REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 223/2011

In the matter between:

CYRIL AYETOMA OGBOKOR	**1ST APPLICANT**
GLADYS AMAKA CYRIL-OGBOKOR	**2ND APPLICANT**
and	
THE IMMIGRATION SELECTION BOARD	**1ST RESPONDENT**
THE MINISTER OF HOME AFFAIRS AND IMMIGRATION	**2ND RESPONDENT**
THE CHIEF OF IMMIGRATION	**3RD RESPONDENT**

Neutral citation: *Ogbokor v The Immigration Selection Board* (A 223/2011) [2012] NAHCMD 33 (17 October 2012)

Coram: GEIER J
Heard: **30 July 2012**
Delivered: **17 October 2012**

Flynote: Review — Review in terms of rule 53 — High Court rules — Unreasonable delay — What constitutes — Question whether delay unreasonable within court's discretion — Delay can be condoned – Applicants seeking to review Immigration Control Board’s decision to refuse them permanent residence permits — Applicant becoming aware of decision before 4 January 2011 — Applicant launching proceedings on 2 September 2011 — Court not satisfied that evidential

basis laid for delay — Condonation of delay not justified under the circumstances — Application for review dismissed on ground of unreasonable delay.

Summary: The applicants had sought an order to review and set aside a decision by the first respondent to refuse them permanent residence permits — This decision communicated under cover of a letter dated 13 December 2010 — Applicants legal practitioner requesting reasons for decision on 4 January 2011 — Setting deadline for reply for 14 January 2011 — Request repeated only on 1 July 2011 — No response received in respect of either request — Application launched on 2 September 2011 — The respondents raised several points *in limine*, inter alia, that there had been an unreasonable delay in bringing the review application —

Held: That a delay of some eight months in the bringing of a review application per se constitutes an unreasonable delay for which the court's condonation would be required

Held: The applicants had not explained their inaction over a period of 8 months – they did also not threaten legal action and seemingly were conducting their case at leisure

Held: A failure to warn a potential respondent can - on its own - lead to an inference of unreasonable delay

Held: Even if the first respondent may have contributed to the delay in this case, by failing to respond to correspondence this factor was neutralised by the applicants' failure to even threaten a review

Held: That every review and the setting aside of an administrative decision causes prejudice of one or other kind to a respondent in a review application. In the absence of even a threat to bring a review it was impossible to consider whether or not the application could have been averted if notice had been given of such intention

Held: As the application was neither voluminous nor complex in nature — Also the record was not voluminous — It would have been a simple matter for the applicants to have brought their review at a much earlier stage - also the legal issues underlying the review are not particularly complex — It would have been an easy matter for the applicants' legal practitioner to have placed the respondents on terms and in the absence of a response to have brought review without further delay.

Held: That the provisions of section 26(7) of the Immigration Control Act of 1993 had a material bearing on the efficacy of the review relief — The delay of the applicants' brought about a situation that — by the time that they eventually launched their application they were actually free — in terms of Section 26(7) of the Immigration Control Act of 1993 — to request a reconsideration of the decision to refuse them a permanent residence permit as communicated on 13 December 2010

Held: Delay in the launching of this application considered to be unreasonable — Condonation refused

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ORDER

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a) The application is dismissed.

b) The respondents are to bear the applicant's costs, jointly and severally, the one paying the other to be absolved, on the attorney and own client scale.

JUDGMENT

GEIER J:

[1] The applicants, both Nigerian nationals, are seeking to review the decision of the Namibian Immigration Selection Board, the first respondent herein not to grant them a permanent resident permit. They also seek certain ancillary relief.

[2] The background facts giving rise to the application are briefly as follows:

(a) The first applicant originally entered Namibia during 1995 as a Technical Aid Corps volunteer under an agreement concluded between the governments of Nigeria and Namibia.

(b) He subsequently obtained employment with the Institute of Higher Education in 1997 where he worked as a senior lecturer until 2001. He then obtained employment with the Polytechnic of Namibia where he is currently employed as a lecturer in Economics.

(c) The second applicant, the first applicant's wife, and their eldest son entered Namibia in 1997 were they have been continuously residing since then.

(d) The first applicant successfully applied for and was granted a succession of employment permits during his tenure in Namibia.

[3] It was in such circumstances that the first applicant tried to obtain permanent residence. A first application was made and rejected during 2000. A second application launched in 2007 as well as a third, which now forms the subject matter of this review were also refused.

