

SOUTH AFRICA / JUDGMENT

# Hossain v Minister of Home Affairs and Another (577/2011)

## [2011] ZAECPEHC 21 (17 May 2011)

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## COURT

Eastern Cape High Court, Port Elizabeth

## BEFORE

J W Eksteen

## CASE / FILE NUMBER

577/2011

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IN

THE HIGH COURT OF SOUTH AFRICA NOT REPORTABLE

EASTERN

CAPE, PORT ELIZABETH

Case

No.: 577/2011

Date

Heard: 10 May 2011

Date

Delivered: 17 May 2011

In

the matter between:

MOHAMMED

KAMAL HOSSAIN

.....Applicant

and

MINISTER

OF HOME AFFAIRS

.....First

Respondent

DIRECTOR

GENERAL OF HOME AFFAIRS

.....Second Respondent

## JUDGMENT

EKSTEEN J:

- [1] There has recently been a steady flow of applications in this court in which refugees arriving in South Africa have sought relief arising from their frustration with the Department of Home Affairs (the Department). This application is one of those. The present application concerns the second respondent's alleged failure to take a decision and to process an application by the applicant for temporary residence.
- [2] Refugees are, per definition, foreigners arriving in the country in a desperate endeavour to escape the persecution to which they have been subjected in their home countries. It is not uncommon for them to experience difficulties with communication arising from language barriers which exist. It is for this reason that they are often dependent upon active assistance and cooperation of officials in the Department in seeking to regularise their presence in this country. Indeed, section 21 of the Refugees Act, 130 of 1998 (Refugees Act) enjoins the refugee reception officer to see to it that an application form in respect of an application for asylum is properly completed and he is, by this section, obliged to assist an applicant in this regard.
- [3] Generally, the courts will be sympathetic to the plight to such refugees and would hasten to their assistance where their rights under our Constitution and other Legislation are infringed, in the same manner as the courts protect the rights of citizens, provided always that a proper case is made.
- [4] The papers in this application, regrettably, are not a model of clarity and fall far short of the standards which this court does, and is entitled to, expect from practitioners who appear before it. The applicant, as more fully set out below, was at all times assisted by an attorney in his affairs relevant to this application.
- [5] The relief

The Notice of Motion filed of record seeks an order:

*"That the Respondents are directed to process the Applicant's application for renewal of Accompany Spouse & Work Permit lodged on 28 October 2010 and captured on 3 November 2010 at the Port Elizabeth Regional Office of the Department of Home Affairs, and to inform the Applicant's Attorneys of their decision within thirty (30) days from the date of the Order."*

- [6] The Immigration Act, 13 of 2002 (the Act) provides in sections 11-23 for various kinds of temporary residence permits to be issued by the second respondent. In the terminology of the Act none of these are referred to as an "accompany spouse and work permit". In argument before me it appears that this appellation is intended to refer to a permit issued in terms of the provisions of section 11(6) of the Act. Section 11(6) deals with "visitor's permits" which may under certain

conditions be issued to a “foreigner who is the spouse of a citizen or permanent resident and who does not qualify for any of the permits contemplated in section 13-22”. On granting such a permit the second respondent may, in terms of section 11(6)(b)

authorise the foreigner to work, hence, I assume, the adoption by the applicant of the colloquial appellation “accompany spouse and work permit” utilised in the papers. I say that I assume this to be the position as no explanation is given in the affidavit for this terminology. I shall consider reference to an “accompany spouse – work permit” to refer to a permit issued in terms of section 11(6) of the Act.

[7] In the introductory portion of the founding affidavit, however, the applicant records as follows:

*“5. This application is instituted in order to compel the Department to process my application for transfer of my accompany spouse – work permit from my old to new passport.*

6. ...

7. It is respectfully submitted that this Honourable Court has jurisdiction to deal with this matter particularly, since:

7.1 My application for transfer of my accompany spouse – work permit was lodged at the Port Elizabeth Regional Office of the Department.

7.2 Failure to finalise my application for transfer of accompany spouse – work permit has impacted on me within the jurisdictional area of this Honourable Court.”

[8] This appears to suggest that a valid permit is existence which requires transfer from one passport to another. I have been unable to find any provision in either the Act or the Refugees Act which imposes such an obligation on the second respondent, nor was I referred to any provision which imposes such a duty. In any event, this does not accord with the relief sought in the Notice of Motion where reference is made to an application for “renewal of Accompany Spouse & Work Permit”.

