IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION,
PIETERMARITZBURG

Case No: AR240/2020

In the matter between:

KWADUKUZA / STANGER TAXI OWNERS ASSOCIATION **APPELLANT**

and

MAPHUMULO TAXI OWNERS ASSOCIATION **FIRST RESPONDENT**
PROVINCIAL REGULATORY ENTITY **SECOND RESPONDENT**
LOCAL TRANSPORTATION BOARD KWAZULU-NATAL **THIRD RESPONDENT**
MEC DEPARTMENT OF TRANSPORT KWAZULU-NATAL **FOURTH RESPONDENT**
KWADUKUZA MUNICIPALITY **FIFTH RESPONDENT**

ORDER

The following order is granted:

a) The appeal succeeds partially in substituting the decision of the Court below with the finding that the appellant, the Kwadukuza/Stanger Taxi Owners' Association had standing to represent its members.
b) The appeal is dismissed on the merits.
c) The Kwadukuza/Stanger Taxi Owners Association is ordered to pay the costs of the first respondent Maphumulo Taxi Owners Association.

JUDGMENT

D. Pillay J (K. Pillay J et Mnguni J concurring)

Introduction

[1] The appellant is KwaDukuza/Stanger Taxi Owners Association (STOA). The first respondent is Maphumulo Taxi Owners Association (MTOA). The STOA and the MTOA are associations of taxi operators based in KwaDukuza. The second respondent is the erstwhile Provincial Taxi Registrar, now referred to as the Provincial Regulatory Entity (PRE) for KwaZulu-Natal. The third respondent is the Local Transportation Board, KwaZulu-Natal. The fourth respondent is the Member of the Executive Council for the Department of Transport KwaZulu-Natal (MEC). The fifth respondent is the KwaDukuza Municipality. The second to fifth respondents abide the decision of this Court.

[2] The appellant appeals the judgment of Balton J. The cause of the conflict is competition for limited licences issued for specific routes. Balton J detailed the history of the internecine and protracted conflict between the associations in her judgment. For the purposes of this judgment, an attenuated account of that history will suffice.

Background

[3] On 5 December 2003 the STOA and the MTOA submitted a dispute to arbitration to determine the MTOA's entitlement to operate overlapping long distance routes and to the rank facilities at KwaDukuza. In paragraph 6 of the Terms of Reference for Arbitration, the parties agreed that the award of the arbitrator would be final and binding upon them and that it may be made an order of court. The Department of Transport KwaZulu-Natal facilitated the arbitration by bearing the costs of the venue for the arbitration.

[4] In paragraph 17 of the Terms of Reference, should any party be dissatisfied with the arbitration and seek to have the award reviewed and set aside, the parties agreed that, pending the outcome of such review, the award would stand and be made an interim order by the court, and that the parties would be obliged to give effect to it.

[5] The arbitrator, Mr *Pammenter SC* resolved the dispute about the routes in favour of the MTOA. As regards the taxi rank, he determined that both associations should operate from a single taxi rank in KwaDukuza. He granted ancillary relief relating to operations at the rank. The award and accompanying reasons were issued on 22 December 2003.

[6] In terms of paragraph 3 of the award, paragraph 2 relating to the arbitrator's determination of the operation of the taxi rank would commence with effect from 31 January 2004; until then the Interim Operating Agreement concluded by the parties on 5 December 2003 would remain in effect. Certain provisions of the award relating to the taxi rank were to continue until the KwaDukuza Municipality, which was also party to the arbitration, the STOA and the MTOA concluded a written agreement, to be approved by the Taxi Registrar, another party to the arbitration, varying the terms of paragraph 2 of the award, such agreement to take effect not before 31 January 2005.

There is no evidence of any such agreement materialising. In any case, the STOA's appeal relates to the licences rather than the rank.

[7] Subsequently, MTOA as first applicant and STOA as third respondent took an order by consent under case number 14323/2005. MTOA was declared a registered minibus taxi association in terms of the KwaZulu-Natal Interim Minibus Taxi Act 4 of 1998. Its members who had valid public road carrier permits were allowed to operate their minibuses in terms of those permits. The KwaDukuza Municipality was directed to ensure that the taxi ranks in KwaDukuza, which it had established for use by the MTOA and its members pursuant to the arbitration award, were once again made available to the MTOA and its members. Effectively, the court order enforced the award.

