2.3 The applicants are excused from deploying any further internal remedies and the Minister of the DHA is directly ordered to see to it that the visa set out in 2.1 above is issued forthwith;

2.4 The Minister of DHA and the DG of DHA, are to pay all the costs of this application, including Counsel's fees, *de bonis propriis* personally, the one paying the other to be absolved, which fees shall be taxable on the scale as between attorney and own client.

[3] The applicants aver that, the first applicant is an adult male who is a South African Citizen and permanently residing in the country since birth (March 1953) and the second applicant is an adult woman of Brazilian Nationality aged 40, who is the spouse to the first applicant. They have been in a permanent heterosexual spousal union, in cohabitation with each other exclusively since March 2020.

[4] The applicants aver that second applicant made an application in terms of section 11(6) of the Act for a spousal visa on 2nd December 2021 whilst lawfully and legally in the country on a visitor's visa. The application was declined on 15th August 2022 and the reason as stipulated in the notice of decision was that *"you have not been good faith spousal relationship for a period of two years with Mr B[...] S[...]."* The applicants contend that it is indisputable that nowhere in the Act or Regulations is there any specific stipulation that says a spousal visa may not be applied for unless the spousal union is at least two years old. In the rejection letter it was stipulated that: *"You may within 10 working days from date of receipt of the notice, make a written representation to the Director-General to review the decision through [www.vfsglobal.com/dha\(southafrica](http://www.vfsglobal.com/dha(southafrica), by submitting an Appeal online. Should you fail to make representations, or fail to keep the Department informed of your whereabouts, the decision set out above shall remain effective."*

[5] The applicants aver that the second applicant received an SMS sometime in August 2022 advising her that a letter of decision on her application was at VFS Polokwane for personal collection. The applicants submit that they were diving in Mozambique at the time and could not immediately fetch the letter and could only collect the said letter on 19th September 2022 after returning from their trip.

[6] The applicants aver that they are bringing this application in terms of PAJA and in as far as it may be necessary to have a cutoff date for this application in terms of the 180 days allowed by section 7, would be 30th July 2023. Accordingly, this application is well within time.

[7] The applicants also contend that there is ongoing litigation between the parties, which is also centered on the visa in question, and which is pending in this Court under case number 041947/2022. This matter was heard on 2nd May 2023 and judgement has been reserved. The applicants contend that the said matter is distinguishable from the matter before court though the subject matter would appear to be the same.

[8] The applicants submit that the application was completely in order but for what the adjudicator considered to be the lack of 2 years. They further submit in the founding affidavit at paragraph 35 that the rejection letter is irregular in that:

“(a) it does not specify which provision of the law it is that should have been complied with and was not: i.e. where it is laid down that there must be a two-year relationship;

(b) it does not show what the basis or starting point of the adjudicator’s calculation is.

(c) There is thus a ‘due process’ failure not only as to giving proper reasons or reasons intrinsic to the decision that must be taken but also

as to deliberately, and thus unlawfully, hiding the process from transparency and scrutiny.

- (d) Nowhere in the Act is there any stipulation that in a change of status application based on a spousal union, the union must be two years old before such an application can be made. On the contrary all that Section 11(6) requires, apart from the applicant holding a 'visitor's visa', is a 'foreigner who is a spouse...' - i.e. that, simpliciter, a spousal relationship must be in existence.*
- (e) In FA-1, thus, all the required criteria are properly established and fulfilled and there was no legal or factual basis for rejecting the application. This, in my submission, is the legal situation today before this Honourable Court and is the basis on which the relief sought must be granted."*

[9] The first applicant avers that he *'was quite disenchanted with the quality of the advice they received from attorneys and consultants who professed to be specialists in Immigration law,'* and he conducted his own research and downloaded the Act and the Regulations and began searching for the two-year requirement. He found the said requirement in Regulation 3. The applicants contend that the manner in which the two-year requirement has been inserted in the regulation, as something that must be put in a notarial agreement that must serve a manner of proving that a relationship exists, leads to all sorts of illegalities, invalidities, incongruities, and irregularities.

