

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, EAST LONDON)**

CASE NO.: EL1461/2018

In the matter between:

ALPHA OMEGA YOUTH OUTREACH

APPLICANT

And

NATIONAL LOTTERY COMMISSION

FIRST RESPONDENT

JUDGMENT

Smith J:

- [1] This matter concerns the validity of the respondent's refusal of an application for a financial grant from the National Lottery Distribution Trust Fund (the fund) submitted to it by the applicant. The applicant seeks an order, *inter alia*, reviewing and setting aside that decision, and that the application should not be remitted to the respondent for reconsideration, but that the court should instead substitute its decision for that of the respondent, and approve the application.
- [2] The applicant is a non-profit organisation whose main aim is to address social problems such as crime and drug abuse amongst the youth. The respondent is the National Lottery Commission, established in terms of the Lotteries Act, No. 57 of 1997 (the Act). The main functions of the respondent are, *inter alia*,

to receive monies raised through national lottery competitions, to adjudicate funding applications, distribute funding to charities, and administer the fund. The respondent is assisted in the adjudication of funding applications from qualifying entities by distribution agencies appointed by the Minister of Trade and Industry in terms of sections 28(1) and 28(2) of the Act. These agencies are, however, merely sub-committees of the Commission and perform their functions on its behalf. It is common cause that in adjudicating applications for funding the respondent exercises a public power, and its decisions are consequently subject to judicial scrutiny.

- [3] On 14 September 2015 the respondent published a notice in various newspapers inviting applications for funding from non-profit organisations for the 2016/2017 financial year. The stipulated closing date was 22 October 2015.
- [4] The applicant submitted an application before the stipulated deadline, applying for a grant in excess of R 800 000.00. According to the applicant its application, as well as supporting documents, complied with the respondent's terms and conditions in all respects.
- [5] On 28 March 2017 the respondent advised the applicant that it had depleted its funds available for the 2016/2017 financial year and that its application would accordingly only be considered in respect of the 2017/2018 financial year.
- [6] The applicant was eventually advised, on 25 April 2017, that its application had been declined for the following reasons;
 - "The dates of the financial year end in the founding document is not aligned to the date in the Annual financial statements.

- Furthermore, the Arts and Culture Distributing Agency noted the acknowledgment of the error by the applicant however the guidelines are prescriptive on the requirement and thus can't be overridden."

- [7] It is common cause that the contended non-alignment of the dates refers to the fact that the applicant's constitution provides that its financial year runs from the 1st of February to the 1st of February of the ensuing year, whereas the financial statements were in respect of the period commencing 1 February 2014 and ending 31 January 2015.
- [8] The applicant subsequently lodged an internal appeal which was also unsuccessful. The applicant has also previously successfully applied for condonation for its failure to bring the proceedings within the 180 day period as prescribed by The Promotion of Administrative Justice Act, No. 3 of 2000.
- [9] Mr *Sellem*, who appeared for the applicant, submitted that the respondent failed to exercise its discretion properly, or at all. He argued that the respondent had on previous occasions approved applications submitted by the applicant based on financial statements which suffered from the same alleged non-alignment of dates. He argued that it is thus clear that on this occasion the respondent has adopted a dogmatic and intransigent approach, and has consequently rejected the applicant's application for flimsy reasons.
- [10] It is indeed evident from the papers that the respondent has made no effort to consider whether or not it should condone the irregularity in the financial statements, if indeed there were one. It seems logical to me that external auditors, when faced with a founding document that defines a financial year as commencing on 1 February and ending on 1 February of the ensuing year, would audit the books from 1 February until 31 January of the following year.

The ensuing year's audited financials would again commence on 1 February. The audit would therefore of necessity cover a period of an entire financial year. I am accordingly of the view that the difference of a day between the financial year end as defined in the applicants constitution and the period stipulated in the financial statements is more perceived than real.

- [11] In the event, even if the respondent is correct in its assertion that there was non-alignment of the dates stipulated in the aforesaid documents, it would have been a relatively insignificant matter and certainly one which at the very least impelled the respondent to exercise a discretion in this regard. This is more so since it appears that the respondent had on previous occasions either ignored or decided to condone a similar discrepancy.
- [12] Mr *Tisani*, who appeared for the respondent, conceded that it had a discretion to condone the perceived irregularity. He argued, however, that the respondent has indeed exercised its discretion properly since the irregularity is not only a technical one but goes to the root of the respondent's responsibility to ensure probity in all applications that serve before it.
- [13] I do not agree with these submissions. In my view it is manifest that the respondent adopted a rigid, dogmatic and entirely technical approach. Once it decided that the guidelines are "prescriptive" and cannot be "overridden", it effectively refused to exercise a discretion. This was no doubt a strategy to enable it to deal with the large number of applications that serve before it.
- [14] In *National Lotteries Board vs The South African Education and Environment Project* 2012 (4) SA 504 (SCA), at para. 9, the Supreme Court of Appeal criticized this type of inconsistent and rigid application of guidelines. In that matter the board had refused an application for funding because the

applicant's financial statements were not properly signed. The court held that the respondent was not entitled to treat every departure from the strict prescripts of the guidelines as fatal. The court held furthermore that a proper exercise its discretion compelled the respondent to consider whether, despite the discrepancy, the objects of the guidelines had been achieved, and if it has "then insignificant or technical instances of non-compliance should generally be condoned. (See also: *Kemp NO v Van Wyk* 2005 (6) SA 519 (SCA), at para.1)

[15] In this matter the respondent has similarly failed to exercise its discretion properly by applying the guidelines dogmatically and rigidly. This much is evident from the reasons provided for the decision. I am accordingly of the view that the decision falls to be reviewed and set aside.

[16] Mr *Tisani* has, however, argued correctly that the applicant did not make out a case for its prayer that this court should substitute its own decision for that of the respondent. It is established law that the default position is that where the decision of an administrative functionary is reviewed and set aside, the matter must be remitted to that functionary for reconsideration in the light of the reviewing court's findings. The provisions of PAJA (s.8(1)(c)(ii) (aa)) contemplates the substitution of decision making where the decision is a foregone conclusion, remittal would be a waste of time, or the decision maker has displayed bias. (*Tripartite Steering Committee & Another vs Minister of Basic Education & Another* 2015 (5) SA107 (ECG). None of these factors has been established in this matter.

[17] The applicant has elected not to follow the procedure prescribed by Uniform Court Rule 53, which means that I do not have before me all the information and

documentation that had served before the respondent. I am accordingly not in a position to determine whether, if the matter is remitted to the respondent, the outcome would be a foregone conclusion. The matter must therefore be remitted to the respondent for reconsideration.

[18] In the result the following order issues:

- a) The respondent's decision to refuse the application for funding submitted by the applicant under reference number 93382, is hereby reviewed and set aside.
- b) The matter is remitted to the respondent for reconsideration on the basis that the applicant has submitted proper financial statements.
- c) The respondent is ordered to pay the costs of the application.

J.E SMITH
JUDGE OF THE HIGH COURT

Appearances

Counsel for the Plaintiff	:	Adv. Selem
Attorneys for the Plaintiff	:	Sotenjwa Attorneys
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Counsel for the Defendant	:	Adv. Tisani
Attorneys for the Defendant	:	Diale Mogashoa Attorneys
		Pretoria

Date Heard : 17/10/2019

Date Delivered : 12/11/2019