[8] On 29 June 2017 the STOA, cited as KwaDukuza Taxi Association (KTOA), applied under case number 2317/2017 for condonation, delivery of the records of the arbitration, and to review and to set aside the award. That application in which the STOA was represented by its erstwhile 'newly elected' chairperson Bonginhlanhla Bhekhi Gwala was not finalised. It appears to have been overtaken by this application in which Dumisani Mhlongo deposed to the founding affidavit as the chairman of the STOA.

[9] In 2009, s 49(1) of the National Land Transportation Act 5 of 2009 (NLTA), which repealed the National Land Transport Transition Act 22 of 2000 (NLTTA), provides for existing permits to remain valid subject to subsection (3). Section 49(3) of the NLTA provides that permits issued for minibus taxi type services for indefinite or definite periods that have 'not yet expired, must lapse seven years after the date of commencement of this Act.' However, 'the holder [of a permit] may apply within that period for its conversion to an operating licence to the [PRE] that is responsible for receiving applications for operating licences for the relevant services.'[1]

Grounds of appeal

[10] Against this brief background, the primary ground of appeal is the dismissal of the STOA's application seeking an order in the following terms:

'Granting a confirmatory order, that the Arbitration award granted in 2005 can no longer continue to have any legal effect in relation to the issue of operating licences post seven (7) years from the commencement date of the National Land Transportation Act No.5 of 2009 and as by the enactment of the act the Order has become unenforceable'.

[11] The remaining relief sought in the notice of motion hinges on the primary ground succeeding. In paragraph 2 of the notice of motion, the STOA sought an order declaring unlawful and irrational the refusal or failure by the PRE and the MEC to consider the 'Applicant's application' for the issue of operating licences based on the interpretation and the application of the order enforcing the award. Furthermore, in paragraph 4 it claimed confirmation 'to allow the applicant rights to trade on the long distance routes'.

[12] The secondary ground of appeal relates to the finding of the Court below that the MTOA had applied for the conversion of its licences and that its members are therefore holders of valid licences. An ancillary ground of appeal relates to the standing of the STOA to institute proceedings on behalf of its members. I deal first with the validity of the licences, the relief sought and then the standing of the STOA.

The status of the licences

[1] Section 47(2) of the NLTA.

[13] The STOA did not apply to review and set aside taxi operator licences issued to members of the MTOA. That was the process it should have pursued under the Promotion of Administrative Justice Act 3 of 2000 when the licences were granted. Having failed to do, so it was already on the backfoot when it contested the validity of the licences in the arbitration.

[14] Turning to the Terms of Reference of the arbitration, the parties agreed to be bound by the arbitrator's award, unless and until it was reviewed and set aside. The award has not been reviewed and set aside. Consequently, the award remains binding on the STOA and the MTOA by virtue of their agreement to be so bound.

[15] The STOA and the MTOA also agreed to make the award an order of court which they duly did by consent. On the authorities cited in the judgment of Balton J,[2] an arbitration award that is made an award of court acquires the status of an order of court, which remains in force as such until it is set aside. Accordingly, both associations also bound themselves to the order which made the arbitration award an order of court. That court order remains extant under case number 14323/2005. Together, the award and the court order give effect to the underlying taxi operator licences issued to members of the MTOA.

[16] The next question is whether the NLTA unravelled the order of court. The NTLA was promulgated four years after the court issued the order. Unless specifically provided for, the repeal of legislation does not have retrospective effect.[3] Consequently, all that was done and any rights, privileges, obligations and liabilities acquired prior to the 2009 amendment of the NLTA remained extant.

[17] However, the requirement in s 47(1) and (2) of the NLTA that 'all permits' will lapse after seven years after the commencement of the NLTA, applies to those permits that the order of court enforced. The MTOA attested to having applied within seven years of the commencement of the NTLA for converting its operating licences. The STOA disputes that the MTOA made any such application. Alternatively, if it did, then it was not valid.

