



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED:

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SIGNATURE

8/8/2022

.....
DATE

Case No.: **45583/2019**

In the matter between:

FIDELITY ADT (PTY) LTD

Applicant

and

**MR ABRAHAM MONGWE N.O
CHAIRMAN OF THE APPEAL BOARD**

First Respondent

THE FIREARMS APPEAL BOARD

Second Respondent

**THE NATIONAL COMMISSIONER OF THE
SOUTH AFRICAN POLICE SERVICES
GENERAL K J SITHOLE**

(in his capacity as Registrar of Firearms)

Third Respondent

THE MINISTER OF POLICE

Fourth Respondent

JUDGMENT

SARDIWALLA J:

[1] The Applicants seek to review and set aside the decision of the First and Second Respondent, dated on 17 May 2019 refusing the Applicant's appeal for firearms licences alternatively setting aside and reviewing the original decision of the Third Respondent refusing the firearm licences.

Background Facts

[2] On 12 July 2017 the Applicant made an application for nine new Glock pistols with the South African Police Services. At the time of the application George Rautenbach (hereinafter referred to as "Rautenbach") was the nominated responsible person for the applicant and a notification of change of circumstances had accordingly been done. Thereafter, due to a consolidation of activities by the Applicant, the author of the founding affidavit Johannes Cornelius Wentzel (hereinafter referred to as "Wentzel") was appointed as the responsible person for the Applicant and a notification on assignment of new responsible person was submitted on 22 May 2018. At the time of the original application for the firearm licences Rautenbach remained the responsible person for the Applicant at the time the Second and Third Respondent's representatives refused the Applicant's application on the basis that;

"your company has failed to appoint a responsible person which is registered/linked with it as a security service provider with PSIRA".

[3] An appeal was lodged by Wentzel on behalf of the Applicant and he attached the relevant documentation confirming his authority to continue with the appeal. The appeal was refused by the Second and Third Respondent. Prior to the refusal of the initial application

Rautenbach set out in paragraphs 89,90,91,92 and 93 of his original application a request that the Applicant be informed of any defects or missing information and or undisclosed requirements and that the Applicant be afforded an opportunity to rectify same. Wentzel also in the Appeal requested that the Applicant and or its attorney be given an opportunity to address the Appeal Board or the persons who made the decision to refuse the application. The appeal application proceeded without the above being considered and the First respondent and Second Respondent refused the appeal on 17 May 2019 stating the following reasons:

“The initial application that was refused was made by one George Rautenbach and who asserted that he was the responsible person. No proof has been forwarded to substantiate the claim that George Rautenbach was linked and registered with the PSIRA at the time of the refusal of the initial application.”

[4] It is that decision which the Applicants in these proceedings seeks to have reviewed and set aside alternatively the initial decision made by the Third Respondent in the initial application by Rautenbach.

Grounds of Review

[5] The Applicant's grounds of review are that:

5.1 Failure of administrative justice as is contemplated by Section 3 (2) (a) and (b) of the Promotion of Justice Act as read with sections 5 and 6 of the same Act; and

5.2 The actual reasons provided by the Respondents in refusing the application of the Applicant.

The Applicants submission in support of the relief

[6] The Applicants contend that the refusal of a licence is an administrative decision as read in the definition of “decision” in PAJA. Further that the applications applied for were properly motivated and submitted and that the First, Second and Third Respondents refusal of the applications is based on a non-existing requirement of the Firearms Control Act as well as the Private Security Industry Regulatory Act (hereinafter referred to as “PSIRA”). The Applicant submits that neither section 7, 8 or 20 contain a requirement that the responsible person be linked to the Applicant for the firearms. It submitted that the Applicant had established that at the time that Rautenbach made the applications he was the appointed responsible person and registered with PSIRA and linked to the Applicant and provided proof of same before this Court. Finally, the Applicant attacks the legibility of deponent to the Respondent’s answering affidavit Emile Els in that he did not clearly identify which of the Respondent’s he was employed by. It went onto submit that Els avers that the Applicant was not compliant with PSIRA but does state how he arrived at the conclusion and there is no confirmatory affidavit by PSIRA in this regard. The Applicant avers that Els did not have personal knowledge of the facts that he was attesting to. Further that whilst Els alleges that the Applicant did not comply with the legal requirements he does not state in which provision that legal requirement can be found.