[9] Mr Moorhouse, who appeared on behalf of the applicant advised me at the hearing of the application that he did not intend to seek the relief contained in the Notice of Motion. Instead he handed to me a draft order setting out the relief which was ultimately sought. The order which was sought is:

*“1. That the Second Respondent is directed to decide upon the Applicant’s application for a renewal of his temporary residence permit in terms of section 11(6) of Act 13 of 2002;*

2. That the Second Respondent must furnish the Applicant’s attorneys of record with the aforementioned decision within thirty days from the date of the granting of this Order.”

[10] The matter of “transfer” of an existing permit therefore appears to be no longer relevant. Save to the extent of dealing with allegations in the evidence which have bearing upon the outcome of the matter I shall consider this aspect to be irrelevant. It is an application for “renewal” which is in issue.

[11] Evidence

The applicant, a Bangladeshi national, states that he came to South Africa to seek asylum. During his initial stay in South Africa he formed a relationship with and married a South African citizen. As a result thereof and on the advice of his legal representatives he lodged an application for what he refers to as “accompany spouse”. He was subsequently issued with an “accompany spouse – work permit” under file number PE300/09 on 18 August 2009. This document he attaches. The document evidences that he was issued with a permit in terms of section 11(6) of the Act to “co-habit with his South African spouse and to work for Corner Cash Stores”.

[12] Ex facie the permit it is valid for one year lapsing on 22 August 2010. The applicant recognises that the permit was valid only until 22 August 2010. He declares, however, that his legal representatives had been informed at the time of the issue of the permit by officials of the Department that his application had been approved for a period of two years. The reason for the permit having been issued only for one year was, so he alleges, that his passport was due to lapse on 22 August 2010. In these circumstances the Department advised that the permit in respect of the second year would be issued once his new passport had been issued. This, he says, has now occurred.

[13] The applicant records that he has been advised of the relevant provisions of section 11(6) and he submits that he has complied with the requirements. He then proceeds to record as follows:

*“15. The Act’s Regulations prescribes the procedure which an Applicant must follow in order for an application for an accompany spouse – work permit transfer to be considered by the Second Respondent. Having been assisted to lodge a complete application in the prescribed manner on 3 November 2010 an official acknowledgement of receipt was issued.”*

[14] Section 11(6) of the Act makes no reference to the transfer of permits. I have already recorded that the applicant does not seek any relief relating to the “transfer of a permit”. I have also found no provision in the Act relating to the “transfer” of permits. The regulations referred to are neither annexed to the application nor identified. On the papers filed it is accordingly not entirely clear what the perception of the applicant was of the nature of the application which he had made to the Department.

[15] Be that as it may, the applicant acknowledges that he has been duly assisted, presumably by the officials of the Department, to lodge a complete application in the prescribed manner on 3 November 2010. In support thereof he has annexed an acknowledgement of the receipt issued by the Department. The receipt, however, does not tie in with the allegations in the affidavit. The document annexed is indeed an acknowledgement of receipt of an application

issued by the Department. It records the applicant's name, date of birth and passport number and then set out two reference numbers, presumably to facilitate the identification of the application for record purposes. It then records that the application received is for a "relative's permit (spouse)". A relative's permit is one provided for in section 18 of the Act. The discrepancy is not explained. Different requisites apply to the application in terms of section 18 to those which apply to section 11. In addition, section 18(2) provides that the holder of such a permit may not conduct work. The confusion in respect of the nature of the application is compounded by the inscription on the acknowledgement of receipt of the following remarks:

*"REMARKS: SPOUSE*

#### PERMIT TRANSFER"

- [16] The document provides no clarification of these comments. Whatever the position may be it is apparent from the foregoing, and indeed accepted during argument on behalf of the applicant, that no valid permit was in existence on 3 November 2010.
- [17] Having lodged this application on 3 November 2010 the applicant alleges that his legal representatives were advised that it would take thirty days to finalise the application. This is confirmed by the applicant's attorney of record. Whilst the papers do not say so I shall assume, in the applicant's favour, for purposes hereof that this information is alleged to have been conveyed at the offices of the Department. The papers do not suggest who at the Department conveyed this nor the rank or office of this source. It is not suggested that applications of this nature ordinarily take thirty days nor is it alleged that thirty days represent a reasonable time within which to take a decision. No basis is laid for such a conclusion.
- [18] The applicant records that since December 2010 the applicant's legal representatives have been visiting the offices of the Department on a regular basis to enquire about the issuing of his accompany spouse – work permit. On all these occasions, he says, the Department has failed "to provide adequate reasons as to the delay" in the issuing of his permit. This allegation is confirmed in a confirmatory affidavit by the applicant's attorney of record. I find it somewhat curious that

despite legal representatives being sent to attend upon the Department no particulars are provided in respect of any of these visits. The affidavit does not reveal who the legal representative was who attended upon the offices of the Department on each or any occasion nor does it reveal the dates or frequency of such visits. No information is provided as to who was approached at the offices of the Department and no detail is provided as to the response received. The inescapable conclusion to be drawn from the statement contained in the affidavit is that indeed the Department did provide reasons for the delay and that either the applicant or his legal representatives regard those reasons as being inadequate. The court has, however, not been taken into the applicant's confidence so as to determine the adequacy or otherwise of the reasons which were in fact provided. I shall revert to this aspect below.

[19] On 24 December 2010 the applicant's attorney of record sent a letter of demand by registered post to the Department. The letter, I consider, as I shall show below, is of significance to the question of whether a reasonable delay has occurred. It was sent, as I have recorded on 24 December 2010. It is addressed to The Director: Legal Services of the Department in Pretoria. At the top of the first page a reference number is inserted as being the reference of the applicant's attorney. Below that provision is made for "Your Ref:" being the reference number allocated by the Department. No reference number has been reflected on the letter notwithstanding that the acknowledgement of receipt to which reference is made in the body of the letter, contains specific references. At the commencement of the letter it carries the heading "APPLICATION OF TRANSFER OF ACCOMPANY SPOUSE – WORK PERMIT". The applicant's name is then reflected and it then records: "DATE OF APPLICATION 03 NOVEMBER 2010".

[20] The letter commences with a brief summary of the applicant's arrival in South Africa and then proceeds as follows:

*"He got married to his South African citizen wife and then approached our office to assist him to lodge an application for Accompany Spouse – Work Permit in terms of Section 11(6) of the Immigration Act 13 of*

2002. We confirm that our client was issued with the aforesaid permit at the Port Elizabeth Regional Office on 18 August 2009, under file number PE300/2009.

The accompany spouse – work permit was approved for two (2) years but a period of 1 year could only be issued since his passport was also valid for one year. We confirm that our office lodged a complete application for permit transfer on 3 November 2010 and an official acknowledgement of receipt was issued.

We were advised that the Department will process our client's application with thirty (30) days. Despite having repeatedly made enquiries at the Regional Office of the Department, as to the outcome of the application, the Department has failed to and/or neglected to furnish our client with a decision as to whether his application for accompany spouse – work permit transfer has been approved or rejected.

In the circumstances, we are instructed to demand, as we hereby do, that:

- (a) The Department or its duly authorized official forthwith consider and decide upon our client's application for transfer of accompany spouse – work permit.
- (b) And inform our office of its decision within twenty (20) days from date hereof.

Failure to do so will leave us with no option but to institute High Court proceedings compelling the Department to consider and decide upon our client's application for transfer of accompany spouse – work permit."

[21] I shall revert to the content of the letter below. The applicant records, however, that no response was received to this letter and accordingly this application was issued on 25 February 2011.

[22] Legal Basis of Application

The applicant refers to section 8(3) of the Act which provides as follows:

*“Any decision in terms of this Act, ..., that materially and adversely affects the rights of any person, shall be communicated to that person in the prescribed manner and shall be accompanied by the reasons for that decision.”*

[23] Administrative action as envisaged in the Promotion of Administrative Justice Act, 3 of 2002 (PAJA) includes both the taking of a decision and the failure to take a decision of the nature defined in section 1 of PAJA. Section 6(2)(g) of PAJA provides for the judicial review of administrative action which consists of such a failure. That much is not contentious. In the present matter the law does not lay down a time within which the second respondent is required to take a decision. This brings the provisions of section 6(3) of PAJA into play. Section 6(3) provides as follows:

*“(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.”