[10] The applicants aver that they were aggrieved by the refusal for the spousal visa and an appeal was lodged as stipulated in the rejection letter. The applicants contend that they tried to upload the appeal on the address referred to in the rejection letter, but their efforts were futile. At paragraph 46 of the Founding Affidavit, the applicants aver that:

“... There is no website with such an address but what does pop-up on the screen are Links to the ‘VFS Global’ general web-site. Nowhere on that web site can anything be found or be seen that refers to, relates to, mentions, or accommodates the lodgment of any ‘appeal’ or review. Screen shots of these facts are attached at the end of the affidavit.”

[11] The applicants aver that as a result, they were forced to serve the appeal by sheriff on the DG as well as by emailing it to whatever address they could find for the VFS on 28th September 2022. In the appeal it was emphasized that they accepted that the DG needed some tool to weed out sham unions and they were prepared to go along with the invalid two-year requirement. The applicants stated in the appeal that because the internal appeal is a *de novo* hearing, the two-year time frame if enforceable, must be applied as at the time that the DG would be dealing with the appeal. According to the applicants the relationship was already then past 31 months.

[12] The applicants aver that section 11(6) of the Act is the only provision which opens the door for a visa based on a spousal relationship. They contend that the Section read together with Regulation 9 must be read and understood in

terms of the Constitutional Court's judgment in the matter of **Nandutu and Others v Minister of Home Affairs and Others (CCT114/18) [2019] ZACC 24; 2019 (8) BCLR 938 (CC); 2019 (5) 325 (CC) (28 June 2019)**. The first applicant pointed out that the Constitutional Court ruled that the spousal visa is the visa contemplated by Section 11(6) and is separate and distinct from the general visitor's visa.

[13] The applicants aver that the appeal was an opportunity to the DG to rectify a wrong that should have never occurred. They contend that they were entitled to have the visa issued in the first instance as the application was compliant. They further aver that a decision on, a visa application is not final, binding and irreversible. The applicants submit that the DHA always remains free to make a U-turn and grant an application previously refused as well as to seek out and engage the applicant for any other information that it may lawfully require. The DHA also has powers to waive certain requirements and they place their reliance on Sections 30(2) and 31(2) (c) of the Act.

[14] The applicants contend that the wrongful refusal of a spousal visa quite apart from making the foreign spouse an illegal foreigner, creates a torturous prison for the couple who for instance, as in their case, dare not cross the borders for fear of having a passport being stamped *non-grata*. Furthermore, the foreign spouse cannot have a livelihood since without a spousal visa, that spouse cannot acquire work or money. This will result in that spouse not being able to

retain their dignity and cannot contribute financial and emotional support that defines a spousal union.

[15] The applicants aver that their appeal was not acknowledged by the DG and not knowing what to expect and also wanting the freedom to travel as a married couple, they launched an urgent application on the 4th November 2022 under case number 41947/2022. A *Rule Nisi* on the was granted 5th December 2022 which stated that:

“1.1 Pending the reconsideration by the Director General of the application by T[...] A[...] Y[...] of a spousal visa or residence permit, and any further internal or judicial appeals, or reviews that might ensue, T[...] A[...] Y[...], holder of a Brazilian passport No [...] is hereby given the right to:

1.1.1 Move in and out of the Republic of South Africa as if she were a permanent resident and all persons commanding border posts or any port of entry of the RSA are hereby required to give effect to this order;

1.1.2 Subject to the requirements of the South African Revenue Service, to work and do business in the Republic.

1.2 Without any manner derogating from the foregoing order, 1st or 2nd Respondents and any person commanding any borders post or port of entry are ordered to issue forthwith and on demand whatever ‘visa’ or ‘permit’ might be needed to give effect to the foregoing orders.

1.3 *In the event of the spousal relationship aforesaid ending for any reason whatsoever, (a) the foregoing provisions of this order shall lapse and be of no further force and effect and (b) the applicants, separately, shall be obliged, to advise the Department of Home Affairs in a manner to be designated by the said Department, accordingly.*

1.4 *It is declared that T[...] A[...] Y[...] has been in a spousal relationship with B[...] G[...] S[...] (RSA Id [...]) since 13 March 2020.”*

[16] The applicants submit that the reason for the application under case number 41947/2022, was that first applicant's visitor's visa was expiring on 10th December 2022. She ran the risk of being classified an illegal foreigner after that date. The applicants further submit that this was a precautionary step that they had to take, seeing that they could not find any specific statutory or regulation for the protection of foreigners who have lodged appeals against the refusal of a change of status.

