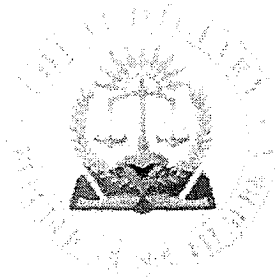


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO

11/5/2020
DATE


SIGNATURE

CASE NO: 016084/2019

In the matter between:

**GERMAN SHEPHERD FEDERATION OF
SOUTH AFRICA**

Applicant

and

**REGISTRAR OF ANIMAL IMPROVEMENT:
DEPARTMENT OF AGRICULTURE, FORESTRY
& FISHERIES**

First Respondent

**MINISTER OF AGRICULTURE, FORESTRY
& FISHERIES**

Second Respondent

KENNEL UNION OF SOUTH AFRICA

Third Respondent

JUDGMENT

MIA, J

- [1] The applicant sought an order by way of notice of motion issued on 6 May 2019 to review and set aside the decisions of the first respondent (the Registrar) to register the third respondent in terms section

8(7)(a)(i) and (ii) of the Animal Improvement Act 62 of 1998 (the Act) as a canine breeders society on 23 October 2015 and as a registering authority on 13 June 2016. The application is brought in terms of sections 6 and 7 of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA). The first, second and third respondents (the respondents) oppose the application.

- [2] The applicant is the German Shepherd Dog Federation of South Africa (the Federation), a non-profit association, comprising 25 specialist German Shepherd Dog Clubs and numerous owners of pure bred German Shepherd dogs in the Republic of South Africa (South Africa). Their purpose is to benefit the German Shepherd dog breed in all spheres in South Africa and internationally. The first respondent is an officer designated as the Registrar, in terms of s (3) of the Act in the Department of Agriculture, Forestry and Fisheries. The second respondent is the Minister of Agriculture Forestry and Fisheries cited as the Minister to whom reference is made in section 1 of the Act. The third respondent is the Kennel Union of Southern Africa (KUSA), a society which records the health and DNA data of different breeds of dogs with a constitution in terms whereof it may sue and be sued.
- [4] The applicant distinguishes itself from KUSA in that it is a union of kennel clubs pertaining to more than 139 different breeds of dogs whilst the Federation's sole purpose is to benefit the German Shepherd dog breed. The latter is affiliated to the Association for German Shepherd Dogs in Germany (WUSV) which maintains an international standard. KUSA associates with the German Kennel Club (VDH) which represents numerous species of dogs. The Federation contends that 90% of all internationally recognised pedigreed German Shepherd dogs are registered with the Federation. It maintains that KUSA does not uphold the high standards as it does. For that reason, it seeks to review and set aside the issuing of a certificate to KUSA as a breeding society by the Registrar on 23 October 2015 and as a registering authority on 13 June 2016. It contends it is an interested party as far as the German Shepherd breed is concerned and wishes to retain

exclusive rights as a breeding society and registering authority in respect of the German Shepherd breed.

- [5] To appreciate this application in its proper context, I set out briefly the following background. On about 5 July 2012 KUSA applied for registration as a Breeders Society and Registering Authority for 218 breeds of domestic dogs which included the German Shepherd breed. On 23 October 2015, the application a Breeders Society was approved and published in the Government Gazette number 40058 on 10 June 2016. On 13 June 2016 the Registrar approved the application for the registration of KUSA as a Registering Authority. On 23 February 2017, the applicant lodged an appeal pursuant to the provisions of section 23 of the Act against the decision of the Registrar in respect of the registration of KUSA as a Breeding Society and Registration Authority. The appeal was lodged late as it was beyond the sixty days required in terms of section 19 of the Regulations to the Act.

- [6] On 15 November 2018, the appeal board considered the matter and handed down its decision. According to the appeal board, the appeal was unsuccessful on the basis that a review court is best placed to determine the lawfulness or unlawfulness of administrative actions, not itself. In other words, it lacked jurisdiction to decide the matter.

