IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION – BHISHO)

CASE NO: 481/2009
DATE HEARD: 31/07/2012
DATE DELIVERED: 18/09/2012

In the matter between

MAPOTONI MZWANDILE TOTOLO **APPLICANT**

and

THE MINISTER OF HOME AFFAIRS, **1ST RESPONDENT**

REPUBLIC OF SOUTH AFRICA

THE DIRECTOR GENERAL OF THE **2ND RESPONDENT**

DEPARTMENT OF HOME AFFAIRS,

REPUBLIC OF SOUTH AFRICA

THE REGIONAL DIRECTOR OF THE **3RD RESPONDENT**

DEPARTMENT OF HOME AFFAIRS

JUDGMENT

ROBERSON J:-

[1] This is an application in terms of s 6 (2) (g) of the Promotion of Administration of Justice Act 3 of 2000 (PAJA), for the review and setting aside of the respondents' failure to consider and decide upon the applicant's application for the amendment of his date of birth as contained in the Population Register, and other relief. S 6 (3) of PAJA provides that where the ground of review is a failure to take a decision as provided in s 6 (2) (g), and no time period is prescribed within which a decision must be taken, proceedings may be instituted on the ground that there has been unreasonable delay in taking the decision.

[2] The applicant alleged in his founding affidavit that he was born on 17 March 1943. In support of that allegation he annexed a copy of what he said was his baptismal certificate, which reflected his date of birth as 17 March 1943. On 17 September 2007 and at the offices of the third respondent in Mdantsane, he applied for the amendment of his date of birth, which he alleged was wrongly reflected in the Population Register as 17 March 1951. A copy of his identity document, which was issued on 20 October 1988, reflected his date of birth as 17 March 1951. His application was two fold, because once his date of birth was amended, he would have to be issued with a new identity document containing the correct date of birth. He annexed a copy of an acknowledgment of receipt of his application. This document bore the official stamp of the Department of Home Affairs, Mdantsane and reflected that the applicant had paid the required fee. The date on the official stamp was 17 September 2007. At the time of making his application, he was told to return in three months to collect his

amended identity document. He did so in December 2007 and was told that a decision was still being awaited from the second respondent, and was further advised to return once a month to enquire about progress.

[3] He returned to the offices of the third respondent once a month after that but was always informed that a decision from the second respondent was awaited. When it was apparent no decision was forthcoming, he consulted his attorney on 4 June 2009. His attorney sent letters to the respondents putting them on terms to make a decision or to furnish reasons if the application had been refused. No response was received from the respondents, and the application was accordingly launched on 14 July 2009. The applicant claimed that he is illiterate and that his illiteracy and the lack of information received from the third respondent, led to his not instituting proceedings earlier.

[4] The application was opposed and the answering affidavit was deposed to by one Courtenay Champion who stated that he was the Chief Administration Clerk at the "Respondent's Head Office." Presumably he meant the office of the Department of Home Affairs in Pretoria. He stated that the matter was "excipiable on the account of its inexplicably late filing and as such Applicant's matter had prescribed". After referring to a delay of two years on the part of the applicant in bringing the application, he stated as follows:

> "That there is no reasonable explanation for such a delay, save the self serving notion that the Applicant's illiteracy is to blame for the delay which I implore the above Honourable Court to treat such with the

contempt it deserves.

The Applicant does not say why he allowed the matter relating to the correction of the details on his identity document to remain for all the years that he was carrying the document without seeking for its correction.

The Applicant does not explain that the motive of this sudden galvanization into action to seek that rectification is not driven by the intention to access old age pension wherein the age requirement for adult male applicants is pegged at the age of 65."

[5] After querying the authenticity of the baptismal certificate Champion went on to suggest that the applicant should have made a fresh application for the amendment of his particulars in the Population Register, supported by further and presumably more persuasive documents to confirm his date of birth. Champion specifically denied that the applicant made an application at the offices of the third respondent on 17 September 2007, and that he had submitted supporting documents and photographs with his application. He put the applicant to the proof of his allegations that he had been issued with a receipt of his application, that he had paid a fee, that he had periodically returned to the offices to enquire about progress, that he had not yet been furnished with a decision on his application, and that his attorney had sent letters and received no response.

[6] The replying affidavit was deposed to by the applicant's attorney. He stated in the affidavit that any queries which the respondents had concerning the applicant's application for an amendment of his birth particulars should have been brought to his attention and did not amount to a defence to the application.

He also pointed out that there were no supporting affidavits from officials of the third respondent in Mdantsane and that anything stated by Champion about what happened at that office was hearsay. He challenged the authority of Champion to depose to the affidavit and also criticised the obstructionist conduct disclosed by the affidavit. The rest of the affidavit, which was thirty six pages long, consisted of legal submissions, extracts from the answering affidavit and criticism of the respondents' conduct towards the applicant.

[7] When the matter was argued, the application was opposed on two grounds: the first was undue delay in bringing the review proceedings, and the second was that the applicant was not born in 1943.

Delay

[8] S 7 (1) of PAJA provides:

> "Procedure for judicial review
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> 1) Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date –
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> a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2) (a) have been concluded; or
> b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons."

