JM

IN THE HIGH COURT OF SOUTH AFRICA
(REPUBLIC OF SOUTH AFRICA)
PRETORIA

CASE NO: 19936/12

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED

27.6.2014
DATE

SIGNATURE

27/6/2014

In the matter between:

MAHLALERWA TRANSPORT ASSOCIATION **APPLICANT**

And

LIMPOPO PROVINCIAL REGULATORY ENTITY (REGISTRAR OF TRANSPORT) **1ST RESPONDENT**

MEC FOR ROADS AND TRANSPORT (LIMPOPO PROVINCE) **2ND RESPONDENT**

UNITED MPHAHLELE TAXI ASSOCIATION **3RD RESPONDENT**

GAUTENG PROVINCIAL REGULATORY ENTITY (REGISTRAR OF TRANSPORT) **4TH RESPONDENT**

JUDGMENT

MSIMEKI J:

INTRODUCTION

[1] The applicant brought this application seeking an order:

"1. Reviewing and setting aside the First Respondent's decision taken during August 2010 to the effect that:

1.1 The registration of the route **BRCLP 93735** from SELETENG to SPRINGS main taxi rank in favour of the Third Respondent be reviewed and set aside.

2. Ordering any party who opposes this application to pay costs thereof.

3. further and/ alternative relief."

BACKGROUND FACTS

[2] Both applicant and the third respondent are Taxi Associations with members who transport commuters. The applicant's members transport people from Lebowakgomo to Johannesburg and back while the third respondent's transport people from Seleteng to Springs and back. The Applicant alleges that the first respondent registered a route namely route BRCLP 93735 (the route) from Seleteng to Springs main taxi rank in favour of the third respondent during August 2010 without due regard to the applicable laws. The first respondent, on the other hand, contends that the route had long been in existence and that the third respondent and its members had been utilising it using permits which the first respondent merely converted to operating licences in August 2010. The applicant seeks costs only against any party who opposes the review application and the setting aside of the decision complained about. The application is opposed by the first the second the third and the fourth respondents. There are points in limine raised by the respondents which the court needs to resolve before dealing with the merits of the application. Should the court find in favour of the respondents in the issues pertaining to the points in limine raised then that will dispose of the matter at the outset.

[3] **Advocate Mtsweni** represented the first, the second and the fourth respondents while **advocate Leseme** appeared on behalf of the third respondent. **Advocate Mashavha** represented the applicant.

THE ISSUE

[4] The issue to be resolved is whether the first respondent acted as alleged by the applicant without due regard to the applicable laws or whether the first respondent merely converted the transport permits used by the members of the third respondent without registering the alleged route in favour of the third respondent as alleged by the applicant.

POINTS IN LIMINE

[5] The points in limine raised on behalf of the first, second and the fourth respondents are:

1. that the review application was brought late

2. that the applicant failed to exhaust the internal remedies before it brought the review application.

The points in limine taken by the third respondent are:

1. That the applicant lacks locus standi to bring the application (locus standi in judicio)
2. That the first and fourth respondents were not properly cited as parties to the review application.
3. That, in the main application, the applicant did not exhaust the remedies available to it and that therefore the court lacks jurisdiction to entertain the matter.
4. That the applicant ought to have joined the National Public Transport Regulator and the Provincial Regulatory Entity.

[6] I have decided to first deal with the points in limine as it is, in my view, prudent in this matter, to do so.

RELEVANT LAW

[7] Key to the resolution of the issue in this matter are the following Acts:

1. The National Land Transition Act No. 22 of 2000;

2. The National Land Transport Act No. 5 of 2009;

3. Promotion of Administrative Justice Act No. 3 of 2000;

4. The Constitution of the Republic of South Africa Act No. 108 of 1996 (the Constitution Act); and

5. Decided cases.

CONDONATIONS

[8] The parties have asked the court to condone their acts.

1. The applicant in its supplementary affidavit asked the court to condone its late bringing of its review application.

2. The first respondent, in its answering affidavit, has asked the court to condone the late filing of the opposing affidavit.

3. The third respondent, in its notice of motion dated 18 October 2012, has asked the court to condone the late filing of its heads of argument.

