

Challenging the Failure of the Department of Home Affairs to Make a Decision on a VISA Application in Terms of PAJA

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28 February 2025

compel the Department of Home Affairs to process visa applications and provide feedback. The case further highlighted a number of infringements of rights due to the Department of Home Affairs' failure to process visa and permit applications in a timely manner.

PAJA aims to give effect to the right to administrative action that is lawful, reasonable and procedurally fair and to the right to written reasons for administrative action as contemplated in section 33 of the Constitution of the Republic of South Africa, 1996; and to provide for matters incidental thereto.³ Determining whether a certain action can be considered an administrative action involves deciding while taking into account legal precedents that interpret administrative action in terms of s33 of the Constitution and its definition in s1 of PAJA.⁴ In *N B and Another v Minister of Home Affairs and Another*⁵ the court referred to the definition of "administrative action" in s1 of PAJA, which includes a decision by an organ of state exercising a public power that adversely affects the rights of any person and has a direct, external legal effect. The court used a distilled definition of the concept from the Constitutional Court case *Minister of Defence and Military Veterans v Motau and Others*⁶, which contains seven elements that an administrative action must include.

In accordance with Motau an administrative action must be (a) a decision of an administrative nature; (b) by an organ of State or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of any legislation or an empowering provision; (e) that adversely affects rights; (f) that has a direct, external legal effect; and (g) that does not fall under any of the listed exclusions.⁷

PROCEDURAL FAIRNESS

In the *De Saude Attorneys* case the court found that the inaction of Department of Home Affairs is a fundamental breach of procedural fairness. The court highlighted that the failure to give a decision over an unduly prolonged period of time constitutes unfair administrative action. Moreover, the Department of Home Affairs has statutory and constitutional obligations to process applications in a timely manner.

INTRODUCTION

Applying for permanent residency in South Africa can be a frustrating and drawn-out process. The Department of Home Affairs is often criticized for its slow processing of various types of visa applications, with many applicants waiting for years for an outcome. In a case handled successfully by our offices, an individual waited for over three years for an outcome on his permanent residency visa application, even though his family members, who applied at the same time, had already been approved. This delay left him in a difficult and uncertain position, highlighting the challenges and inefficiencies within the Department of Home Affairs. For many, such delays cause unnecessary stress and raise concerns about fairness in the system.

Delays in processing visa applications can cause significant problems for applicants. These delays can affect employment opportunities, access to social services, and overall stability. This article examines the law that regulates government's obligation to take decisions that constitute "administrative action" fairly, and timeously, and highlights what persons affected by the government's failure to make a decision on a VISA application, can do to protect themselves in such a situation.

LEGAL RECOURSE UNDER PROMOTION OF ADMINISTRATIVE JUSTICE ACT

In terms of our law VISA Applicants have the right to expect that their visa applications will be processed, and they will receive outcomes on their visa application within a reasonable timeframe. The Promotion of Administrative Justice Act¹ (PAJA) can be an effective legal tool for applicants who are facing delays with respect to their visa applications. In *DG Department of Home Affairs v De Saude Attorneys*² the court highlighted that PAJA can be used as a remedy to

The court noted that the Immigration Act aims to ensure that visas and permanent residence permits are issued promptly and the Department's failure to adhere to these obligations constitutes a violation of procedural fairness and the rule of law.⁸

According to S3(1) an administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair. To give effect to the right to a procedurally fair administrative action, the Department of Home Affairs must give a person whose rights or legitimate expectations are materially and adversely affected 'adequate notice of the nature and purpose of the proposed administrative action; a reasonable opportunity to make representations; a clear statement of the administrative action; adequate notice of any right of review or internal appeal, where applicable; and adequate notice of the right to request reasons.'⁹

According to s6(1) of PAJA any person whose rights or legitimate expectations have been materially and adversely affected may institute proceedings in a court or a tribunal for the judicial review of an administrative action. S6(2)(g) further stipulates that a court or tribunal has the power to judicially review an administrative action if the action concerned consists of a failure to take a decision. Additionally, in *De Saude Attorneys case* the court referred to *Kruger v President of the Republic of South Africa & others*¹⁰ thereby highlighting that failure to provide a decision over an unduly prolonged period of time amounts to an unfair administrative action.¹¹

PROCEDURAL REQUIREMENTS FOR JUDICIAL REVIEW UNDER PAJA

S7(1) outlines procedural requirements that one must comply with before referring a matter concerning unduly delayed recessing of visa applications to court for a judicial review under PAJA. S7(2) PAJA requires a person whose rights or legitimate expectations are affected in this regard, to exhaust any internal remedies provided for in any other law before instituting legal proceedings in court for judicial review. These remedies may include sending a letter of demand or mandamus to the Department of Home Affairs to compel the department to process the visa applications and give feedback. Upon conclusion of exhausting all the available internal remedies without relief, legal proceedings for judicial review are supposed to be instituted no later than 180 days. However, in exceptional circumstances, a court or tribunal may, on application by the person whose rights have been affected, exempt such person from the legal obligation to exhaust any internal remedy provided for by any other law if the court or tribunal deems it in the interest of justice.

CONCLUSION

The Department has statutory and constitutional obligations to process applications in a timely manner. The Department's failure to process visa applications in a timely manner is a violation of the right procedural fairness in terms of PAJA. Visa applicants are entitled to have decisions made on their applications within a reasonable timeframe. The Department's systemic failure to deliver decisions amounts to a denial of administrative justice and procedural fairness. Visa Applicants facing unduly delay with their visa applications processing can use PAJA as a tool to find legal recourse.

However, Internal remedies must be exhausted first. If no relief has been achieved the visa Applicants can challenge the inaction by the Department within 180 days after the date on which any proceedings instituted in terms of internal remedies as have been concluded; or 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. The Department's inaction (its failure to take a decision timeously) can be challenged by instituting legal proceedings to a court or tribunal to review the conduct/omission of the Department in terms of S6(1) read with s6(2)(g) of PAJA. Contact the Public Law Department at HBGSchindlers if you require further assistance in compelling the Department of Home Affairs to take a decision in a VISA application case.

¹Promotion of Administrative Justice Act 3 of 2000.

²Director-General of the Department of Home Affairs and Others v De Saude Attorneys and Another; [2019] 2 All SA 665 (SCA) (29 March 2019).

³Promotion of Administrative Justice Act 3 of 2000.

⁴De Rebus 2023 To PAJA or not to PAJA that is the question? Is the avoidance of PAJA justified? 01 April 2025 available at < <https://www.derebus.org.za/to-paja-or-not-to-paja-that-is-the-question-is-the-avoidance-of-paja-justified/> > (accessed on 06 February 2025).

⁵N B and Another v Minister of Home Affairs and Another (9940/2022) [2024] ZAWCHC 39 (6 March 2024).

⁶Minister of Defence and Military Veterans v Motau and Others 2014 [5] SA69 CC.

⁷Minister of Defence and Military Veterans v Motau and Others para 33
⁸Director-General of the Department of Home Affairs and Others v De Saude Attorneys and Another; [2019] 2 All SA 665 (SCA) (29 March 2019) para 59.

⁹Promotion of Administrative Justice Act 3 of 2000.

¹⁰Kruger v President of the Republic of South Africa & others 2009 (1) SA 417 (CC).

¹¹Director-General of the Department of Home Affairs and Others v De Saude Attorneys and Another [2019] 2 All SA 665 (SCA) (29 March 2019) para 41.



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