[24] The applicant, as I have shown, contends that he had applied in 2009 for a temporary residence permit. The evidence shows that pursuant to that application a permit was issued in terms of section 11(6) and that such permit, although only issued for the period of one year was approved for a period of two years and that decision was duly conveyed to the applicant's representatives. The applicant has no complaint in respect of that decision. Whilst I am alive to the fact that a “decision” is defined in PAJA so as to include a decision relating to the refusing to give a “certificate” (subparagraph (b) of the definition of “decision”) and the “retaining or refusal to deliver up, an article ...” (subparagraph (f) of the definition of “decision”), the applicant has not requested the issue or the delivery of a permit in respect of the remainder of the period pursuant to the earlier decision. No reliance is placed upon the decision taken in 2009. The applicant now seeks a direction that the second respondent decide upon his application “for a renewal” of his temporary residence permit.

It is abundantly clear on the papers that it is the application of 3 November 2010 to which reference has been made above which is in issue. I shall accordingly limit what follows to the application of the provisions of PAJA to the evidence set out above in respect of the application on 3 November 2010.

- [25] The application of section 6(2)(g) has recently enjoyed the attention of Wallis J in two separate matters to which I shall refer below. Most recently, in *Thusi v Minister of Home Affairs* 2011 (2) SA 561 at 577-579 Wallis J stated as follows:

*“[41] PAJA is the statutory embodiment of the constitutional right to just administrative action, that is, administrative action that is lawful, reasonable and procedurally fair. Administrative law as developed by our courts prior to the constitutional era is now subsumed under the constitutional right to just administrative action and does not exist as a separate body of law alongside the constitutional dispensation. However that does not mean that the administrative law developed by our courts prior to the Constitution and the enactment of PAJA is to be disregarded. It may provide a helpful source to inform and illuminate the particular provisions of PAJA.*

- [42] Without saying that the two overlap entirely, s 6(2)(g) deals with a situation that under the common law would have attracted the remedy known as a mandamus. This was an order requiring a public authority to comply with a statutory duty imposed on it, or to perform some act to remedy a state of affairs brought about as a result of its own unlawful administrative action. As with the common-law mandamus, s 6(2)(g) of PAJA deals with the failure by an administrator to take a decision that the administrator is under a legal obligation to take.

- [43] Where s 6(2)(g) is invoked and a mandatory order is claimed by way of consequential relief, the applicant must demonstrate that the administrator concerned is under a duty to perform the act in question and has failed to so. This was also the case with a common-law mandamus. In *Moll v Civil Commissioner of Paarl* (1897) 14 SC 463 at 468 De Villiers CJ said about this form of relief:

‘The wide power possessed by the Court under our law of interdicting illegal acts implies the power, as pointed out in *New Gordon Co. v Du Toitspan Mining Board* (9 Juta, 154), of compelling the performance of a specific duty, at all events on the part of a public officer, by mandatory interdict or other form of “mandament”. It also implies the power of correcting an illegality committed by such public officer, so long as it is capable of correction, if the rights of an individual are infringed by such illegality. But it is obvious that relief will not be given where such rights are of a doubtful nature, or where the public officer has acted in the exercise of a discretion left to him, but only where the existence and continued infringement of an absolute legal right have been clearly established.’

When dealing with the appropriate consequential relief in such a case Greenberg J (as he then was) said:

‘... prima facie, as the proceedings are based on a complaint that the statutory body has withheld from the aggrieved party the right given to him by statute, it would seem that the more appropriate remedy is to order that he be given that to which he was entitled and which has been withheld; in the present case the applicant’s cause of action is not that they were entitled to a certificate but to a proper hearing and exercise of discretion – and prima facie the court should grant them what has been withheld.’

I think these statements of principles are equally applicable to a review under s 6(2)(g) of PAJA.

[44] This has two consequences for the cases under consideration. The first and obvious one is that each applicant was obliged to establish on a balance of probabilities that he or she made either an LRB application or an application for the issue of an identity document, or both such applications, and that there has been an unreasonable delay in responding to those applications. That must at least have been the situation when the application was launched. Otherwise they will have commenced prematurely and without establishing any ground for review at all ...”

I agree entirely with the conclusions arrived at by Wallis J as set out above.

[26] In the present case the applicant made an application to the second respondent for the renewal of his rights of temporary residence. It is by no means clear whether the application was made in terms of section 11(6) or section 18. The applicant makes the averment that he was assisted to make the application in terms of section 11(6). The acknowledgement of receipt issued as proof thereof reflects that the application made was in terms of section 18 of the Act. It is not necessary for present purposes for me to make a finding in this regard as it does not appear to me to be material to the outcome of the application. In either event the applicant is entitled to a decision. That is what he contends has been withheld from him.