[9] The applicant does not seem to have been against the condoning of the first respondent's late filing of its opposing affidavit. It, similarly, does not appear to have opposed the condonation of the third respondent's late filing of its heads of argument.

[10] What has clearly been opposed is the condonation of the applicant's late bringing of its review application.

[11] It is noteworthy that the applicant's application is brought in terms of Section 33 of Act No. 108 of 1996 (the Constitution Act), read with Act No. 3 of 2000 (PAJA).

Section 33 (1) and (2) of the Constitution Act provides that:

"(1) Everyone has the right to administrative action that is lawful, reasonable and

procedurally fair

(2) Everyone whose right has been adversely affected by administrative action has the right to be given written reasons."

Section 7(1) of PAJA provides that:

"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." (my emphasis)

Section 7(2) (a) provides:

"subject to paragraph 2(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" (my emphasis)

Section 7(2) (b) provides:

"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." (my emphasis)

Section 7 (2) (c) provides:

"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."(My emphasis)

Section 9(1) allows the parties to agree to extend the period of 180 days for a fixed period, failing such agreement the court or tribunal may, on application by the person or administrator concerned, extend the period.

This, in terms of Section 9(2), may only be done "where the interest of justice so require."

[12] Section 92(1) of National Land Transport Act, 2009, provides:

> "92(1) The following persons may appeal to the Transport Appeal Tribunal against an act, direction or decision of any entity that has granted or refused an application relating to an operating licence, in the manner and within the time prescribed:
>
> (a) The aggrieved applicant;
> (b) The holder of any operating licence or permit affected by the decision; or
> (c) Any other person interested in or affected by the decision."

Section 92(3) provides:

> "(3) Appeals pending before Provincial Transport appeal bodies contemplated in Section 128 (1) of the Transition Act on the date of commencement of this Act must be finalised by those bodies as if this Act had not been passed, unless the MEC directs that those appeals must be transferred to the Transport Appeal Tribunal for finalisation."

It is noteworthy that the National Land Transport Transition Act No.22 of 2000 was repealed in its entirety by the National Land Transport Act No.5 of 2009. Both Acts deal with the conversion of permits to operating licences.

CASE LAW

[13] It has been submitted, on behalf of the applicant, that the review application has been brought in good faith and that there is a prospect of success in the application. The court was referred to the case of **Bertie Van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others 2010 (2) SA 181 (CC)**. In paragraph [14], **Mokgoro J** shows that lateness in bringing an application is not the only

consideration. The test for condonation, according to the judge, is "whether it is in the interest of justice to grant condonation."

See also **Van Wyk v Unitas Hospital and Another (open Democratic Active Centre as Amicus Curiae) 2008 (2) SA 472 (CC) and S v Mercer 2004 (2) SA 598 (CC) (2004) (1) SACR 1.**

Mr Mtsweni, on behalf of the first, second and fourth respondents referred the court to the case of:

Gqwetha v Transkei Development Corporation Ltd and Others 2006 (2) SA 603 (SCA) at 612E-F. Therein the court, per **Nugent JA**, shows the importance of initiating judicial reviews without undue delay where the validity of the decisions of the public bodies is challenged. Failure to do so, according to the judge, affects their efficient functioning. Aside the prejudice that may be caused to the respondent, the public interest element in the finality of administrative decisions and the exercise of administrative functions are paramount in deciding whether condoning an action will be in the interest of justice.

See also: **Wolgroeiers Afslaers (Edms) Bpk v Munisipalitiet van Kaapstad 1978 (1) SA 13 (A) at 41E-F**

At paragraph [23] of the Gqwathe v Transkei Development Corporation Ltd case the court said:

> "underlying that latter aspect of the rationale is the inherent potential for prejudice, both to the efficient functioning of the public body and to those who rely upon its decisions, if the validity of its decisions remains uncertain. It is for that reason in particular that proof of actual prejudice to the respondent is not precondition for refusing to entertain review proceedings by reason of undue delay although the extent to which prejudice has been shown is relevant consideration that might even be decisive where the delay has been relatively "slight" (**Wolgroeiers Aflaers**, above **at 42C**).
>
> The question as shown in:
>
> **Associated Institutions Pension Fund and Others v Van Zyl and Others 2005 (2) SA 302 (SCA) at 39C** is whether the delay was

unreasonable and, if so, whether the delay in all circumstances can be condoned.

