

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE – GRAHAMSTOWN)**

CASE NO: 1070/2009

DATE HEARD: 11/02/10

DATE DELIVERED: 22/2/10

NOT REPORTABLE

In the matter between:

NOMZAMO GEZA

APPLICANT

AND

THE MINISTER OF HOME AFFAIRS

1ST RESPONDENT

THE DIRECTOR GENERAL: HOME AFFAIRS

2ND RESPONDENT

The applicant applied for a *mandamus* directing the second respondent to furnish her with an identity document, claiming that she had applied for one in May 2007 and had not received it. The deponent to the answering affidavit stated that no record of an application for an identity document made by the applicant could be found. She suggested, judging from the receipts that the applicant attached to her founding affidavit, that she had applied for the amendment of a pre-existing identity document and for its re-issue. In her reply the applicant admitted that an identity document had, in fact, been issued to her in July 2006 and that she had applied for it to be amended and re-issued. The application was dismissed with costs on the basis that the applicant had, in reply, sought to make out a new case to which the respondents had had no opportunity to reply.

JUDGMENT

PLASKET J

[1] The applicant launched an application in which, when the Notice of Motion is pared to its basics, she seeks a *mandamus* directing the second respondent – the Director General of the Department of Home Affairs – to issue her with an identity document, in terms of s 25(1) of the Identification Act 68 of 1997.

[2] She states in her founding affidavit that she is ‘making this affidavit in support of an application to obtain my identification document from the respondents’ and that she applied for an identity document on 23 May 2007 at the King William’s Town offices of the Department of Home Affairs. She was, she says, told that the identity document would be ready for collection in two months and she should return to the office then.

[3] She did so but was told to return a month later. She states that she has gone back to the office on a monthly basis ‘but was always advised that my identity document was not ready for collection’. She proceeds to say that because ‘the respondents have failed to provide me with the identity card within a reasonable time’ she approached what appears to be a para-legal institution for help. This institution, Ethembeni CC, wrote to the respondents on her behalf stating that according to their instructions, the applicant ‘made an application to your King William’s Town office for an identity card on or about 23 May 2007’ and that she had still not received it. A demand was made that ‘all things necessary be done to issue an identity card to the applicant and that our offices be informed, in writing, as to when and where the applicant may collect the identity card, within one month of date hereof

failing which an application will be brought to the High Court for appropriate relief’.

[4] Having stated that at the time of deposing to her founding affidavit no ‘adequate response’ had been received from the respondents, the applicant proceeds to say:

‘12. I qualify for an identity document and have done all that is required from me to apply for an identity document. If the second respondent had any doubts as to whether I qualify for the issue of an identity document or any reason that I did not qualify, such reservation or reason has not been made known to me.

13. I am being greatly prejudiced by the respondents’ lack of action in providing me with an identity document. The possession of a valid identity document is a statutory prerequisite for, *inter alia*, the obtaining of a bank account, applying for a social grant, obtaining employment, voting in any election and proving my citizenship and permanent residency.’

[5] In the Notice of Motion, specific reference is made to a failure to take a decision on the applicant’s application for an identity document in terms of s 15 of the Identification Act. This section provides that every South African citizen and permanent resident who attains the age of 16 years must apply in the prescribed form for an identity document.

[6] The respondents’ answering affidavit is deposed to by Ms Girlie Sinuka, a supervisor of the identity section of the King William’s Town office of the Department of Home Affairs. She states in her affidavit that the application is opposed because ‘the applicant did not make an application for an identity document on 23 May 2001, as alleged’: no trace of such an application could be found either in her office or in the head office in Pretoria and she makes the point that ‘[w]ithout an application for an identity document the applicant is

not entitled to the relief sought in her Notice of Motion, which relief is based on the premise that the applicant made an application for an identity document’.

[7] Ms Sinuka points out further that the receipts that the applicant attached to her founding application, apparently to show that she had applied for an identity document, in fact suggest that she applied for an amendment to a pre-existing identity document and for its re-issue.

[8] This is admitted by the applicant in her replying affidavit. She states that she had, in fact, been issued with an identity document on 27 July 2006 but that certain of the information contained in it was erroneous and had to be corrected. Despite this, she persisted in the relief sought by her although her counsel, Ms Collett, conceded that relief different to that claimed in the Notice of Motion would have to be granted, if the application was to succeed.