In *Sibiya v Director-General: Home Affairs and Others, and 55 Related Cases* 2009 (5) SA 145 at paragraph [16] Wallis J (as he then was) said the following:

> "The conclusion that PAJA is applicable brings into focus 7(1) of PAJA which provides that any proceedings for judicial review in terms of s 6(1)

> of PAJA must be instituted without unreasonable delay and not later than 180 days after the date upon which the applicant became aware of the administrative action or might reasonably have been expected to have become aware of the administrative action. (I appreciate that s 7(1)(b) deals with the reasons for the administrative action but where the characteristic of the administrative action in question is inertia on the part of the department, that ceases to be relevant.) The determination of the date when the applicant became aware or should reasonably have become aware of the department's default in providing the requested identity document is a matter of some nicety, as no time is fixed in the Identification Act or the regulations for the delivery of the identity document and accordingly the question in every case is whether a reasonable time has elapsed from the time the application was made, so that the applicant can legitimately claim that the department is in default of its obligations. It is only at that stage that the period of 180 days provided in s 7(1) of PAJA can commence to run."

[9] There was no evidence to counter the applicant's averment that he had been to the offices of the third respondent once a month after December 2007, and was told each time that a decision was being awaited. In those circumstances, and taking into account the applicant's illiteracy, it was reasonable that it would have taken some time for the applicant to become aware of the failure to make a decision on his application. In that case, bearing in mind the difficulty in ascertaining when the 180 day period began to run, I am satisfied that, because each time he visited the offices he was led to believe that a decision was still to be made, the 180 day could have begun to run from the time of his last visit, or at least within 180 days prior to the date he instituted these proceedings. The opposition on the ground of delay therefore cannot succeed.

Dispute about date of birth

[10] This ground of opposition has no merit. The application concerns a failure to make a decision at all, not a failure to grant his application for the amendment

of his date of birth. The merits of his application for the amendment of his date of birth are irrelevant for the purpose of the present proceedings. Counsel for the respondents accepted that no decision had been made.

[11] The application must therefore succeed.

[12] Counsel for the applicant submitted that an award of costs on the attorney and own client scale was appropriate in the circumstances. Counsel for the respondents submitted that there was fraudulent conduct on the part of the applicant because the baptismal certificate was suspect, and that he should be penalised in costs accordingly. Counsel for the respondents also submitted that the unnecessary length of the replying affidavit should be taken into account in deciding on an appropriate award of costs.

[13] It is a pity that this application was argued at all. Clearly the applicant's application at the third respondent's offices only received consideration when these proceedings were instituted. Only in the answering affidavit was it said that there is a problem with his baptismal certificate and that he should submit further and better documents in support of his application. This is unacceptable conduct on the part of the respondents. Champion's answering affidavit was deposed to on 18 March 2010. It did little to answer the applicant's case and contained inaccurate and careless denials, or professed lack of knowledge, of the applicant's averments. It also contained unpleasant remarks, namely that the

court should treat with contempt the applicant's explanation for the delay based on his illiteracy, and that the applicant should have averred that he was not fraudulently trying to qualify for a pension. These are meaningless remarks and do nothing to further the case of the respondents. The matter was eventually argued more than two years after Champion deposed to the answering affidavit and still no decision had been made. This lack of action is deplorable. The matter was still opposed, in the knowledge that no decision had been made. This type of conduct in litigation borders on an abuse of court proceedings. In all these circumstances I am of the view that a punitive costs order is warranted, but not to the extent of the attorney and own client scale.

[14] It is impossible for me in these proceedings to decide whether or not the baptismal certificate is fraudulent. This is something the respondents will have to look at after they are ordered to make a decision. I do agree however that the replying affidavit is inordinately long and intend to take this account when making the costs order.

[15] In the result the following order is made:

15.1 The respondents' failure to consider and decide upon the applicant's application for an amendment to the population register so as to reflect the date of his birth as 17 March 1943 and the issue of an identity document reflecting the amendment, is reviewed and set aside.

15.2 The respondents are directed to consider and decide upon the applicant's application for an amendment to the population register so as to reflect the date of his birth as 17 March 1943 and the issue of an identity document reflecting the amendment, and to inform the applicant's attorneys of their decision thereon within 30 days of service of this order upon them: provided that

15.2.1 In the event of the applicant's application being approved, the respondents are directed to furnish the applicant with the identity document within 60 days of service of this order upon them; and

15.2.2 In the event of the applicant's application being refused, the respondents are further directed to furnish the applicant's attorneys with written reasons for the decision so taken, within 60 days of service of this order upon them.

15.3 The respondents are to pay the costs of this application on the attorney and client scale, the one paying the other to be absolved: provided that the applicant is only entitled to one quarter of the costs of the drawing of the replying affidavit of attorney Ndzabela.

J M ROBERSON
JUDGE OF THE HIGH COURT

Appearances:-

For the Applicant: Adv J. L. Hobbs, instructed by Sigabi Attorneys, King Williams Town .

For the Respondents: ADV A.M. Da Silva, instructed by The State Attorney, East London.