It is evident from **Setsokosane Bus-diens (Edms) Bpk v Voorsitter Nationale Vervoerkomisie en 'n Ander 1986 (2) SA 57 (A) at 86G** that the reasonableness or otherwise of a delay depends entirely on the facts and circumstances of each case. The investigation to determine the reasonableness or unreasonableness should not be equated with the judicial discretion which should be exercised judicially.

[14] Clearly, Section 7 (2) (a) of PAJA, precludes, through the use of 'shall' in the Section, a court or tribunal from reviewing an administrative action before the internal remedy provided for "in any other law" has been exhausted. The present case is one of those cases which require that the internal remedy first be exhausted before a court is approached with a review application. The reason for this procedure was well set out in:

Koyabe and others v Monister for Home Affairs and Others (Lawyers for Human Rights as amicus curiae) 2010 (4) SA 327 (CC) at paragraphs [35] to [37].

According to the court, internal remedies are meant to provide immediate and cost effective relief. The executive is given an opportunity to utilise its own mechanisms and rectify irregularities before the parties approach the courts. Approaching the courts before the internal remedies are exhausted, according to the court, "undermines the autonomy of the administrative process" thereby rendering "the judicial process premature effectively usurping the executive role and function." **Koyabe and Others case at 341C paragraph [36].**

At paragraph [37] at F to 343A the court said:

"Judicial review can only benefit from a full record of an internal adjudication, particularly in the light of the fact that reviewing courts do not ordinarily engage in the fact finding and hence require a fully developed factual record".

This becomes possible where the internal remedies are properly exhausted before courts are approached.

THE PARTIES' CASE

POINTS IN LIMINE ON BEHALF OF THE FIRST, SECOND AND THE FOURTH RESPONDENTS

[15] **LATE LAUNCHING OF THE REVIEW APPLICATION**

In paragraph 18 of its founding affidavit the applicant alleges that it brought the review application within the time prescribed in terms of Section 7(1) of PAJA. Challenged by the chairman of the **Limpopo Operating Board, Isaiah Wilskirt Modisha**, the applicant then filed its supplementary affidavit. In paragraph 18 thereof the applicant states:

> "The applicant was still within the one hundred and eighty (180) day period when it launched its review application."

Modisha, in paragraph 3.6 of his answering affidavit, states:

> "3.6 the applicant's application was filed way outside the time limits set by the provisions of Section 7 of PAJA and cannot be heard by the Honourable court on that basis alone".

The applicant's replying affidavit fails to properly deal with these allegations. The supplementary affidavit also fails to properly deal with this allegation. Prompted by Modisha's challenge, the applicant, in its supplementary affidavit, scantily and insufficiently refers to the condonation in paragraph 23. Clearly the applicant did this after realising that there, indeed, was a problem as the application had been brought late.

[16] The applicant, realising the problem, further sought to point out that it first needed to exhaust the internal remedies. It states in paragraph 17 of its founding affidavit:

"17. The applicant has exhausted all internal remedies as envisaged by Section 7 (2)(9)(sic) of PAJA by first lodging the appeal to the Transport Appeal Tribunal in

terms of Section 92(1) of the National Land Transport Act No.5 of 2009 and the chairperson of the said Tribunal indicated that the National Transport Appeal Tribunal does not have jurisdiction to preside over the decision taken by the first respondent ."(my emphasis)

In this paragraph the applicant alleges that it lodged the appeal. However, in paragraph 15 of the supplementary affidavit, the applicant states that it" attempted to launch an appeal to the National Transport Appeal Tribunal." Not only are the two paragraphs contradictory, the applicant, therein, fails to disclose when the lodging or the attempt to lodge the appeal with the Tribunal was made. It is also not known where and how that took place. There is no proof of the appeal. No confirmatory affidavit of the chairperson has been annexed to the applicant's papers. In paragraph 15 of the supplementary affidavit, page 10 of the court record, the applicant states that:

> "The secretariat of the National Transport Tribunal indicated that the Tribunal does not have jurisdiction to deal with the decision of the Provincial Public Transport Registrar on matters which affect the registration of routes to taxi associations."