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[2] *Government of the United Republic of Tanzania v Steyn & others* (28994/2019) [2019] ZAGPJHC 312 (4 September 2019); 2019 JDR 1690 (GJ) para 9; *Bezuidenhout v Patensie Sitrus Beherend Bpk* 2001 (2) SA 224 (E) at 229B-D.

[3] Section 12(2) of the Interpretation Act 33 of 1957.

[18] Applying the principle in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[4] this Court accepts the evidence of the MTOA that it applied for conversion of its operating licences and that it did so within seven years before they lapsed automatically by operation of law. Section 47 requires that the application must be made, but not necessarily be granted, before they lapsed. The application for conversion suspended the lapsing of the permits.

[19] As for the STOA's attacks on the validity of the application for conversion, that is a matter for determination by the PRE responsible for receiving and determining such applications. Consequently, whatever the STOA submits as defects in the application for conversion, it is not for this Court to pronounce on, at least, not before the PRE determines the conversion application.

[20] In the circumstances, I find, on substantive grounds, that the arbitration award, the order of court and the operating licences granted to MTOA for the five long distance routes starting from Stanger to Durban, to Empangeni, to Eshowe, to Kranskop and to Tongaat are valid and enforceable. In other words, neither the STOA nor its members are entitled to them. The confirmation the STOA sought in the first paragraph of its notice of motion must be refused, as the Court below correctly did.

The relief sought

[21] In claiming the relief in paragraphs 2 and 4 of its notice of motion, the STOA labours under the misapprehension that the licences are issued to associations instead of to its members who are taxi operators. Section 64(1) of the NLTA provides:

'An operating licence may only be issued to and held by the person registered, in terms of the National Road Traffic Act, as the owner or operator of the vehicle, as defined in that Act, and specified in the operating licence.'

[4] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634E-635C.

[22] This had also been the position under s 87 of the NLTTA. Consequently, the STOA's claim to be issued with the licences was impermissible. The finding by the Court below that the relief sought was incompetent stands. This finding, together with the finding that the licences are validly held by the MTOA, would dispose of this appeal, but for the question of standing.

Standing of STOA to institute proceedings

[23] Section 38 of the Constitution provides:

'Enforcement of rights

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –

(a) anyone acting in their own interest;

(b) anyone acting on behalf of another person who cannot act in their own name;

(c) anyone acting as a member of, or in the interest of, a group or class of persons;

(d) anyone acting in the public interest; and

(e) an association acting in the interest of its members.'

[24] Counsel for the MTOA, Ms *Richards* contested the STOA's standing to institute and represent its members in legal proceedings on the basis a secondary ground of appeal firstly, that the STOA did not plead or argue that any right in the Bill of Rights was infringed or threatened; secondly, not all members of the STOA signed the resolution to institute proceedings and the resolution did not mandate it to represent its members; and thirdly, the STOA had no direct and substantial interest in the proceedings which it purported to institute in the interests of its members.

[25] In the Court below, the STOA did not identify the right in the Bill of Rights that was infringed or threatened. It does so in its heads of argument in this appeal. That, it alleges, was the right to ensure that its members enjoy just or fair administrative action under s 33 of the Constitution. Counsel for

the STOA, Mr *Xulu* submitted from the bar that the STOA also relied on s 22 of the Constitution which recognises the freedom to trade. The Court below found that the STOA lacked standing.

[26] Ms *Richards's* contention that if a constitutional case is not pleaded then 'the applicant is confined to the common law prescripts pertaining to locus standi,' insinuates that we have two systems of law, one under the Constitution and the other under the common law. That is incorrect. Repeatedly, the Constitutional Court[5] and this division emphasised that:

'There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.'[6]

[5] *Pharmaceutical Manufacturers Association of South Africa & another: In re Ex Parte President of the Republic of South Africa & others* [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 (CC) para 44; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & others* [2004] ZACC 15; 2004 (4) SA 490; 2004 (7) BCLR 687 (CC) para 22; *Minister of Health & another v New Clicks South Africa (Pty) Ltd & others* [2005] ZACC 14; 2006 (2) SA 311; 2006 (1) BCLR 1 (CC) paras 118, 432438; *NAPTOSA & others v Minister of Education, Western Cape, & others* 2001 (2) SA 112 (C).
[6] *Naidoo v Director of Public Prosecutions & others* (12180/2017) [2020] ZAKZDHC 39 (13 August 2020) para 100 citing *Pharmaceutical Manufacturers*.