[4] The applicants allegedly received the notification of the relevant rejection of their third application during early January 2011, which notification had been made under cover of a letter dated 13 December 2010.

[5] The first applicant immediately consulted his legal practitioner who, on his instructions, on 4 January 2011, addressed a letter in the following terms to the Permanent Secretary in the Ministry of Home Affairs and Immigration in Windhoek:

'Dear Sir or Madam

Re: DR CYRIL OGBOKOR AND FAMILY / APPLICATION FOR PERMANENT RESIDENCE PERMIT (14/2/11-4268/96)

We are acting on behalf of Dr Cyril Ogbokor

Our client made an application for the issuance of a permanent residence permit, which was rejected by way of your letter dated 13 December 2010.

We would appreciate it if you could inform us of the reasons for the rejection of our client's application for the permanent residence permit. We would appreciate it if you could finish the said reasons in writing and on or before Friday 14 January 2011.'

Yours faithfully

Norman Tjombe

Norman Tjombe Law Firm'

[6] No reasons were supplied by the said deadline or subsequently.

[7] Eventually and on 01 July 2011 a further letter was written by the said legal practitioner to the permanent secretary of the Ministry of Home Affairs and Immigration:

'Dear Sir or Madam

Re: DR CYRIL OGBOKOR AND FAMILY / APPLICATION FOR PERMANENT RESIDENCE PERMIT (14/2/11-4268/96)

We refer to our letter dated 4 January 2011, of which we attach a copy thereof hereto for your ease of reference.

We would appreciate it if you could forward to us the reasons for the rejection of our clients' application for permanent residence.

Yours faithfully

Norman Tjombe

Norman Tjombe Law Firm'

[8] In such circumstances and in the absence of a response to also this letter the applicants eventually launched this application for review on 02 September 2011.

[9] Given the circumstances it did not come as a surprise that the respondents raised the *in limine* objection of the unreasonable delay of the applicants bringing of this review application.

[10] The applicants in turn denied that there was any unreasonable delay. They contend that, despite repeated requests, no reasons for the first respondent's decision had been forthcoming and that, in the absence of any reasons for a decision, it was difficult for the applicants to even decide whether or not the first respondent's decision should be challenged. It was thus the first respondents' inaction which should be viewed as the sole contributing factor for the application only being launched some 'seven' months later.

[11] It was submitted further that the delay could also not have prejudiced the respondents.

[12] Mr Tjombe, who also appeared on behalf of the applicants at the hearing of this matter, conceded however that a review court has the discretion to bar an applicant who fails to provide a reasonable and satisfactory explanation for the delay for the timeous prosecution of his or her review.

[13] He submitted further with reference to South African case law that the *in limine* objection should be dismissed.[1]

[1] *Solidarity and Others v ESKOM Holdings Ltd* (2008) 29 ILJ 1450 (LAC);*Associated Institutions Pension Fund and Others v Van Zyl and Others* 2005 (2) SA 302 (SCA) *Sishuba v National Commissioner of the South Africa Police Service* (2007) 28 ILJ 2073 (LC), *NAPTOSA and Others V Minister of Education, Western Cape and Others* (2001) 22IU 889 (C) and *Autopax Passenger Services (Pty) Ltd v Transnet Bargaining Council and Others* (2006) 27 ILJ 2574 (LC)

[14] Mr Chanda who appeared on behalf of the respondents relied on the unreported Namibian decision of Damaseb JP in *Ebson Keya v Chief of the Defence Force & 3 Others* [2] and also the findings of this court, as made in the *Purity Manganese (Pty) Ltd v Minister of Mines & Energy*[3] and the *Namibia Grape Growers and Exporters v Minister of Mines & Energy*[4] decisions, in which cases a delay of some seven months for the bringing of the review application was held as having constituted an unreasonable delay.

[15] The court was however not referred by counsel to the decision of *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and Others* 2011 (2) NR 437 (HC) in which the applicable Namibian authorities were conveniently set out by Damaseb JP as follows :

'[41] In Ebson Keya v Chief of Defence Forces and Three Others the court had occasion to revisit the authorities on unreasonable delay and to extract from them the legal principles applied by the courts when the issue of unreasonable delay is raised in administrative law review cases. The following principles are discernable from the authorities examined:

(i) The review remedy is in the discretion of the court and it can be denied if there has been an unreasonable delay in seeking it: There is no prescribed time limit and each case will be determined on its facts. The discretion is necessary to ensure finality to administrative decisions to avoid prejudice and promote the public interest in certainty. The first issue to consider is whether on the facts of the case the applicant's inaction was unreasonable: That is a question of law.