The secretariat's supporting affidavit has also not been annexed to the applicant's papers. One suspects that the applicant, possibly, wanted to deal with the delay in bringing the review application and exhausting the internal remedies. It has, however, failed to do so. The applicant, according to Mr Mtsweni, does not sufficiently explain to the court as to what steps it took in order to bring the review application within the required time limit and also furnishing the court with acceptable explanation for the delay to enable it to properly exercise its discretion to condone or not to condone the delay. Mr Mtsweni, in my view, is correct. Mr Mtsweni, as a result, concluded that the applicant's explanation dealing with the delay does not constitute a reasonable and acceptable explanation in the circumstances of the case. Mr Mtsweni is again, in my view, correct.

[17] **FAILURE TO EXHAUST INTERNAL REMEDIES**

Mr V P Msibi, on behalf of the applicant, in his affidavit, stated that the chairperson of the Tribunal had been involved when the appeal to the tribunal was lodged. He changed the version to say that he received the advice regarding the jurisdiction

from the secretariat. The versions are, indeed, inconsistent. It is significant to note, as Mr Mtsweni submitted, that the applicant is not applying for exemption from exhausting the internal remedies. No facts are before the court, according to him, enabling the court to exercise its discretion to exempt or not to exempt the applicant from the duty to exhaust the internal remedies. This submission, in my view, is correct. Mr Mtsweni correctly submitted that the review application was premature and fell to be dismissed with costs. It was his submission finally, that the court should exercise its power in terms of Section 7(2)(b) of PAJA and dismiss the application and direct the applicant to firstly exhaust the internal remedies before bringing the application to court. There is, indeed, merit in the submission

[18] **THE THIRD RESPONDENT'S POINTS IN LIMINE**

The third respondent's heads of argument do not deal with all the points in limine raised in its answering affidavit. Mr Leseme, in paragraph 10 of the third respondent's heads of argument states that:

> "the Operating Licences Board has direct and substantial interest in the matter. The Applicant has failed dismally to cite OLB as Respondent".

He, on behalf of the third respondent, shares the view that the applicant has not fully exhausted the avenues available to it to be entitled to the order that it seeks.

[19] The point in limine relating to jurisdiction, in my view, was correctly abandoned

[20] My agreement with Mr Mtsweni, and to an extent, Mr Leseme in their submissions relating to the unreasonable delay that has been demonstrated in the applicant's failure to bring the review application within the prescribed 180 days, the failure to furnish reasonable and acceptable explanation for such failure as well as the failure to exhaust the internal remedies make it unnecessary for me to deal with the remaining points in limine raised on behalf of the third respondent.

[21] The application to the facts of this case, of the relevant Sections of the Acts and the legal principles enunciated in the decided cases referred to above, reveals that:

1. The applicant did not bring the review application within the stipulated 180 days.

2. The delay was unreasonable and has a bearing on the public body's decision and resultantly affects those who rely on the decision, in particular, the third respondent and its members in this case.

3. There is dearth of necessary information which ought to enable the court to determine whether it, indeed, will be in the interest of justice to condone the late bringing of the review application. Absent this and the necessary explanation, there is nothing to demonstrate that the court, after exercising its discretion judicially and properly, should condone the lateness.

4. The applicant, although duty bound to exhaust the internal remedies, failed to do so.

The application, in my view, on the basis of the points in limine discussed above, should fail, and the points in limine upheld. The points in limine are, accordingly, upheld.

[22] Condonation is granted to the first respondent for the late filing of its answering affidavit and to the third respondent for the late filing of its heads of argument.

[23] **The order I make, as a result, is as follows:**

1. **The review application is dismissed with costs.**

2. **In terms of Section 7(2)(b) of PAJA, the applicant is directed to first exhaust the internal remedies before instituting proceedings in a court for judicial review in terms of the Act.**

M.W MSIMEKI
JUDGE OF THE HIGH COURT
NORTH GAUTENG, PRETORIA

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DATE OF HEARING: 07 FEBRUARY 2014
DATE OF JUDGMENT: