THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 233/11
Reportable

In the matter between:

MINISTER OF HOME AFFAIRS **APPELLANT**

and

T MABOHO AND 117 RELATED CASES **RESPONDENTS**

Neutral citation: *Minister of Home Affairs v Maboho* (233/11) [2012] ZASCA 42 (29 March 2012).

Coram: Cloete, Malan, Leach and Tshiqi JJA, and Plasket AJA

Heard: **13 March 2012**

Delivered: **29 March 2012**

Summary: **Identity document: order of court a quo directing that identity documents be issued to applicants, replaced with an order that their applications be considered, together with a structural interdict to facilitate the process. The problem of numerous applications for the same relief being brought by the same attorneys on virtually the same papers, discussed.**

ORDER

On appeal from: Limpopo High Court (Thohoyandou) (Makhafola J sitting as court of first instance):

1 The appeal against the order made by the court a quo succeeds, to the extent set out in paragraph 2.

2 The order made by the court a quo is set aside and the following order substituted in each application:

'(a) The Department of Home Affairs is ordered to consider the applicant's application for the issue of an identity document and file an affidavit with this court (with a copy to the applicant's attorney) on or before 29 June 2012, or within such further period as may be agreed by the parties or allowed by this court on good cause shown, stating:

(i) that an identity document has been issued to the applicant; or

(ii) that the applicant's application for an identity document has been refused, and if so, the reasons for the refusal; or

(iii) that if it has not been possible to process the applicant's application, the reasons therefor and if information is required for this purpose, what attempts have been made to obtain such information.

(b) Either party may on notice apply to this court for further or alternative directions for the purpose of bringing the application to finality.

(c) The costs to date are reserved.'

3 The appeals against the interlocutory orders made by the court a quo are dismissed.

JUDGMENT

CLOETE JA (MALAN, LEACH AND TSHIQI JJA, AND PLASKET AJA CONCURRING):

[1] In 2007 the 118 respondents, as applicants, each instituted motion proceedings in the Limpopo High Court, Thohoyandou, for an order directing the appellant, the Minister of Home Affairs, to issue them with temporary identity documents and thereafter, with identity documents. On 9 November 2009 the court a quo (Makhafola J) ordered that the former be furnished within three months, and the latter, within six months, of the date of the order. It would be convenient to refer to the parties as 'the applicants' and 'the Minister'.

[2] The Minister applied to the court a quo for leave to appeal against the order and three interlocutory orders. The court a quo dismissed the application and ordered the attorney dealing with the matter in the office of the State Attorney, Thohoyandou, to pay the costs of that application *de bonis propriis*. This court subsequently granted leave to appeal, set aside the costs order relating to the application for leave to appeal and ordered that those costs, together with the costs of the application for leave to appeal in this court, be costs in the appeal.

[3] It is not necessary to say anything more about the appeals against the interlocutory orders made by the court a quo than this: the issues raised were of such a nature that the orders sought on appeal would have no practical effect or result, save in regard to costs; and in my view, as counsel representing the Minister found himself unable to submit that exceptional circumstances existed that required questions of costs to be considered, these appeals should be dismissed in terms of s 21A of the Supreme Court Act, 59 of 1959.

[4] However, the appeal against the orders made by the court a quo requiring the Minister to furnish the applicants with identity documents, stands on a different footing. Before dealing with the appeal against those orders, it is necessary to set out the facts and the law.

[5] So far as the facts are concerned, we have before us only one application, that of Ms Tsireledzo Maboho. We were informed from the bar by counsel representing the Minister that, save in regard to the names of the applicants, their village addresses, their ages, the dates upon which and places where they applied for identity documents and the dates of their last attendances at the offices of the Department of Home Affairs, the applicants' founding affidavits were in identical terms. It is at this juncture that I wish to deal with the problems that have occurred, particularly in the Eastern Cape[1] and Kwazulu-Natal[2] in regard to social grant applications and applications similar to the present. That the problem persists, and is not limited to those jurisdictions, is illustrated by the 118 applications which are the subject matter of this appeal.