[17] The applicants aver that what is directly relevant to this application before Court out of case number 41947/2022, is that on 28th January 2023 the DG filed an answering affidavit in which he stated that because the appeal had not been lodged with VFS, it does not exist. The applicants aver that this is contrary to how internal reviews are to be lodged in terms Regulation 7 of the Immigration Act. This decision to refuse to consider the appeal by the DG is therefore reviewable. The applicants contend that to remit the matter back to

the Respondents or allowing for further internal remedies will serve no purpose at all.

[18] The applicants further contend that again based on the answering affidavit, the *Rule Nisi* had to be extended on the 2nd February 2023. B[...] also took the view that it was appropriate to amend the notice of motion in case number 41947/2022 and base it on a common law *mandamus* for the immediate issuance of the visa. This application was to be heard on the 2nd February 2023 on an urgent basis. The matter was ruled not urgent, and it was eventually heard on the 2nd May 2023 and judgment was reserved. The applicants contend that although this may seem like the *mandamus* application has the same target as this review application, the cases are distinct from each other. Firstly, Case 41947/2022 is not a PAJA review, it is a case for the inclusion of a common law *mandamus* based on Legality. Secondly, how the court decides case 41947/2022 is not a known factor and has no bearing on the issues that arise in the PAJA review. Thirdly, the PAJA review is a separate *lis* which may or may not have its own set of further appeals.

[19] B[...] contends that he has waited two months for the decision in case number 41947/2022, in which time the DHA could have issued the visa and dropped its unjustified refusal. Furthermore, the turn of events in case 41947/2022 and his amended demand for issuance of the visa therein, presented the DHA with

a further chance to issue the visa. The Applicants contend that the court must interfere and order the issuance of the visa forthwith.

[20] The respondents on the other hand contend that the applicants after becoming aware of the decision to refuse the visa application, have brought two urgent applications instead of a review. They only bring a review application 145 days outside the 180 days within which a review must be brought, without a condonation application for the delay.

[21] The respondents aver that the applicants have not demonstrated the exceptional circumstances which exempts them from exhausting internal remedies as provided for in terms of PAJA before bringing a review.

[22] The respondents further contend that the applicants were granted a *Rule Nisi* on 2nd May 2023 and judgment was handed down on 16th August 2023 in favour of the respondents. A notice for leave to appeal was lodged by the applicants, thus the Rule Nisi is reinstated. The respondents contend that the matter is *lis pendens*, as the matter is already pending before the Court where the subject matter is similar to the subject matter of this application.

[23] The respondents aver that the applicants may not demand the same relief more than once and are estopped from raising the same issues before court. They submit that the applicants filed their notice of application for leave to

appeal on the same day the judgement was handed down, 16th August 2023. The effect of the notice for leave to appeal is that the rights granted in the *Rule Nisi* are back before Court. Therefore, the applicants are estopped from raising the same issues between the same parties, in circumstances where the *Rule Nisi* already grants them the rights sought to be vindicated in this application.

[24] The respondents further contend that the Court must not allow the applicants who have since launched an appeal against the judgement of 16th August 2023, thus placing the matter back before Court, to launch a collateral attack. They submit that the rule against a collateral challenge is to prevent the launching of new proceedings to achieve an objective which is already before Court, or a final decision has already been obtained. The Respondents aver that this has been held to be an abuse of Court process.

[25] The respondents further contend that all the urgent applications including the matter before court now which started as an urgent matter, brought by the applicants pertain to the issuing of a visa through the Courts. No application for a travel visa as sought in this application, has been brought to the DHA. The respondents contend that this application must be dismissed with costs on a punitive scale.

[26] The law regarding the timing of review applications is stated in Section 7 of PAJA and provides that : “ *proceedings for a judicial review*” of an

administrative act must be instituted “ ... *without reasonable delay and not later than 180 days*” after the date of the reasons furnished for the decision.

This section is crystal clear in my view, and it is not ambiguous or difficult to understand.

