IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE

CASE NO: 21602/17

In the matter between:

PENINSULA TAXI ASSOCIATION	Applicant
And	
THE CITY OF CAPE TOWN	First Respondent
THE PROVINCIAL REGULATORY ENTITY OF THE WESTERN CAPE	Second Respondent

Coram: P.A.L.Gamble, J
Date of Hearing: 28 August 2019
Date of Judgment: 3 December 2019

JUDGMENT DELIVERED ON TUESDAY 3 DECEMBER 2019

GAMBLE, J:

INTRODUCTION

[1] The Applicant, the Peninsula Taxi Association ("the PTA"), is a body which represents the interests of some 200 minibus taxi owners and operators in the

City Bowl of Cape Town. Its members ply their trade along designated routes in Cape Town and surrounds, routes which are often described with reference to the roads along which the taxi's travel or the suburbs which they serve[1].

[2] The taxi industry is comprehensively regulated through both national and provincial legislative instruments to which I shall refer shortly. In this matter a number of the PTA's members applied for the renewal of their taxi operating licenses during 2017. Some of the applicants were successful in that regard and others not, while some were only partially successful. The unsuccessful applicants now apply for the review of the decisions affecting them.

THE STATUTORY SCHEME

[3] The primary overarching statute applicable to this matter is the National Land Transport Act, 5 of 2009 ("*the NLTA*"), which prescribes that to run a taxi an operating license is required under s50(1). The NLTA also requires the establishment of regulatory entities in the various provinces under s23. These are the entities that ultimately consider and grant or refuse applications for operating licenses under s24(1) of the NLTA and are referred to as "*PRE's*". The second respondent is the Provincial Regulatory Entity of the Western Cape and will be referred to simply as "*the PRE*".

[4] The Transport Appeal Tribunal Act, 39 of 1998 ("*the TATA*"), is legislation specifically designed to

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[1] So for example, such routes would include "*Cape Town Main Road to Camps Bay, Cape Town to Wynberg, Cape Town to the Cable Way Station and Cape Town to Bonteheuwel."*

> *"provide for the establishment of the Transport Appeal Tribunal to consider and to decide appeals noted in terms of national land transport legislation…"*[2]

Accordingly, any person dissatisfied with a decision under the NLTA is entitled, under s92 of that act, to approach the TAT for an appeal against such a decision. The prosecution of such an appeal is governed by the Transport Appeal Tribunal Regulations of 2012 ("*the TAT Regs*")[3].

[5] The applications for the renewal of the taxi operating licenses in this case were considered by the second respondent, the City of Cape Town, ("*the City*") in terms of s55(1) of the NLTA, which prescribes that

> "*before… the [PRE] considers any application for the….renewal….of an operating license, it must by notice in the prescribed manner inform all planning authorities in whose areas the services will be operated of the application with the request to give directions with regard to the application based on its integrated transport plan…"*

[6] The purpose of the City's involvement in the process of the renewal of a taxi operating license is to give consideration to the impact which the granting of such renewal might have on its integrated transport plan ("*ITP*"). In so doing, the City, as the relevant planning authority, must indicate whether there is a need for the renewal of the service on the route(s) or in the area(s) requested in terms of its ITP and, if

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[2] See the long title of the TATA

[3] The regulations were issued under GN 26 of 17 January 2013 in Government Gazette No. 36077.

there is a need for such service, it must direct the PRE to grant the operating license and make any recommendations it considers that regarding conditions to be attached to the operating license.[4]

[7] The purpose behind the legislation seems to be to enable a local authority to promote its IDP efficiently. In the instant case one sees, for example, that operating licenses were refused on certain of the routes on which the City's "*MyCiti*" buses operate conceivably to encourage commuters to use that transport system rather than a privately owned minibus taxi.

[8] And, in the event that the public transport requirements for any particular route are adequately served by an existing public transport service of a similar nature, standard or quality provided in terms of, inter alia, operating licenses issued under its ITP, the City is obliged to direct the PRE to refuse the application for renewal.[5] The answering papers in this matter reflect that invariably in such circumstances the PRE will refuse such an application although it is stressed that this does not happen mechanically. Moreover, where the PRE decides to grant an operating license (clearly in circumstances where the City does not object thereto), the PRE still has a residual discretion to consider the application and, for instance, impose its own conditions thereon.

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[4] S55(2)(a) of the NLTA

[5] S55(3) of the NLTA.

THE FACTUAL BACKGROUND

[9] As I have said, the PTA complains in the founding affidavit of its chairperson, Mr. Igshaan Lucas that a number of its members' operating licenses were refused by the City in circumstances constituting reviewable errors.

> "*[17] The Applicant contends that in recent times, as more fully appears below, the City's Planning Authority has acted arbitrarily, inconsistently and unfairly in respect of the issuing of support letters to the PRE when members of the Applicant applied for the renewal of their operating licenses.*
>
> *[18] The members of the Applicant have recently not been receiving support for operating licenses in cases where they have received such support in the past. Such refusal of support was without rational foundation, random, capricious, arbitrary and/or unfair, as more fully set out in the course of this affidavit.*
>
> *[19] On the other hand, some members of the Applicant have indeed been receiving the support of the Planning Authority, without any justification for the distinction between them and the former group whose applications have not been supported.*"

[10] The City's Manager: Transport Regulations Management, Mr. Lee van den Berg, deposed to the answering affidavit on behalf of the City. In that affidavit he deals in detail with the facts relating to the refusal of the individual operators. But, he

raises a point *in limine*, alleging that the PTA had filed to exhaust its internal remedies before launching this application. The internal remedy in question is an appeal under the TATA to the TAT against the decision of the PRE in each individual case.