The Respondent’s version

[7] The Respondent’s contention is that the Applicants failed to submit information that Rautenbach was employed by the Applicant and linked to it. It alleges that upon receipt of the application it conducted an investigation as it is required to do so and it was discovered that

Rautenbach was not listed as an employee of the Applicant and therefore rejected the application. They aver that the appeal was refused as the Applicant substituted Rautenbach with Wentzel as the responsible person and such constitutes an irregularity of the proceedings and that the Appeal Board could not adjudicate the matter properly. They contend that the Applicant should have submitted a new application under Wentzel as the responsible person to avoid unnecessary litigation. They further aver that the deponent to the affidavit provides legal support to the Respondents and is conversant with its activities. The Respondent's referred to precedent stating that a deponent employed by a corporate entity is not required to have first-hand knowledge and as such can rely on records in the company's possession to ascertain the relevant facts. Regarding the issue of non-joinder the Respondent's aver that PSIRA has a substantial interest in the matter as the Registrar of Firearms relies on information provided by PSIRA to confirm nominated persons are registered. The Respondent's argued that the Code of Conduct confers on the Applicant a duty to ensure that its records with PSIRA are up to date. The Respondent's accept the applicability of PAJA but aver that judicial review is only applicable once the Applicant's have exhausted all internal remedies and allege that the Applicant had a recourse to submit a new application with Wentzel as its nominated responsible person.

[8] The Respondents further contend that it was insufficient for the Applicant to merely nominate a responsible person without notifying the Registrar as stated in section 7(4)(b) of the Firearm Controls Act. It maintained that its decision to refuse the Applicant's application for firearm licences was rational and not arbitrary. Lastly it submitted that the Court cannot submit its own finding of the facts and that it is required to remit the matter to the Third Respondent to be decided *de novo*.

Section 3 – Procedural fairness in administrative action affecting individuals

[9] In *Maleka v Health Professionals Council of SA and Another* [2005] 4 All SA 72 (E) the applicant was taken off the register of private medical practitioners by the registrar of the first respondent without prior notice or the opportunity to be heard prior to this happening. Jones J held that this amounted to unfair administrative action (at para 11). Although Jones J did not specifically mention the provisions of section 3, it is the case that section 3 provides the statutory framework for the decision he reached. Section 3(2)(b)(i) and (ii) state that fair administrative action requires an administrator to give a person adequate notice of the nature and purpose of the proposed administrative action and a reasonable opportunity to make representations to the administrator.

[10] *Trend Finance (Pty) Ltd and another v Commissioner for SARS and another* [2005] 4 All SA 657 (C) concerned the seizure of a shipment of shoes imported by the first and second applicants by the Commissioner for SARS and the Cape Town Controller of Customs (second respondent) for non-compliance with customs and duty requirements laid out in the Customs and Excise Act 91 of 1964. The applicants sought in prayer 1 of their notice of motion the review and setting aside of the respondents' decision in terms of section 65(6) of the Customs and Excise Act. That section allows a person seeking to import goods to challenge the determination of the value of the goods, upon which determination duty payable is to be calculated. Van Reenen J found on the facts in this case that the applicants had not succeeded in showing that the Controller had erred in finding that the actual value of the items to be imported were higher than the value as contended by the applicants, and using this higher value

to determine the duty fees payable (at para 65). The applicants sought review of the respondents' actions in the alternative on the basis of PAJA (see prayer 2 at para 10). Van Reenen J summarised the argument as follows:

“The review of the determination is being sought on the following grounds:

Firstly, that the respondents did not follow a fair procedure or afford the applicants a fair hearing before making the determination;

Secondly, in the alternative, that the respondents did not afford them a fair hearing before demanding payment of an amount equal to the value thereof for duty purposes, namely R695 508; and

Thirdly, that the determination was arbitrary and capricious as it was made on inadequate and insubstantial grounds.” (at para 73)

[11] Van Reenen J disposed quickly of the third ground. Having already found that the determination was the product of an objectively verifiable arithmetic calculation (at para 70), the judge held that it could not be claimed that the determination of the quantum to be paid as duty was made on inadequate and insubstantial grounds (at para 74).