[6] The law reports are replete with reported cases (and one shudders to think how many unreported cases there have been) that show that there are very many persons who are entitled to social grants and identity documents who have not been provided with them due to laziness, lack of capacity or gross ineptitude in the government departments concerned. This has evoked a strong response from the courts: see for example the remarks of this court in *Permanent Secretary, Department of Welfare, Eastern Cape & another v Ngxuza & others* 2001 (4) SA 1184 (SCA) para 8 and *Jayiya v Member of the Executive Council for Welfare, Eastern Cape & another* 2004 (2) SA 611 (SCA) para 18. In the former case, Cameron JA said:

'The papers before us recount a pitiable saga of correspondence, meetings, calls, appeals, entreaties, demands and pleas by public interest organisations, advice offices, district surgeons, public health and welfare organisations and branches of the

[1]See eg *Vumazonke v MEC for Social Development, Eastern Cape and three similar cases* 2005 (6) SA 229 (SE) and cases referred to therein.
[2]See eg *Cele v South African Social Security Agency and 22 related cases* 2009 (5) SA 105 (D) and *Sibiya v Director-General: Home Affairs & others and 55 related cases* 2009 (5) SA 145 (KZP).

African National Congress itself, which is the governing party in the Eastern Cape. The Legal Resources Centre played a central part in co-ordinating these entreaties and in the negotiations that resulted from them. But their efforts were unavailing. The response of the provincial authorities as reflected in the papers included unfulfilled undertakings, broken promises, missed meetings, administrative buck-passing, manifest lack of capacity and at times gross ineptitude.'

In the latter case, Conradie JA referred to '. . . the laziness and incompetence which is at the root of the malaise in the Eastern Cape Department of Welfare . . . .' In *Vumazonke v MEC for Social Development, Eastern Cape and three similar cases* (above, n 1) Plasket J went so far as to direct the Registrar to serve copies of the judgment on the Premier of the Eastern Cape Province, the Chairperson of the Social Development Standing Committee of the Eastern Cape Provincial Legislature, the Minister of Social Development in the National Government, the Chairperson of the Human Rights Commission and the Chairperson of the Public Service Commission. In the *Sibiya* matter (above, n 2, para 63) Wallis J roundly criticised the inefficiency of the Department of Home Affairs in dealing with applications similar to the present. But if the applications which are the subject of the present appeal are anything to go by, the problem continues.

[7] The difficulty facing the courts is compounded by the desire of some attorneys not so much to assist members of the public to obtain their due, but to exploit the situation for personal gain. There can of course be no objection to attorneys assisting clients to assert their rights by litigation. That is a primary function of the attorneys' profession; and if some firms of attorneys are prepared to act pro bono or on a contingency basis, they are performing a public service. Nor can there be an objection if a standard format or precedent is used to bring an application on behalf of a number of clients ─ provided that the standard format is tailored to fit the circumstances of each particular applicant. Where the abuse comes in is where this is not done and the client (who more often than not is illiterate) deposes to allegations that are not relevant to his or her case or, worse, that are not true. This problem can be dealt with by the courts directly by scrutinizing each application. The court has the power in terms of Uniform rule of court 6(6) to make no order (save as to

costs) but to grant leave to the applicant on the same papers supplemented by such further affidavits as the case may require ─ or to dismiss the application. In deciding which course to follow, a court should of course be careful not to visit the sins of the attorney on the client ─ particularly where, in the words of Cameron JA in *Permanent Secretary, Department of Welfare, Eastern Cape & another v Ngxuza & others* above, at para 11, the applicants are 'drawn from the very poorest within our society' and 'have the least chance of vindicating their rights through the legal process'.

