IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 36121/2015

Date: 6/5/16

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

6-5-16 .....
DATE SIGNATURE

In the matter between:

NATIONAL COUNCIL OF SOCIETIES FOR THE PREVENTION OF CRUELTY TO ANIMALS ("NSPCA") **APPLICANT**

Versus

SENIOR MAGISTRATE PRETORIA, MR TSATSI **FIRST RESPONDENT**

MCLAREN CIRCUS CC **SECOND RESPONDENT**

DAVID DALLAS MCLAREN **THIRD RESPONDENT**

JUDGMENT

TOLMAY, J:

INTRODUCTION

[1] The applicant brought a review application in which it sought the review of the first respondent's decision taken on 30 December 2014 to renew the licence and certificate of second and third respondents issued in terms of sec 2 and 3 of the Performing Animals Protection Act 24 of 1932 ("PAPA").

[2] The first respondent did not oppose the application nor did he furnish any reasons for his decision. Second and third respondents opposed the application.

BACKGROUND

[3] The second and third respondents operate a travelling circus under the name McLarens circus which operates throughout South-Africa and have incorporated animals in their acts since 2006.

[4] PAPA requires persons who use animals for exhibition or training purposes to be licenced to do so, which licences in terms of sec 2 are currently issued by magistrates. Licences are valid for a calendar year until 31 December of the relevant year. The licence may be renewed for further annual periods upon the applicant bringing an application for each year.

[5] Section 3 of PAPA provides that the holder of a licence is not permitted to exhibit or train any animals unless he/she is in possession of a certificate authorising the exhibition or training of all the animals specified in the licence.

[6] Regulation 2(3) of PAPA states that the magistrate may, before considering the application for a licence, gather all available information from local animal welfare organisations. It is common cause that the magistrate did not call for any information from the applicant or any other local animal welfare organisation before granting the licence.

[7] It is further common cause that the licence which is the subject of this application expired on 31 December 2015. The respondent argued that as a result the application has become academic and that I should therefore refuse to entertain the application. The parties only argued the possible mootness of the dispute before me, and I was requested to determine this aspect only.

[8] Counsel on behalf of the applicant conceded that the licence has lapsed and that there would be no point in setting aside the decision made by the magistrate and to refer it back for reconsideration. The applicant however insisted that the Court should still pronounce on the validity of the decision. What is sought at this stage is a declaratory order of invalidity, in his heads of argument Mr Cilliers (SC) on behalf

of the applicant asked that the administrative action be declared unconstitutional and invalid.

[9] The provisions of sec 2 and 3 of PAPA have been declared unconstitutional and invalid[1]. The court found that the function of granting of the licence by a magistrate was non-judicial, and that there exists no compelling reason why it should be issued by a member of the judiciary. The Court confirmed the order of constitutional invalidity made by the High Court, but suspended the order initially for 18 months to enable parliament to cure the constitutional defect. An application for extension was brought and an extension of 6 months followed. A further extension of 12 months was later granted after a further application was brought[2]. Zondo J in the judgment pertaining to the last extension remarked that Parliament would have been granted 3 years to cure the defect in the Act and would have been granted more than enough time for the bill to be passed into law. I infer from the aforementioned remark that no further extensions will be granted. The period of extension lapses on 27 August 2016. Under these circumstances one must accept that the existing dispensation will only last until 27 August 2016. The proposed new legislation grants the authority to issue licences to veterinarians and animal scientists[3].

LEGAL PRINCIPLES

[1] NSPCA v Minister of Agriculture, Forestry and Fisheries & Others 2013(5) CC p 571
[2] Minister of Agriculture, Forestry and Fisheries v SPCA [2015] ZACC 27
[3] Government Gazette, 9 April 2014, No 37541

[10] It is trite that a case is moot and therefore not justiciable if it no longer presents an existing or live controversy[4]. It is also trite that Courts should not decide issues of academic interest only[5]. In this case this Court now has to determine whether there still exists a live controversy between the parties on which the Court must decide, or whether a discrete legal issue of public importance arises which will affect matters in the future and which will require the Court to entertain the matter despite of the mootness of the issue.

[11] As already stated the licence granted in this matter has lapsed on 31 December 2015. The applicant now wants this Court to grant a declaratory order pertaining to the validity of the decision of the first respondent despite the fact that the licence has lapsed and the matter has become on the face of it academic. There is an existing policy that a Court should not decide a point that has become academic. In **JT Publishing (Pty) Ltd v Minister of Safety and Security**[6] the following was said which finds application in this matter:

"I interpose that enquiry because a declaratory order is a discretionary remedy, in the sense that the claim lodged by an interested party for such an order does not in itself oblige the Court handling the matter to respond to the question which it poses, even when that looks like being capable of a ready answer. A corollary is the judicial policy

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[4] National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs & Others 2000(2) SA 1 CC, footnote 18, Radio Pretoria v Chairman ICASA 2005(1) SA 47 on 55, JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others 1997(3) SA 514 CC