[27] Furthermore, s 39(1) and (2) concerning the interpretation of the Bill of Rights states:

'a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom . . . (b) . . . and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

[28] Thus, it rests upon all of us to advance the constitutional project at every opportunity.[5] Consequently, even though the STOA did not specifically plead and argue its case on standing, the Court below became aware of it when the MTOA raised the issue. The Court had to apply s 39(1) and (2) and the Constitutional

[5] See *Naidoo* para 117-118 fn 107-108.

Court's generous approach adopted in several cases[6] and summarised as follows in *Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others*:[9]

'These cases make it plain that constitutional own-interest standing is broader than the traditional common law standing, but that a litigant must nevertheless show that his or her rights or interests are directly affected by the challenged law or conduct. The authorities show:

(a) To establish own-interest standing under the Constitution a litigant need not show the same "sufficient, personal and direct interest" that the common law requires, but must still show that a contested law or decision directly affects his or her rights or interests, or potential rights or interests.

(b) This requirement must be generously and broadly interpreted to accord with constitutional goals.

(c) The interest must, however, be real and not hypothetical or academic.

(d) Even under the requirements for common law standing, the interest need not be capable of monetary valuation, but in a challenge to legislation purely financial self-interest may not be enough – the interests of justice must also favour affording standing.

(e) Standing is not a technical or strictly-defined concept. And there is no magical formula for conferring it. It is a tool a court employs to determine whether a litigant is entitled to claim its time, and to put the opposing litigant to trouble.

(f) Each case depends on its own facts. There can be no general rule covering all cases. In each case, an applicant must show that he or she has the necessary interest in an infringement or a threatened infringement. And here a measure of pragmatism is needed'. (footnotes omitted)

[29] Pertinently to the taxi industry, the Supreme Court of Appeal reiterated in *Polokwane Local and Long Distance Taxi Association v Limpopo Permissions Board & others*:[7]

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[6] For example *Ferreira v Levin NO& others; Vryenhoek & others v Powell NO & others* [1995] ZACC 13; 1996 (1) SA 984; 1996 (1) BCLR 1 (CC); *Lawyers for Human Rights & another v Minister of Home Affairs & another* [2004] ZACC 12; 2004 (4) SA 125; 2004 (7) BCLR 775 (CC); *Limpopo Legal Solutions v Vhembe District Municipality & others* [2017] ZACC 30; 2018 (4) BCLR 430 (CC). See also C F (Neels) Swanepoel 'The judicial application of the "interest" requirement for standing in constitutional cases: "A radical and deliberate departure from common law"' 2014 *De Jure* 63. [9] *Giant Concerts CC v Rinaldo Investments (Pty) Ltd & others* [2012] ZACC 28; 2013 (3) BCLR 251 (CC) para 41.

'The courts are impelled to adopt a broad and liberal approach to standing when interpreting s 38(*e*) of the Constitution.'

[30] In this case, both associations have sued each other without questioning their respective standing. An example already referred to above is the application that resulted in the order by consent in which the MTOA, as applicant, cited the STOA as third respondent. The MTOA is open to the same criticisms that it levels against the STOA. Applying the doctrine of peremption, the Court below should have barred the MTOA from contesting the STOA's standing. Now that the issue has been raised as a ground of appeal, it is necessary to investigate and determine whether the STOA, as a matter of law and fact has standing.