[27] The second requirement which the applicant must establish is that there had been an unreasonable delay in responding to his application prior to the launch of this application. I consider that this matter is more problematic than the first. The second decision by Wallis J to which I have referred above is *Sibiya v Director-General: Home Affairs and Others* and 55 Related Cases 2009 (5) SA 145 (KZP). In this matter Wallis J addressed at length the issue of unreasonable delay. There are many similarities between the issues in the present application and the issues under consideration in *Sibiya supra*. I find myself in agreement with the approach and reasoning of Wallis J in that matter. I consider that it is of assistance to have regard to some of the reasoning in that matter.

[28] In *Sibiya supra* at

p. 161-162 the learned Judge held as follows:

*“[24] As the question of whether the department has delayed unreasonably in attending to an application is a question of fact in my view if an applicant wishes to satisfy a court that there has been unreasonable delay in dealing with their application they must furnish sufficient particulars of their personal circumstances and the nature of their application, so as to indicate on what basis the*

*reasonable period has been determined. Enough information must be furnished to convey to the court the reasons why they contend that there has been undue delay in dealing with their application and why they allege that the department is in default. ... While one must be cautious of applying statements made in the wholly different context of what constitutes a reasonable time for performing a contractual obligation in the different environment of administrative action it has there been held that what is a reasonable time will depend amongst other things on the particular circumstances surrounding the performance of the contractual obligation in question, and the difficulties, obstacles and delays in performing that were actually foreseen or would be foreseen by a reasonable person. It has also been said that one is entitled to expect reasonably prompt and appropriate action and due diligence on the part of the party obliged to perform. Suitably adapted, these seem to me to be appropriate matters to take into account in determining whether a reasonable time has passed after the lodging of an application so that it can properly be contended that the department is in default.*

- [25] If, after taking into account all the potential vagaries of the situation, whether those referred to above or others not identified by me, one could be satisfied that a period of three months would be an adequate period in every case within which the department should either provide an identity document or refuse to do so, then the standard allegation in this regard could be accepted. However, it would require considerably more information than is at present available on these papers to satisfy me on that score. ...”
- [29] I turn to consider the averments relating to delay in the present matter. The applicant herein says that his legal advisors were advised that the application would be processed in thirty days. That may be so, however, a prediction made at the time of the receipt of the application cannot of itself be a measure as to what constitutes a reasonable time within which the second respondent was obliged to process the application. It certainly does not suffice to satisfy me that thirty days would always be reasonable to finalise any application for the renewal of temporary residence permit. The prediction of an official in the Department is of course not without value and it is one of the considerations to which I would usually have regard in considering whether or not a reasonable period had elapsed. It must however be considered in the context of all the other averments relating to delay contained in the founding affidavit. In this instance the allegation is of little assistance. I have referred above to the inadequacy of the averments relating to this prediction. If an undertaking was given by a responsible official in the Department to process the application in thirty days then I find it remarkable that greater particularity is not set out in the papers which would enable

the court to assess the weight to be attached to it. Importantly the applicant does not allege that thirty days would be a reasonable time for the Department to respond.

- [30] The second consideration raised in the founding papers in respect of an unreasonable delay is the repeated visits which the applicant’s legal representatives allegedly made to the office of the Department. I have dealt with the shortcomings in those averments above. I find it curious that the applicant does not disclose the reasons which officials of the Department advanced for the delay. The unilateral conclusion of the applicant that the reasons advanced

were not “adequate” to justify the delay are of little persuasion. The question arises irresistibly in the mind whether the reasons given may have been considered to detract from the merits of the applicant’s case.