- [7] The main issue for determination is whether the Registrar was empowered to take the decision to issue a certificate to KUSA as a Breeding society on 23 October 2015 and as a Registering authority on 13 June 2016 without consulting the Federation before taking the decision. Flowing from that, taking into account the provision of s 7 of PAJA which prescribes the time frame of 180 days for the institution of a review application; whether the application for review was brought within the prescribed time frame. Before proceeding to determine the merits of the application for the review of the decision of the Registrar, procedurally, it is important to determine the issue of condonation first. The respondents oppose the application for condonation for reasons set out hereafter.

AD CONDONATION

- [8] Mr Marais appearing for the applicant argued that the respondents' objection to the application for condonation in terms of section 23 of the Act was demonstratively bad. In terms of section 19 of the Regulations, the Act required an appeal to be lodged within sixty days of the Registrars decision or the applicant having knowledge thereof. The applicant served the review application against the first and second respondent on 7 May 2019 on the Deputy State Attorney, Johannesburg and on the third respondent on 10 May 2019. He admitted that the service on the first and second respondents was not proper and was corrected and re-issued on 20 May 2019. He maintained that this was a *bona fide* error. To this extent, he submitted that the error is miniscule and insignificant.
- [9] In terms of the PAJA, section 7, the date of lodging the review application is three years from the date the Registrar took the decision and more than two years after the applicant came to know about the decision in August 2016. Notwithstanding this delay, Mr Marais submitted that the applicant enjoyed a reasonable prospect of success and the respondents, despite being invited, did not show the prejudice they will suffer due to the late compliance. Despite the applicant writing to the respondents inviting them to consent to condonation or to provide details of the prejudice they were likely to suffer, they refused to consent and failed to furnish particularity relating to the purported prejudice.
- [10] Mr Tshitereke appeared for the first and second respondents, and Mr de Jager for the third respondent. Both counsel took issue with the same aspects and relied on the same arguments to a large extent. Mr Tshitereke argued that the late application was not a *bona fide* error. He argued that the applicant was not reviewing the outcome of the appeal board's decision handed down in November 2018 but the decision of the Registrar to grant KUSA a licence as a Breeding Society and a Registering Authority as set out above. The applicant, in

any event, was late in lodging the appeal as the decision of the Registrar came to its attention on 31 August 2016. It delayed in initiating its appeal as provided for in terms of the Act, so the submission continued. This delay however should not allow it to hide behind having to exhaust internal remedies to explain its delay in bringing an application for review within a reasonable time as contemplated in PAJA.

- [11] He argued that the applicant became aware of the Registrar's decision on 31 August 2016. The 60 day period in terms of Regulation 19 expired on 31 October 2016. The applicant only lodged its appeal on 23 February 2017. The appeal board's decision was handed down on 15 November 2018. The application for review was issued on 6 May 2019. This went far beyond the 180 days required in terms of section 7 of PAJA. The application for condonation was only instituted on 6 January 2020. The decision which is sought to be reviewed was taken by the Registrar on 23 October 2015 and 13 June 2016 respectively. The applicant was three years late in lodging the application to review the decision it became aware of on 31 August 2016.
- [12] Mr de Jager affirmed these submissions and noted that the Registrar's decisions were taken in October 2015 and June 2016 almost 4 years ago. The decisions have been fully implemented. In view hereof he argued that it is in the public interest and in KUSA's interest and a well-recognised principle in our law that there be finality and certainty with regard to decisions that are made. He pointed out further that the applicant did not challenge the decision of the internal appeal board but rather the decision of the Registrar. In the circumstances the 180 day period envisaged in section 7(1) of PAJA is not calculated with reference to the Appeal Board's finding on 15 November 2018 but rather the earlier date of 31 August 2016 when it came to the applicant's attention that the Registrar had registered KUSA as a Breeding Society and Registration Authority. As such the review application is hopelessly delayed and out of time.