[8] Large scale litigation in similar matters by a particular attorney can of course be the product of touting, and can also lead to bills of costs in standard form being submitted for taxation where the amounts claimed do not accurately reflect the amount of work done by the attorney. In addition, taxation at the normal tariff applicable for individual applications may not be appropriate where an attorney has produced a 'job lot'. The problem is exacerbated by the fact that taxations are frequently unopposed and vast amounts of taxpayers' money are wasted.[3] Those abuses can, and one hopes they will be, addressed first by the law societies and, ultimately, by the courts.

[9] It is difficult to see what more high courts can do. As a matter of practicality, those most affected have introduced local rules to regulate the disposal of the avalanche of cases of the nature under discussion: rule 21 of the 'Joint Rules of Practice for the High Courts of the Eastern Cape Province (the Provincial Divisions Currently Known as the Ciskei Division, the Eastern Cape Division and the Transkei Division)' which came into force on 1 January 2008[4] and rule 30 of the 'Practice Manual of the KZN Division of the High Court'[5] which was circulated to practitioners on 1 June 2009, deal with social grant applications. Apart from that, the remedy most likely to achieve results is not an order directing compliance by government officials with the prescripts of the relevant legislation, but a structural interdict supervised by the court.[6]

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[3] *Ndevu v MEC for Welfare, Eastern Cape & another* unreported SECLD judgment in case 597/02 quoted in *Vumazonke* above, n 1, paras 4 – 5.
[4] *Erasmus Superior Court Practice* at D4-8C to E.
[5] *Erasmus* op cit at D9-14 and 15.
[6] See eg *Ngxuza & others v Permanent Secretary, Department of Welfare, Eastern Cape & another* 2001 (2) SA 609 (E) at 630C-D. As an example of how the court controlled the

[10] I return to the present appeal. In the application forming part of the record before us, Ms Maboho stated that she is 18 years old. On 9 May 2007 she applied for an identity document at the Gole Secondary School in Thohoyandou. She was assisted by employees of the Department in completing the necessary application forms; she furnished two photographs of herself, and her fingerprints were taken. She was not issued with a receipt. She was told to return after three months. She did so, and an employee of the Department, after checking on the computer system, advised her that her application had not been processed. She again made enquiries on at least two subsequent occasions, the last being on 5 October 2007, and received the same answer. She said that she was being severally prejudiced because, without an identity document, she could not apply for a driver's licence or a bursary, and she could not obtain employment, open a bank account, apply for a passport or vote.

[11] Counsel for the Minister pointed out that the same prejudice is alleged by all of the applicants; but that does not of itself reflect adversely on the veracity or the cogency of the allegations made. Had there been allegations that could not have been true, it was incumbent on the Minister's legal representatives to point this out. Nothing of this nature was raised. I have no difficulty in accepting at face value that each of the applicants are suffering the same prejudice. Indeed, the lack of an identity document carries with it so many disabilities that the prejudice speaks for itself.[7]

[12] So far as the law is concerned, the combined effect of the Identification Act 68 of 1997 and the Births and Deaths Registration Act 51 of 1992 may be summarised as follows:

(a) there is an obligation on South African citizens (whether or not outside the Republic), and persons who sojourn permanently or temporarily in the Republic, for whatever purpose, to have a birth registered within 30 days –

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operation of the order, see at 631ff.

[7]Contrast *Sibiya* above, n 2 paras 30-34.

although this can be done at a later date subject to further requirements being satisfied;[8]

(b) the particulars of a birth have to be recorded in the population register – but only in the case of persons who are South African citizens and persons who are lawfully and permanently resident in the Republic;[9]

(c) the Director-General of Home Affairs is obliged to assign an identity number to every person whose particulars are included in the population register;[10]

(d) any person who is a South African citizen or who is lawfully and permanently resident in the Republic is required, upon attaining the age of 16 years, to apply for an 'identity card'[11] but until a date determined by the Minister, green bar-coded identity documents will continue to be issued.[12]

[13] As I have said, the applications were instituted in 2007. Notices of intention to oppose were delivered on behalf of the Minister but no answering affidavit followed. Months went by. Eventually, in 2009, the matters were all set down for hearing. In heads of argument produced on the morning of the day on which the applications were to be heard, the legal representatives of the Minister for the first time submitted that, as the applicants had not alleged that they were South African citizens or had permanent residence, their applications were fatally defective.