- [31] Mr Moorhouse argues that it is for the respondents to explain the delay. I have already expressed my agreement with the conclusions reached in Thusi’s case, *supra* that it is incumbent upon the applicant to establish that an unreasonable delay had occurred prior to the launching of the application. It is one of the jurisdictional facts required in section 6(3) of PAJA to make out a case for review under section 6(2)(g).
- [32] It remains to consider the letter of demand. I have quoted extensively from the letter above. It called upon the Department or its duly authorised official to consider and decide upon the applicant’s application. The failure by the Department, in the context of the present matter, to respond at all to the letter is indeed cause for concern. I have referred above to the plight of foreigners forced to seek refugee in our country from the persecution to which they have been subjected elsewhere. They are dependent upon the assistance of the second respondent and they are entitled to such assistance. They are entitled, just as any other citizen is, to expect at the very least an acknowledgement of receipt of a communication of this nature. (Compare in this regard Sibiya’s case *supra* p. 163-164 para [27].) This failure on the part of the Department, although it falls to be deprecated cannot, coupled only with the application having been made, be decisive of the matter. The judgment in Sibiya *supra* addressed the considerations which affect the weight to be attached to letters of demand such as these. The learned Judge at p. 163B-D stated:

*“[26] However, the usefulness of such a notice depends upon it being couched in terms that will enable the department to identify the applicant in question and their application, and give them a meaningful response. If it merely compounds existing confusion it is of little help. That is the case with the letters of demand attached to the affidavits in these applications. Like the affidavits*

themselves, they are in standard terms and they furnish the minimum of information. At most they contain the name of the applicant, their date of birth, identity number if they have one, or the reference number of their application, the date of the application and the office at which it was made, and nothing more. ...”

- [33] Having considered the content of the letters in issue in Sibiya *supra* the learned Judge held that they were not sufficient to establish that a reasonable time had lapsed. He went on to state as follows at p. 164F:

*“... if the letters had been properly informative and directed the Department’s attention to the correct application and the nature of that application my inclination might have been to say that they did. However, as I have already noted, the letters do not. They*

all assert that the application is simply one for the issue of an identity document when manifestly that is not correct in many

instances. They make no attempt to distinguish between an initial application and one joined with an application for the late registration of the applicant's birth. They do not distinguish between those instances and an application for a replacement identity document, whether or without a change of information concerning the applicant. ..."

- [34] Subjecting the letter in issue in the present matter to similar scrutiny shows, in my view, simply a compoundment of the already existing confusion which arises from the terminology utilised by the applicant, the perception of his application being in terms of section 11(6) and the acknowledgement of receipt of an application in terms of section 18. The letter is addressed to "The Director: Legal Services" of the Department in Pretoria. All previous dealings in respect of the applicant's applications have been with the Port Elizabeth office of the Department.
- [35] The letter recognises the acknowledgement of the receipt of the application and the letter specifically provides for the insertion of the Department's reference number. Yet, remarkably, the reference number is not inserted. I think that it is extraordinary that the Department's reference number in respect of the application which features so prominently in the acknowledgement of receipt is not referred to anywhere in the letter. Clearly the allocation of a reference number is to enable the Department to identify the application in issue when future enquiries are made. That is the purpose of providing it. There is every reason to believe that this failure might make it extremely difficult for the Department to identify the correct application. The applicant's passport number which enjoys equal prominence in the acknowledgement of receipt is similarly not referred to.
- [36] I have recorded above that it is apparent from the acknowledgement of receipt that the application received by the Department has been acknowledged as being an application for a "relative's permit (spouse)" same being an application in terms of section 18. I find it curious that this feature which may have assisted the Department in identifying the correct application and the nature of such application is not included in the letter. The letter persists in the terminology identifying the application as one for "transfer of accompany spouse – work permit". This terminology could hardly assist the Department in identifying an application for the "renewal of a visitor's permit" in terms of section 11(6) of the Act or an application for a "relative's permit" in terms of section 18 of the Act. The reference to the "file number" of the 2009 application is equally little assistance.
- [37] In these circumstances I do not consider that the letter coupled with a prediction by an unidentified individual in the Department that the application be processed in thirty days can establish that an unreasonable delay had occurred prior to the issue of this application. This is particularly so where it would appear from the founding affidavit that reasons for the delay have been provided which the applicant, or his legal representatives, regard to be inadequate but which are not shared with the court. It is significant too that nowhere in the papers does the applicant say what he considers to be a reasonable period within which to respond to his application nor is any attempt made to motivate why the delay which has occurred should be considered to be unreasonable.

[38] For these reasons I am unable to find that the applicant has established that an unreasonable delay had occurred prior to the issue of the application. The application is accordingly fatally defective.

[39] In the result, the application is dismissed. No order is made in respect of costs.

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J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Applicant: Adv Moorhouse, instructed by Maci Attorneys, Port Elizabeth

For Respondent: Adv Msizi, instructed by the State Attorney, Port Elizabeth

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