(ii) If the delay was unreasonable, the court has discretion to condone it.

(iii) There must be some evidential basis for the exercise of the discretion: The court does not exercise the discretion on the basis of an abstract notion of equity and the need to do justice between the parties.

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[2]Unreported judgement in High Court case A 29/2007
[3]2009 NR (1) 277 (HC)
[4]2002 NR 328 (HC)

(iv) An applicant seeking review is not expected to rush to court upon the cause of action arising: She is entitled to first ascertain the terms and effect of the decision sought to be impugned; to receive the reasons for the decision if not self-evident; to obtain the relevant documents and to seek legal and other expert advice where necessary; to endeavour to reach an amicable solution if that is possible; to consult with persons who may depose to affidavits in support of the relief.

(v) The list of preparatory steps in (iv) is not exhaustive but in each case where they are undertaken they should be shown to have been necessary and reasonable.

(vi) In some cases it may be necessary for the applicant, as part of the preparatory steps, to identify the potential respondent(s) and to warn them that a review application is contemplated. In certain cases the failure to warn a potential respondent could lead to an inference of unreasonable delay.

[42] Writing for a two-judge bench of this court in Disposable Medical Products (Pty) Ltd v The Tender Board of Namibia and Others 1997 NR 129 (HC) at 132D Strydom JP (as he then was) said:

'In deciding whether a delay was unreasonable two main principles apply. Firstly whether the delay caused prejudice to the other parties and secondly, the principle applies that there must be finality to proceedings. Although the Court has discretion to condone such delay it is seldom if ever, prepared to do so where the delay caused prejudice.'

[43] I wish to repeat the following remarks in the Keya case at 10 – 11, para 19:

'In my experience, every review and setting aside of an administrative decision causes prejudice of one or other kind to a respondent in a review application. Proof of prejudice, without more, should not take the matter very far. Otherwise a Court would not grant review. What is needed is proof of prejudice which could have been averted if notice were had of an impending review. The more substantial such prejudice, the more it strengthens the conclusion that the delay in bringing a review application was unreasonable. In exercising the discretion whether or not to condone unreasonable delay, the Court may have regard to the conduct of a respondent insofar as it may have contributed to the delay.'

[44] To the above, I wish to add the following: the length of time that had passed between the cause of action arising and the launching of the review is not a decisive factor although no doubt important. The crucial consideration is the extent to which passage of time — in view of the nature of relief and the subject to which it relates — either weakens or has no or

little bearing on the efficacy of the relief sought. The less efficacious the relief sought or the more serious the prejudice it causes on account of the delay, the stronger the inference that the delay was unreasonable.'[5]

[16] Returning to the facts of this matter and with reference to the authorities summed up in the *Kleynhans* matter there can be no doubt that a delay of some eight months in the bringing of a review application per se constitutes an unreasonable delay[6] for which the court's condonation is required.

[17] The first relevant consideration to any such condonation emerges with reference to the application itself, which was neither voluminous nor complex in nature. Coupled with these considerations is that the record, which was only belatedly made available, is also not voluminous. It would have been a simple matter for the applicants to have brought their review at a much earlier stage. Also the legal issues underlying this matter are not particularly complex.

[18] It is also to be noted that the applicants' first letter of demand set a deadline for 14 January 2011. This was never followed up until July 2011. Surely it would have been an easy matter for the applicants' legal practitioner to have placed on record, for instance, shortly after the expiry of the first deadline, that no reasons for the first respondent's decision had been received and, that by the time of the effluxion of a second and further deadline for example, the applicants would accept that no record or reasons would be forthcoming or were indeed available and that in the absence of any such record and reasons such absence and the lack of reasons would be advanced as a further ground for review. The application could thereafter have been brought without further delay. It is clear that in terms of Rule 53(1) of the Rules of High Court the record would in any event have had to be made available upon the launching of the application where after the applicants would been afforded the further opportunity to amend their papers in terms of Rule 53(4).

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[5]At pages 450 - 451

[6]See also *Purity Manganese Pty Ltd v Minister of Mines & Energy op cit* and the *Namibia Grape Growers and Exporters v Minister of Mines & Energy op cit*

[19] Yet, inexplicably, the applicants did nothing. They also do not explain their inaction, save to put the blame of respondents.