[14] The court a quo gave its order on 9 November 2009 and its reasons more than six months later on 28 May 2010. The principal finding attacked on appeal was that the applicants had 'complied with the [Identity Act] in that they are resident in specific villages within Thohoyandou, a location in the Republic, and therefore fall within the parameters of ss 3, 9, 10 and 15 of the Act'. Counsel for the Minister pointed out that it does not follow from the fact that the applicants are resident in the Republic, that they are South African citizens or that they are lawfully and permanently resident in the Republic, and

[8]Sections 2 and 9 of the Births and Deaths Registration Act.
[9]Sections 3 and 8 of the Identification Act.
[10]Sections 7(1) and 8 of the Identification Act.
[11]Sections 3 and 15(1) of the Identification Act.
[12]Section 25(1) of the Identification Act.

submitted that they had accordingly not shown that they were entitled to identity documents in terms of the Identity Act. Although I agree that the applicants have not shown that they are entitled to identity documents, this fails to address the point that the applicants averred that they had already made applications for identity documents, assisted by officials of the Department, and that those officials had accessed the progress (or lack thereof) of their applications on a Department of Home Affairs computer; and it is those applications on which the applicants relied for the relief sought.

[15] However, the relief sought by the applicants and granted by the court a quo was incompetent. The applicants should have asked for an order in terms of s 6(2)(g) read with s 6(3) of the Promotion of Administration of Justice Act 3 of 2000,[13] requiring their applications to be considered. They were not entitled to an order directing a successful outcome.

[16] I interpose to remark that it was not contended on behalf of the Minister that there had been insufficient time after the applications were made to process them before these proceedings were launched. In the application which forms part of the record before us, Ms Maboho applied for an identity document on 9 May 2007. She was told to return three months later. She did so, more than once. The notice of motion was issued on 26 October. More than five months had elapsed. Prima facie, that seems to me to have been an unreasonable delay entitling her to invoke s 6(3)(a) of PAJA.[14]

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[13]'6(2) A court or tribunal has the power to judicially review an administrative action if —
. . .
(*g*) the action concerned consists of a failure to take a decision;
. . .
(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; . . .'

[14]Contrast *Sibiya* above, n 2 paras 18-29; but compare *Thusi v Minister of Home Affairs* 2011 (2) SA 561 (KZP) para 65.

[17] The legal representatives of the Minister were at fault in not causing an answering affidavit to be delivered stating that without the identity numbers or dates of birth of the applicants, the Department could not access any application for an identity document ─ which, it was suggested from the bar, and despite the allegations made by each applicant to the contrary, was the actual problem. We were also told from the bar that if a birth has not been registered, with the consequence that an identity number has not been assigned, an application for an identity document is automatically converted to an application for a late registration of birth to enable an identity number to be assigned so that an identity document can be issued. But none of this is on the papers. On the other hand, it would be pointless to make an order with which the Department could not comply. That would be in no-one's interests, least of all the applicants'. Counsel representing the Minister informed us that none of the applicants has yet received an identity document despite the lapse of well over four years.

[18] It therefore seems to me that the solution would be a structural interdict aimed at ensuring that the applications are considered expeditiously, but giving the court a quo powers to supervise the process ─ in particular, by enabling the officials of the Department to obtain the information they require. There can be no prejudice to the applicants, who filed a notice of intention to abide the decision of this court and who were accordingly not represented at the hearing of the appeal. Counsel for the Minister, having taken an instruction from his attorney, agreed that such an order would be appropriate. He also agreed that the various concerns that the Minister's legal representatives have about the affidavits placed before the court a quo, would be addressed if such an order were to be made. It is not necessary for me to catalogue these concerns. They relate, broadly speaking, to the manner in which and circumstances under which the founding affidavits were attested.