[27] Turning to the matter before me there are two decisions that have been brought before court for review. The first decision is the refusal to grant a spousal visa and the second one is the refusal by the DG to acknowledge that there was an appeal lodged. The applicants contend that their review application is brought within the time limits and the respondents are submitting that the review application is hopelessly out of time.

[28] With regard to the first decision, the applicants first became aware of the decision on 19th September 2022 when they collected the rejection notice from the Polokwane VFS. It is common cause between the parties that the decision was made on 15th August 2022 and was collected by the applicants almost a month later. In the letter it was stated that in the event the first applicant was aggrieved by the decision, she had 10 working days from date of receipt of the notice within which to lodge her appeal, which she did. The appeal was served by sheriff on 26th September 2022 after having failed to upload it on the VFS website as directed in the rejection letter. It was only after the applicants found out after reading the respondent's answering affidavit in case number 41947/2022 that they realised that their appeal was

not being acknowledged by the respondents that they brought the review for both decisions.

[29] In my view all along the applicants were under the impression that their appeal was in the process of being considered until they read the answering affidavit which stated that because the appeal was lodged through the service by sheriff instead of VFS, such appeal does not exist. The said affidavit was served on 28th January 2023 on the applicants' attorneys.

[30] It has been held by both the Supreme Court of Appeal and the Constitutional Courts that where an internal appeal has been initiated against an administrative decision, the 180 days in terms of section 7 of PAJA does not run against the decision being appealed internally. See the matters of **Brummer v Minister for Social Development and Others (CCT 25/09) [2009] ZACC 21; 2009 (6) SA 323 (CC) 2009 (11) BCLR 1075 (CC) para 77, and South Durban Community Environmental Alliance v MEC For Economic Development, Tourism and Environmental Affairs, Kwazulu-Natal Provincial Government and Another (231/19) [2020] ZASCA 39; [2020] 2 All SA 713 SCA); 2020 (7) BCLR 789 (SCA); 2020 (4) SA 453 (SCA) para's 3-9**. Taking into consideration the authorities, I am of the view that the date from which the 180 days is to be calculated is the 28th January 2023 when the applicants became aware that their appeal was considered not to be in existence. The 180 days for both decisions would lapse on the 29th July

2023. The applicants' review application was filed on 6th July 2023 in compliance with Section 7 of PAJA.

[31] With regard to the internal appeal in question, the respondents made a proposal in their answering affidavit wherein an undertaking was made by the DG, "*to consider the internal appeal served to the DHA by Sheriff and have a decision communicated within 5 days.*" See para 170 of the answering affidavit at 01-282 on caselines. During arguments in open court the first applicant expressed a view that he did not believe the undertaking made by the DG under oath.

[32] The court is sympathetic to the frustration of the applicants, however I am of the view that in circumstances wherein an organ of State has reconsidered their decision not to consider an appeal because it was not brought to their attention in a preferred manner and are now willing and able to consider the appeal, they should be afforded an opportunity to do so. The DG is best suited to deal with such matters relating to visa applications of whatsoever nature, and the court is mindful of the doctrine of the separation of powers. The court will not interfere and intrude into the powers of the executive except in exceptional circumstances. In the matter of **Glenister v The President of the Republic of South Africa and Others 2009 (1) SA 287 (CC)** at para 33, the Constitutional Court held that the courts are the ultimate guardians of the Constitution and have the right to intervene to prevent the violation of the Constitution.

[33] I am of the view that the decision by the DG not to hear or consider the appeal because it did not come through VFS was regrettable and unlawful. Having decided above that the DG is best suited to deal with this matter, I am of the view that the matter must be remitted back to DHA and the DG for reconsideration. Having decided to remit the matter it is not necessary to deal with the other points *in limine* raised by the respondents and that is the end of the matter.

[34] Under the circumstances the following order is made:

1. The application is dismissed, and each party must bear their own costs.
2. The matter is remitted back to the respondents for the DG to consider the appeal lodged by the applicants within 14 working days of this order.

LENYAI J
Judge of the High
Court, Pretoria,
Gauteng Division

Appearances

Counsel for Appellant

: Adv B.G S[...]

Instructed by : Murray Kotze & Associates

Counsel for Respondent : Adv T.A Modisenyane

Instructed by : State Attorney, Pretoria

Date of hearing : 05 October 2023

Date of judgement : 02 April 2024