[9] It is trite law that an applicant must stand or fall by what is set out in his or her founding affidavit and may not, generally speaking, seek to make out a case in reply.¹ The principle was enunciated thus by Krause J in *Pountas’ Trustee v Lahanas*:²

‘I think it has been laid down in this Court repeatedly that an applicant must stand or fall by his petition and the facts alleged therein, and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny.’

¹ See Cilliers, Loots and Nel *Herbstein and Van Winsen: The Civil Practice of the High Courts of South Africa* (5 ed) (Vol 1) Cape Town, Juta and Co: 2009, 439-441; *Shepherd v Mitchell Cotts Seafreight (SA) (Pty) Ltd* 1984 (3) SA 202 (T), 205E-F; *Johannesburg City Council v Bruma Thirty-Two (Pty) Ltd* 1984 (4) SA 87 (T), 91C-E; *Moleah v University of Transkei and others* 1998 (2) SA 522 (Tk), 534F.

² 1924 WLD 67, 68.

[10] In this case, the factual basis for the relief claimed by the applicant is that she had applied for an identity document and the respondents had failed to issue it to her. The respondents' answering affidavit deals pertinently with the allegation, stating that no record could be found of that application. When the deponent to the answering affidavit alerted the applicant to the fact that the receipts that she attached related to an amendment to a pre-existing identity document and its re-issue, the applicant changed tack and admitted that she had been issued with an identity document on 27 July 2006.

[11] As was the case in *Johannesburg City Council v Bruma Thirty-Two (Pty) Ltd*,³ the applicant did not merely introduce new matter in her replying affidavit: she abandoned the case she had sought to make out in her founding affidavit and tried to substitute it with a new case which the respondents had no opportunity to deal with.

[12] It was suggested by Ms Collett that the different relief now sought by the applicant could be granted under the banner of further or alternative relief. There is no merit in this argument because, whatever the ambit of a prayer for further or alternative relief, such relief may only be granted if it is consistent with the case made out by the applicant in her founding affidavit and is consistent with the primary relief claimed.⁴ In *Johannesburg City Council v Bruma Thirty-Two (Pty) Ltd*,⁵ Coetzee J described the prayer for alternative relief as being 'redundant and mere verbiage' in modern practice adding that whatever a court 'can validly be asked to order on papers as framed, can still be asked without its presence' and that it 'does not enlarge in any way "the terms of the express claim" as pointed out by Trindall JA' in *Queensland Insurance Co Ltd v Banque Commerciale Africaine*.⁶

³ Note 1, 91C-E.

⁴ See *Johannesburg City Council v Bruma Thirty-Two (Pty) Ltd* (note 1), 92G-93E, citing with approval *Queenstown Insurance Co Ltd v Banque Commerciale Africaine* 1946 AD 272, 286.

⁵ Note 1, 93F.

⁶ Note 4.

[13] In the result, as the applicant's case changed from her founding papers to her reply, the application cannot succeed. Before I make an order, however, it is necessary to sound a warning to legal practitioners who mass-produce applications such as this on their word processors. It is unacceptable that proper care is not taken to ensure that the details of each applicant's case are not canvassed thoroughly with them. Care should be taken to ensure that the papers in each matter – even if the starting point is a precedent – is thoroughly checked to ensure that they are accurate, personalised and professional. It is incumbent on attorneys to make sure that the instructions they obtain from clients are accurate, and not merely to fill in the gaps in a blank affidavit on the basis of facts forwarded by an agent who has contact with potential clients. I need do no more at this stage than to refer to the remarks of Wallis J in *Sibiya v Director-General: Home Affairs and others and 55 related cases*⁷ and *Cele v South African Social Security Agency and 22 related cases*⁸.

[14] For the reasons set out above the application is dismissed with costs.

C. PLASKET

JUDGE OF THE HGH COURT

APPEARANCES:

For the applicant: Ms S Collett instructed by Neville Borman and Botha, Grahamstown.

For the respondents: Mr G Bloem instructed by Whitesides, Grahamstown.

⁷ 2009 (5) SA 145 (N), paras 5-6 and footnote 3.

⁸ 2009 (5) SA 105 (D), paras 18 and 23.