[19] It is perhaps desirable that I spell out how the purpose of this court's order could be achieved, without in any way being prescriptive or limiting the discretion of the court a quo to make orders aimed at the speedy resolution of these matters. The ultimate goal is to ensure that those of the applicants who are entitled to identity documents, should be provided with them as soon as

reasonably possible. It seems that the officials of the Department will require identity numbers. No good reason occurs to me why the applicants' attorney should not obtain this information, if it is available: according to a bill of costs annexed to the application for leave to appeal made to this court, he has been able to make telephonic contact with each of the applicants in the past. If an identity number has not been assigned to an applicant, it seems from what we were told from the bar that an application for late registration of birth will have to be completed. The officials could then reasonably be expected to go to the villages where the applicants aver they made their applications, after notice has been given to the applicants via their attorney or the local chief that their attendance will be required for this purpose. If some applicants have died or cannot be traced, their applications could be dismissed. If the applications cannot be traced, the court a quo could investigate the reason and the applicants may have to start from scratch ─ in which case the court could lay down a timetable for the processing of new applications. And if either party encounters any difficulty, that party would be free to approach the court on notice to the other party for directions. I here have in mind the procedure prescribed by Uniform rule of court 6(11):

'Notwithstanding the aforegoing sub-rules, interlocutory and other applications incidental to pending proceedings may be brought on notice supported by such affidavits as the case may require and set down at a time assigned by the Registrar or as directed by a judge.'

It perhaps requires emphasis that 'notice' in the rule does not mean a notice of motion: *Yorkshire Insurance Co Ltd v Reuben* 1967 (2) SA 263 (E) at 265F-266A; and as the ordinary rules fixing time periods for the filing of affidavits are not applicable, any dispute or difficulty should be capable of speedy resolution.

[20] That brings me to the question of costs. So far as the costs in the court a quo are concerned, I agree with the Minister's counsel that the appropriate order would be to reserve the costs for the court a quo to exercise its discretion once these proceedings have run their course. So far as the costs of appeal are concerned, I am unable to agree with counsel for the Minister that his client has been substantially successful on appeal. It is true that the

order directing that identity documents be issued, has been set aside ─ but it has been replaced with an order requiring the applications to be considered, and putting the Department on terms to do so. Nor did the applicants seek in this court to justify the order made by the court a quo ─ as I have said, they did not appear and abide the decision of this court ─ but on the other hand, they asked for that order to be made and they did oppose the application for leave to appeal brought in the court a quo, and those costs are part of the costs of appeal. In the circumstances, I consider that justice would be served if no order were made in respect of the costs of appeal.

[21] The following order is made:

1 The appeal succeeds, to the extent set out in paragraph 2.

2 The order made by the court a quo is set aside and the following order substituted in each application:

'(a) The Department of Home Affairs is ordered to consider the applicant's application for the issue of an identity document and file an affidavit with this court (with a copy to the applicant's attorney) on or before 29 June 2012, or within such further period as may be agreed by the parties or allowed by this court on good cause shown, stating:

(i) that an identity document has been issued to the applicant; or

(ii) that the applicant's application for an identity document has been refused, and if so, the reasons for the refusal; or

(iii) that if it has not been possible to process the applicant's application, the reasons therefor and if information is required for this purpose, what attempts have been made to obtain such information.

(b) Either party may on notice apply to this court for further or alternative directions for the purpose of bringing the application to finality.

(c) The costs to date are reserved.'

3 The appeals against the interlocutory orders made by the court a quo are dismissed.

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T D CLOETE

JUDGE OF APPEAL

APPEARANCES:

For Appellant: G Bofilatos SC

Instructed by:

Ngoepe Attorneys, Thohoyandou

The State Attorney, Bloemfontein