[20] It also appears from the cited correspondence dated 4 January 2011 and 1 July 2011 that no legal action was threatened. It seems as if the applicants were conducting their case at leisure. The correspondence in question thus discloses a singular lack of urgency.

[21] In this regard it is to be noted that a failure to warn a potential respondent can — on its own — lead to an inference of unreasonable delay.[7]

[22] Even if one accepts that the conduct of the first respondent may have contributed to the delay in this case, this factor, in my view, is neutralised by the applicants' failure to even threaten a review in this instance.

[23] I agree with the learned Judge President that every review and the setting aside of an administrative decision causes prejudice of one or other kind to a respondent in a review application. In the absence of even a threat to bring a review it is impossible to consider whether or not the application could have been averted if notice had been given of such intention. This scenario did simply not arise on the facts.

[24] Most importantly however is the impact of the provisions of section 26 of the Immigration Control Act 7 of 1993 on this matter. The section provides:

26 Application for permanent residence permits

'(1)(a) An application for a permanent residence permit shall be made on a prescribed form and shall be submitted to the Chief of Immigration.

…

…

[7] *Kleynhans v Chairperson of the Council for the Municipality of Walvis Bay and Others* at para [41]

(4) When the board has authorized the issue of a permanent residence permit, the Chief of Immigration shall issue such permit in the prescribed form to the applicant concerned. …

…

…

(7)(a) If the board rejects an application submitted to it in terms of subsection (2), the board shall not be obliged to reconsider such application, and the board shall not consider another such application by the same person before the expiration of a period of not less than six months from the date on which the said person was informed of the decision of the board: Provided that if the Chief of Immigration receives any new information or it is shown that the circumstances affecting the application in question have changed, he or she may at any time request the board to reconsider the first-mentioned application.

(b) After receipt of a request in terms of paragraph (a) the board shall reconsider the application in question as if it were submitted to the board under subsection (2).'

[25] It appears that the legislature intended to provide for a mechanism which would allow for a reconsideration of such decisions on changed circumstances before the expiry of the set six month period and thereafter. Given these options it almost seems absurd to revisit a decision that was made by first respondent as far back as 14 October 2010 on information supplied even before that date, particularly if a review application is brought outside these parameters.

[26] The provisions of section 26(7) thus have a material bearing on the efficacy of the review relief which the applicants continue to seek. In this instance the passage of time — caused by the applicants delay - brought about a situation that — by the time that they eventually launched their application for review on 2 September 2011 — they were actually free — in terms of Section 26(7) of the Immigration Control Act 1993 — to request a reconsideration of the decision to refuse them a permanent residence permit as communicated on 13 December 2010. It can further not be of assistance to the applicants' case that the matter was eventually heard in July 2012.

[27] The delay thus brings about a situation that a referral back — now — of the matter, for reconsideration, would merely entail precisely the same enquiry — on the same facts — as they stood at the time that the applicants' third application was made or on facts which may have been overtaken by events or on facts which would no longer be of relevance. That must have been a situation that the legislature intended to avoid through the enactment of sections 26(7)(a) and (b).

[28] It is ultimately on all of the aforementioned grounds that I am not prepared to exercise my discretion in favour of the applicants.

[29] I therefore decline to condone what I consider to be an unreasonable delay in the launching of this application.

COSTS

[30] It has not gone unnoticed that the respondents ignored altogether the requests of the applicants' legal practitioner for reasons for the rejection of the applicants' third application for permanent residence permits.

[31] It is stating the obvious that it is incumbent on all administrative bodies and officials to act fairly in accordance with the requirements of Article 18 of the Namibian Constitution — this obligation entails the providing and making available of reasons to an affected party.[8] The furnishing of reasons remains one of the most fundamental requirements to a fair administrative process. The respondents are in flagrant breach of this requirement.

[32] This court would fail in its duty if it would not censure the conduct of the respondents and express its disapproval of the manner in which they failed to comply with one of the most fundamental requirements imposed on them by Article 18 when requested to do so.

[8]See for instance : *Government of the Republic of Namibia v Sikunda* 2002 NR 203 (SC) at p228

[33] In the result the following orders are made:

a) The application is dismissed.

b) The respondents are to bear the applicant's costs, jointly and severally, the one paying the other to be absolved, on the attorney and own client scale.

H GEIER

Judge

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APPEARANCES

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