[31] Whether the STOA has standing in this case to represent all or some of its members, depends firstly, on the internal arrangements between the STOA, its members and their obligations under their constitution and other instruments. The constitution of the STOA is not before me. However, the resolution passed by some of the members of the association on 11 July 2018 to which they attached their names and signatures is sufficient proof that those members authorised the STOA to institute legal proceedings on their behalf. In the context of this application, a more formal or higher standard of proof of its mandate is unwarranted.

[32] Secondly, associations in the taxi industry are not ordinary voluntary associations. The decision to form an association is voluntary. Under the NLTTA, they were highly regulated institutions interfacing between their members as taxi operators, the State and the public they serve.[8] Notwithstanding the repeal of the NLTTA, the mutuality of these interests persist in the form of the Kwazulu-Natal Interim Minibus Taxi Act 4 of 1998 (KZN Act). Although the KZN Act was repealed in its entirety by the KwaZulu-Natal Public Transport Act 3 of 2005, Part X, headed 'Legitimisation Process for Members of Registered Associations' survives. In s 47 of the KZN Act, the stated objective of the legitimisation process is:

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[7] *Polokwane Local and Long Distance Taxi Association v Limpopo Permissions Board & others* (490/2016) [2017] ZASCA 44 (30 March 2017) para 25.

[8] See for instance ss 52; 57(a)(i) and (iv); 60; 61; 62; 111; 112(1); 115(a)-(c); 116(1); 117 and 118 of the NLTTA.

'to legitimise the operations of *bona fide* members of provisionally registered minibus taxi associations and to enable such members to acquire permits in terms of the Road Transportation Act, 1977 (Act No. 74 of 1977).

[33] Under s 48(2) the KZN Act, for an operator to be eligible for legitimation, he must be:

'(*a*) a member in good standing of a provisionally registered minibus taxi association in terms of section 43 or fully registered minibus taxi association in terms of section 44'.

Although ss 43 and 44 were repealed, the import of s 48 about the nexus between operators and associations is clear.

[34] Included in the information that minibus taxi associations are required to submit to the Provincial Taxi Registrar under s 49(2)(a), is the number of members it claims to have. Furthermore, s 53(3) reaffirms that transfer of minibus taxi permits are not transferrable except from an operator's deceased estate and between members of the same association.

[35] The statutory scheme elevates the status of associations to stakeholders and social partners in the taxi industry. As such, I find that the STOA has standing under subsections (a), (c) and (e) of s 38 of the Constitution at least, and probably also under (d) having regard to its responsibilities as a provider of a necessary public service in a 'sensitive' industry.[9] The STOA has standing to act in its own interests, and in the interests of its members, who are taxi operators, as a group or class of persons. Importantly, it is also required to act in the public interest to provide a peaceful, problem-free transport service. Additionally, the guidelines proffered in *Giant Concerts* support recognising that the STOA has a direct, substantial and mutual interest in this litigation. Consequently, the Court below erred in finding that the STOA did not have standing.

Costs

[36] The appeal succeeds partially in setting aside the finding of the Court below that the STOA did not have standing. As important as correcting this finding is for the taxi industry, it is inconsequential in this case because the substantive remedy the STOA

[9] Section 5(2) of the Kwazulu-Natal Interim Minibus Taxi Act 4 of 1998 refers to the 'sensitivity of the minibus taxi operations'.

claimed was impermissible under the NLTA. Consequently, the appeal must be dismissed. Costs must follow the substantive outcome.

Order

[37] The following order is granted:

a) The appeal succeeds partially in substituting the decision of the Court below with the finding that the appellant, the Kwadukuza/Stanger Taxi Owners' Association had standing to represent its members.
b) The appeal is dismissed on the merits.
c) The Kwadukuza/Stanger Taxi Owners Association is ordered to pay the costs of the first respondent Maphumulo Taxi Owners Association.

D. Pillay J
Judge of the High Court of KwaZulu-Natal

I agree

K. Pillay J
Judge of the High Court of KwaZulu-Natal

I agree

PP
Mnguni J
Judge of the High Court of KwaZulu-Natal

APPEARANCES

NB: With the consent of the parties, judgment was handed down electronically and emailed the parties.

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Date of Hearing	:	22 January 2021 via zoom
Date of Judgment	:	28 January 2021