[12] Turning to the first two grounds of challenge, the judge began by noting that the challenge raised the requirements of procedural fairness set out in section 3 of PAJA. It is to be noted in this respect that the judge considered the application on this ground even though the applicants “fell somewhat short” of the obligation to identify clearly on which sections of PAJA reliance is placed (at para 68). The judge stated:

“Content is given to the concept ‘procedurally fair administrative action’ by section 3(2)(b) of PAJA which provides as follows:

- ‘(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)–
 - (i) adequate notice of the nature and purpose of the proposed administrative action;
 - (ii) a reasonable opportunity to make representations;
 - (iii) a clear statement of the administrative action;
 - (iv) adequate notice of any right of review or internal appeal, where applicable; and
 - (v) adequate notice of the right to request reasons in terms of section 5.’

Those five requirements, which are considered to constitute the core elements of procedural fairness, may be departed from in the circumstances set out section 3(4) which provides as follows:

- ‘(a) If it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in subsection (2).
- (b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including–
 - (i) the objects of the empowering provision;
 - (ii) the nature and purpose of, and the need to take, the administrative action;
 - (iii) the likely effect of the administrative action;

- (iv) the urgency of taking the administrative action or the urgency of the matter; and
- (v) the need to promote an efficient administration and good governance.’

Section 3(3) of PAJA provides that an administrator, in order to give effect to the right of procedurally fair administrative action, in his discretion, may give the person whose rights or legitimate expectations are materially and adversely affected thereby an opportunity to:

- ‘(a) obtain assistance and, in serious or complex cases, legal representation;
- (b) present and dispute information and arguments; and
- (c) appear in person.’

There is no evidence that the Controller, as delegate of the Commissioner, considered or was required to consider the discretion reposed in him by sections 3(3) and (4).” (at paras 77-78).

[13] The judge then set out the facts relevant to the determination of whether the applicants had been subject to unfair administrative processes (at paras 80-81). He drew from this factual exposition that the Controller had failed to notify the applicants that he was intending to exercise his discretion against the applicants, and failed to afford them any opportunity to make representations to the Controller prior to the exercise of that discretion. This, he concluded, “clearly offended against the mandatory requirements of subsections 3(2)(b)(i) and (ii) of PAJA” (at para 84).

[14] Van Reenen J also considered the argument that the Controller had complied with the principles of procedural fairness after the action complained against had been taken. He relied on *Nortjé en ’n ander v Minister van Korrektiewe Dienste and andere 2001 (3) SA 472 (SCA)*

for the proposition that “Although the general rule is that natural justice must be observed before a decision is taken, subsequent compliance may suffice in exceptional circumstances” (at para 82). The judge rejected this argument, holding that no exceptional circumstances had justified such a course:

“[N]one of the considerations that are regarded as sufficient to justify the subsequent compliance with the requirements of just administrative action, such as urgency; impracticability because of the number of persons involved; the possibility that prior compliance will defeat the purposes of the action; and that the decision is merely provisional and relevant to the enquiry whether the requirements of procedural fairness have been complied with, are present in the communications enumerated in paragraph 81 above” (at para 82)

[15] The failure to observe principles of procedural fairness could not therefore be remedied after the administrative action was taken.

[16] The crucial question in the present matter is whether the Applicant was subjected to unfair administrative processes. From my exposition of the papers and the arguments by the parties I am inclined to agree with the Applicant that the First to Third Respondents failed to notify the Applicant that it intended to exercise its discretion against the Applicant and afford the Applicant an opportunity to make representations. This is true of both the initial application and the appeal application. Significant to this case is that the First to Third Respondent's did not address the issue of failing to allow the Applicant to make representations before each decision was taken, especially since both Rautenbach and Wentzel both requested in each of the applications in the paragraphs referred to above that the Applicant be given such opportunity to make representations and even to comply with any undisclosed internal requirements. The First to Third Respondent's absence of an adequate explanation

prevented a fair adjudication of the applications. The First to Third Respondent failed to identify the difficulties in the Applicant's application and informing the Applicant of such issues before making the decision against the Applicant. The First to Third Respondent has also no proffered any departing from section 3(2) and 3(3) as set out in section 3(4) especially in the circumstance of this matter where the object of the Applicants who is one of the largest security companies in South Africa assisting to prevent and combat crime in this country. I cannot find any indication that the Applicant had any intention of committing irregularities by having Wentzel continue with the appeal alleged by the Respondents. The Respondent's argument is flawed as it is standard practice in most legal proceedings that there is a change in the legal representatives, this does not however require the proceedings to be reinstituted and must be rejected. The Respondents have clearly missed the point of these proceedings in that they prevented the Applicant from having a proper hearing by failing to adhere to procedural fairness that is required in administrative actions. Re-applying for the application under the auspices of Wentzel would not in my mind availed the Applicant with an alternative remedy if procedural fairness, as evident from Wentzel's appeal would not be adhered to.