- [13] Mr de Jager submitted further that PAJA does not empower the court to grant condonation where an application has not been filed without reasonable delay and outside the 180 day period provided in section 7 of PAJA. Section 9(1) of PAJA empowers the court on application to extend the 180 day period by a fixed period to a specified date. This particular relief, has not been sought by the applicant, instead the applicant has sought condonation in terms of section 7 of PAJA which is not clear. He asserted that the legal requirement to grant an extension of time required that the applicant explain why it would be in the interests of justice to do so. He pointed out that the applicant failed to address this aspect in its application for condonation. He further asserted that the interests of justice do not favour the late institution of the review application for the reasons indicated above i.e. the law and decisions of the Registrar affecting the public had already been fully implemented.
- [14] Mr Tshitereke's submissions on the extension of time find accord with those of Mr de Jager that the applicant seeking an extension of the time period for review in terms of PAJA must show that it would be in the interests of justice to do so. He contended that in making this determination the court must take into account the applicant's reasons for failure to adhere to the statutory requirements. He noted that in this case the applicant has failed to address the reasons for its failure to take action within a reasonable time. The time-lapse from the date on which the applicant was informed of the decision not to grant its request for condonation and the date on which the application was actually instituted constituted a further inexplicable delay. The applicant failed to act within a reasonable time as contemplated in the Act and as required at every stage in terms of the applicable legislation. The applicant's attempts to hide behind the excuse of exhausting internal remedies to explain its delay ring hollow as the appeal board noted that the applicant was late in lodging its appeal and its pursuance of the review was late in any event when regard is had to the appeal record which was made available to the Court.

- [15] The application is brought in terms of section 6 read with section 7 of PAJA. Section 7 provides:

"7. — (1) any proceedings for judicial review in terms of section 6 (1) must be instituted without unreasonable delay and not later than 180 days after the date—

(a) subject to subsection (2) (c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2) (a) have been concluded; or

(b) 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.

(2) (a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

(b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.

(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice."

- [16] In *Mostert NO v Registrar of Pension Funds and Others* 2018(2) SA 53(SCA) the Court held at para [13]:

" In terms of section 9 of PAJA the period of 180 days may be extended for a fixed period by agreement between the parties or, failing such agreement, by a court on application by the person or administrator concerned. **Such an application may be granted where the interests of justice so require**"(my emphasis)

And at para [34]

"What would constitute unreasonable delay would depend on the circumstances....In *Opposition to Urban Tolling Alliance supra* [27] Brand JA said (para 26)

'At common law application of the undue delay rule required a two stage enquiry. First, whether there was an unreasonable delay and, second, if so, whether the delay (if any) was unreasonable. But after the 180 day period the issue of unreasonableness is predetermined by the legislature; it is unreasonable *per se*. It follows that the court is only empowered to entertain the review application if the interest of justice dictates an extension in terms of s 9. Absent such extension the court has no authority to entertain the review application at all"

- [17] In *Asla Construction v Buffalo City Metropolitan Municipality* 2017(6) SA 360 (SCA) the Court stated at para [13]

"A full and proper determination of the merits of the review application was accordingly dependent upon a finding that the respondent's failure had to be condoned. As stated in *Opposition to Urban Tolling Alliance supra* [26]

'Absent such extension the court has no authority to entertain the review application at all. Whether or not the decision was unlawful no longer matters. The decision has been "validated" by the delay..."

It was thus impermissible for the court a quo to have entered into and decided the merits of the review application without having first decided the merits of the condonation application."

- [18] The rule of law requires that undue delays should not be tolerated without a reasonable explanation. (*City of Cape Town v Aurecon South Africa (Pty) Ltd (Consulting Engineers South Africa Amicus Curiae)* 2017 (6) BCLR 730 (CC); see also *Asla supra*.)

- [19] Applying the above principles to the facts in the present matter, on its own admission, the Federation became aware of the Registrar's decision on 31 August 2016. The decision did not relate to a decision pertaining to an application submitted by it. The Federation viewed

itself as an interested party in its appeal to the Registrar. It initially attempted to submit its own application as a breeding society and when it did not meet with success in the time it expected it was explained to the Registrar that the Federation had no option but to appeal the decision to issue a Breeding license to KUSA. This the Federation did long after the 60 days had passed to lodge appeal as prescribed by section 23 of the Act read with regulation 19. In fact, when the appeal did not have the effect it hoped for, it led to the launch of the review application in May 2019 which was more than three years after the Registrar's decision.