[5] Legal Aid South Africa v Mogidiwara & Others 2015(2) SA 568 (SCA) par 2

[6] *Supra,* 1997(3) SA 514 CC on p 525 A-B

governing the discretion thus vested in the Courts, a well-established and uniformly observed policy which directs them not to exercise it in favour of deciding points that are merely abstract, academic or hypothetical ones. (my emphasis)

And further[7]:

"*But, for reasons that will emerge in a moment, nothing warrants a departure from the policy this time. A further word or two had better be said on the topic before I leave it. Section 98(5) admittedly enjoins us to declare that a law is invalid once we have found it to be inconsistent with the Constitution. But the requirement does not mean that we are compelled to determine the anterior issue of inconsistency when, owing to its wholly abstract, academic or hypothetical nature should it have such in a given case, our going into it can produce no concrete or tangible result, indeed none whatsoever beyond the bare declaration.*"

[12] In this matter, as the licence has lapsed, no concrete or tangible result will follow if the declaratory order is granted. The question arises then whether the Court should, despite that fact, deviate from the policy not to entertain a matter which is moot.

[13] The Court has a discretion to entertain a matter notwithstanding the mootness of the issue between the parties to the litigation if a discrete legal issue of public importance arises that would affect matters in the

[7] Supra, p 525 E

future and where it will be in the interest of justice[8]. One has to determine whether these requirements are met in this matter. In **Qoboshiyane**[9] the Court set out the principle that should apply when a Court exercises its discretion to, despite the mootness of the issue, pronounce on the matter:

"*[5] The disclosure of the report means that any judgment or order by this court will have no practical effect or result as between the parties. In the circumstances this court may dismiss the appeal on that ground alone. The court has a discretion in that regard and there are a number of cases where, notwithstanding the mootness of the issue as between the parties to the litigation, it has dealt with the merits of an appeal. With those cases must be contrasted a number where the court has refused to deal with the merits. The broad distinction between the two classes is that in the former a discrete legal issue of public importance arose that would affect matters in the future and on which the adjudication of this court was required, whilst in the latter no such issue arose. In exercising its discretion the court is always mindful of the wise words of Innes CJ in Geldenhuys and Neethling v Beuthin, that:*

'After all, Courts of Law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important.'" (My emphasis)

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[8] Qoboshiyane NO v AVUSA Publishing Eastern Cape (Pty) Ltd and Others 2013(3) SA 315 (SCA), see also Legal Aid SA v Magidiwara 2015(6) SA p 494

[9] Supra, p 319 par 5

[14] Counsel for the applicant argued that this is an instance where the Court should exercise its discretion to entertain the matter. It was argued that the imperative of formal judicial recognition of the applicant's right to be heard when applications in terms of PAPA and, later in terms of the proposed Performing Animals Protection Bill are considered, remains a discrete legal issue of public importance that would affect matters in future. The fact that the magistrate did not give the applicant a hearing means, so it was argued, that *audi alteram partem* was not complied with and this led to the invalidity of the action and this Court must consequently find that the decision was invalid and unconstitutional.

[15] When one peruses the contents of the application the factual matrix of the application deals specifically with the issues relevant to this particular licence and not with the broader issue pertaining to the inherent right of applicant to be heard. It must also be noted that the regulation as it presently stands is not peremptory as the magistrate may and not must ask for presentations. Despite argument to the contrary, this implies a discretion on the part of the magistrate. Whether this discretion was properly exercised will be determined in the light of the circumstances of each case. A general pronouncement pertaining to this issue will be to cast the net too wide, and I am of the view that this Court should not in the light of the fact that the licence has lapsed and the fact that the merits of the application was not argued make any finding in this regard.

[16] Sections 2 and 3 of PAPA have, as already stated above, been declared unconstitutional and therefore nothing need to be said about it anymore. This Court cannot pronounce on the new act as that act has not yet come into operation, nor did the applicant deal with the requirements of the new act in the application before me. The fact that regulation 2(3) still gives a discretion to the officials granting the licence to call for presentation is something that will have to be considered in the future.

[17] The licences were granted for a year and lapsed on 31 December 2015, consequently there should not be any similar applications before 27 August 2016, when the new act comes into operation. The future effect of the decision is thus negligible. Therefore there exists no discrete legal issue that would affect matters in future.

[18] The applicant wants me to declare the decision unconstitutional and invalid. If an issue of public Importance and constitutional validity is raised the Minister of Agriculture, Forestry and Fisheries should at least have been joined. There should also be compliance with Rule 16(A) of the Uniform Rules of court. In the absence of the aforesaid this Court is not empowered to declare on the constitutional validity of the decision.

CONCLUSION

[19] I am of the view that as a result the matter before me is moot as no live controversy exists which this Court should decide on, nor is it in the interest of justice.

[20] It was argued that applicant should not pay the costs as it protects a public interest. I am however of the view that the fact that applicant persists with an application that is clearly moot justifies a decision that it should pay the costs of this application. One should also consider that the respondents are not government or public entities who could be expected to carry the burden of a cost order in certain circumstances irrespective of the outcome. Consequently I am of the view that the costs should follow the result.

[21] I make the following order:

21.1 The application is dismissed; and

21.2 The applicant is to pay the costs of the application.

R G TOLMAY
JUDGE OF THE HIGH COURT