Section 7 - Applications by persons other than natural persons

[17] Turning to the second ground, the Respondents allege that the Applicant failed in its duty to provide sufficient information as section 7 of the Firearm Controls Act as it did not provide confirmation that Rautenbach was linked with the Applicant at the time of the application and therefore rejected the application. To this end I think it is important to consider section 7, which states that;

“(1) When a juristic person wishes to apply for a licence, permit or authorisation in terms of this Act, it must nominate a natural person to apply on its behalf.

(2) The person so nominated must be identified on the licence, permit or authorisation as the responsible person.

(3) A responsible person who holds any licence, permit or authorisation issued in terms of this Act pursuant to an application contemplated in subsection (1) on behalf of the juristic person must for purposes of this Act be regarded as the holder of the licence in question.

(4) If it becomes necessary to replace a responsible person for any reason, the juristic person must in writing—

(a) nominate a new responsible person who must be in possession of the relevant competency certificate; and

(b) notify the Registrar of the nomination within seven days from the date of the nomination.

[S 7(4) subs by s 6(a) of Act 28 of 2006 1 March 2012.]

(5) For the purposes of this Act, a juristic person includes a trust, as long as the trust deed—

(a) clearly provides for the possession of firearms, ammunition or muzzle loading firearms by the trust;

(b) stipulates clearly the intended purpose of the possession of firearms, ammunition or muzzle loading firearms by the trust; and

(c) indicates that the possession of the firearms, ammunition or muzzle loading firearms by the trust may only endure as long as the possession is necessary to achieve the stated intended purpose.”

[18] Whilst the Respondent alleges that it has conducted an investigation and determined that Rautenbach was not registered/linked to PSIRA and or the Applicant, it fails to take this Court into its confidence and apprise the court of the actions it took at arriving at that conclusion. The Respondent’s did not provide any documentary evidence to support its claims that Rautenbach was not registered with PSIRA or employed by the Applicant it alleges. Instead it has attempted to dilute the facts with a plethora of issues that take do not take the matter any further. Upon interpretation of section 7 of the Firearm Control Act there is no requirement that the nominated person be “linked” to the Applicant nor does it require proof of employment as a pre-requisite. The section clearly states that if a juristic person is applying for a licence then it must appoint a responsible person and further that such person must be identifiable on the permit or licence. Whilst I understand the concerns of the Respondents and its desire to ensure that firearm licences are not obtained fraudulently by persons with no authority to possess them, I am convinced that the documentary evidence including its registration with PSIRA attached to both the initial application and the appeal definitely should have put to rest any concerns the Respondent’s might have had pertaining to the Applicant’s intention.

[19] Furthermore, the Applicant’s in their documentary submissions went a further step to prove their intentions by requesting that should further information or documents be required that they be contacted to provide same. This is my opinion expressly showed good faith on part of the Applicant to ensure compliance with the processes. If anything the Applicant’s request to be notified of any difficulties or make oral submissions is in any event in line with section 3(2) of PAJA and as per my finding above, it only re-iterates that the Respondent’s

failed to adjudicate the matter properly. This Court in the absence of any argument and evidence of a requirement that the responsible person be “linked” or was not in fact “linked” as the Respondents aver and must therefore reject the Respondents argument if no other reasons but purely on the basis that the Applicant had availed itself from the inception of the application to be approached regarding any shortcomings in its application. The First to Third Respondents should have requested the Applicant to provide proof that the responsible person was employed by the Applicant and this would have been easily remedied the issue. However, I am of the view that this would also have been a futile exercise as the Respondents were provided with copies of the resolutions taken to nominate the responsible person’s together with proof of registration with PSIRA and therefore in any event had already possessed sufficient information to link the responsible persons with associated the Applicant.

[20] I see no reason why the costs should not follow the result. I grant the following order:

1. The review of the original decision by the Third Respondent refusing the Firearm licences is set aside.
2. The matter is remitted to the First Respondent for reconsideration.
3. The First to Third Respondent shall bear the costs of the application jointly and severally, the one paying the other to be absolved.



Sardiwalla J

Judge of the High Court

Representation:

For the applicant: MR M HOOD

Instructed by: M J HOOD & ASSOCIATES

For the f respondents: MR R J SEBELMETS

Instructed by: STATE ATTORNEY

Date of the judgment: 8 August 2022