- [20] In my view, the applicant has failed to furnish a reasonable explanation for the full period of the delay in bringing the review application, three years after the decision of the Registrar came to its knowledge on 31 August 2016. It appears to have delayed in pursuing the appeal against the Registrar's decision and delayed in lodging the review. In addition, it lodged an application for condonation seeking relief in terms of section 7 rather than seeking an extension of the period in terms of section 9 of PAJA to a particular date.
- [21] As indicated in *Mostert* and *Asla supra*, an extension is a prerequisite before deciding the merits of the review application. I have before me an application for condonation not an extension for the time period. Even if I were to adopt a generous view of the application for condonation and view it as an extension of the time period, the applicant is required to show that it is in the interests of justice to do so. It can do so by showing how it will be prejudiced in the event I do not grant the extension of the period. It is not clear to what date the extension is required. It is also not clear from the review application or the application for condonation how failing to grant the extension and not being granted the relief requested in the review will impact on the applicant's interests. The applicant seeks to be registered as a breeding society. Reviewing and setting aside the Registrar's decision to register the third respondent as a breeding society and registering authority will result in greater prejudice than if the applicant pursues its

own application with the first respondent to finality. Thereafter, if and when necessary it may review that action or failure to take action.

- [22] In the present matter there has been an inordinate manifest delay, which the applicant has not explained satisfactorily. The applicant's conduct throughout has been to place its own interests above any other as is evident in the prompt service it demands from the officials in the office of the Registrar but it has been slow to pursue the appeal and review. It seeks exclusive jurisdiction with regard to the German Shepherd breed, relying on international connections whilst KUSA has similar international connections. When considering the extent of the delay it goes beyond the 180 days and its failure to explain the delay satisfactorily is *per se* unreasonable (see *Mostert supra*).
- [23] What remains for consideration, is whether the interests of justice dictate an extension of the 180-day period. The applicant has placed no facts before me indicating what prejudice it will suffer in the event that the extension is not granted. On the other hand if the extension is granted it places in jeopardy the certainty of a decision made by the Registrar more than four years ago. The relief that the applicant seeks with regard to setting aside the decision is wide as its case relates only to German Shepherd dogs and the decision of the Registrar pertains to 218 breeds of species comprising 900 000 dogs most which do not affect the applicant. The applicant has not persuaded me that it would have reasonable prospects of success when considering the interests of all persons affected and who have relied on the Registrar's decision and KUSA's status as a Breeding Society and Registering Authority. The applicant can apply in its own right for the same status.
- [24] The application cannot succeed on the simple basis that it was filed late- beyond the prescribed 180 days. Over and above, as demonstrated in the preceding paragraphs of this judgment, there is no good cause shown for the late filing of the review. Consequently, I am not satisfied that it is in the interests of justice that the applicant be granted an extension beyond the 180 days.

[25] For the reasons above I make the following order:

ORDER

The application is dismissed with costs.

A handwritten signature in black ink, consisting of a large, stylized 'S' followed by a cursive 'C' and 'MIA'.

**S C MIA
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Appearances:

On behalf of the applicant	:	Adv H.B. Marais hbmarais@law.co.za
Instructed by	:	Mr S Tarr sjtarr@iafrica.com
On behalf of the 1 st and 2 nd respondent	:	Adv T Tshitereke Adv M Makoti mokgerwa@thulamelachambers.co.za
Instructed by	:	Ms K Ramsurjee (State Attorney) KRamsurjoo@justice.gov.za
On behalf of the respondent	:	Adv N. C de Jager nickdejager@capebar.co.za
Instructed by	:	Webber Wentzel Attorneys. Selwyn.hockey@webberwentzel.com
Date of hearing	:	9 March 2020
Date of judgment	:	11 May 2020