APPLICATION OF PAJA

[11] It is common cause that this review is governed by the provisions of the Promotion of Administrative Justice Act, 3 of 2000 ("*PAJA*"). Both the City and the PRE refer to the provisions of s7(2)(a) of PAJA and say that there was a statutory duty on the PTA to exhaust any internal remedies provided for in any other law, unless it was exempted from doing so by way of a successful application in that regard under s7(2)(c) of PAJA. There is no such application for exemption before the Court.

[12] Both Ms. Sarkas (for the City) and Ms. Adhikari (for the PRE) urged the Court to refuse the application to review on the basis that the failure to note an appeal to the TAT prior to launching these proceedings was fatal to the PTA's case. Reliance was placed on the decision of the Constitutional Court in *Koyabe*[6].

> "*[35] Internal remedies are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilise its own mechanisms, rectifying irregularities first, before aggrieved parties resort to litigation. Although courts play a vital role in providing litigants with access to justice, the importance of more readily available and cost-effective internal remedies cannot be gainsaid.*

[6] Koyabe and others v Minister for Home Affairs and others 2010 (4) SA 327 (CC) at [35] – [39]

[36] First, approaching the court before the higher administrative body is given the opportunity to exhaust its own existing mechanisms undermines the autonomy of the administrative process. It renders the judicial process premature, effectively usurping the executive role and function. The scope of administrative action extends over a wide range of circumstances, and the crafting of specialist administrative procedures suited to the particular administrative action in question enhances procedural fairness as enshrined in our Constitution. Courts have often emphasised that what constitutes a 'fair' procedure will depend on the nature of the administrative action and circumstances of the particular case…

[38] The duty to exhaust internal remedies is therefore a valuable and necessary requirement in our law. However, that requirement should not be rigidly imposed. Nor should it be used by administrators to frustrate the efforts of an aggrieved person or to shield the administrative process from judicial scrutiny. PAJA recognises this need for flexibility, acknowledging in s7(2)(c) that exceptional circumstances may require that a court condone non-exhaustion of the internal process and proceed with judicial review nonetheless. Under s7(2) of PAJA, the requirement that any individual exhaust internal remedies is therefore not absolute.

[39] What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue…"

[13] Mr. Rautenbach for the PTA accepted that there had been a failure on the part of his client to exhaust its internal remedy by way of an appeal to the TAT. In the absence of any application under s7(2)(c) for permission to proceed nonetheless, the Court is precluded (under s7(2)(a)) from hearing the application for review and the PTA must be directed (under s7(2)(c)) to exhaust its internal remedies. That really is the end of the matter.

[14] Mr. Rautenbach urged the Court, nevertheless, to review the decisions of the City to advise the PRE to refuse the respective applications. Ms. Sarkas submitted that the City's decision was not reviewable as it did not meet the definition of administrative action under s1 of PAJA in that the City had not exercised public power which has a direct, external legal effect. With reference to the decision of the Supreme Court of Appeal in *PG Group*[7] counsel for both the City and the PRE submitted that the determination of an application for the renewal of a taxi operating license was a multi-staged process with only the ultimate determination by the PRE having any final effect.

[15] In *PG Group*, which involved the determination of the price of piped gas used for industrial purposes, Leach JA said the following after setting out the parties' contentions as to how the determination should have been made.

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[7] PG Group (Pty) Ltd and others v National Energy Regulator of South Africa and another 2018 (5) SA 150 (SCA) at [30] -

“”*[30] The appellants contended that the court a quo had occurred in this reasoning, and argued that the determination of the methodology was not, in itself, an administrative action subject to review. The question is, whether the determination of the methodology to be used in respect of future price applications is ‘administrative action’, defined in part in s1 of PAJA as being a decision ‘… which adversely affects the rights of any person and which has a direct, external legal effect’.*

[31] In her discussion of the meaning of ‘direct, external legal effect’, Prof Hoexter, in her seminal work Administrative Law in South Africa (2ed) at 227-8, states that the phrase was a last-minute addition to the definition borrowed from German federal administrative law, and quotes the following comment from certain German writers regarding the position in that country:

> ‘If, for example, a decision requires several steps to be taken by different authorities, only the last of which is directed at the citizen, all previous steps taken within the sphere of public administration lack direct effect, and only the last decision may be taken to court for review. This applies, for instance, to many planning or license granting processes where a sequence of procedural decisions leads to a final decision against which a legal remedy is available. Therefore, all the preparatory decisions are in principle not reviewable by the administrative courts.’ “

[16] After dealing with the arguments advanced by the parties Leach JA concluded as follows.

> "*[35] On a similar process of reasoning in the present case, the determination of maximum gas prices was made by way of a staged process which only became binding on its completion when Nersa gave its decision on Sasol Gas's application. The fact that there were various steps in the process does not render each of these steps, individually, an administrative action which adversely affects the rights of any person. For, as Nugent JA stressed in Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works 2005 (6) SA 313 (SCA)…para 24, administrative action in general terms involves the conduct of the bureaucracy having 'direct and immediate consequences for individuals or groups of individuals.' Nersa's determination of the methodology to be used did not have consequences of that nature. It could only have had such an impact once it had determined what Sasol Gas's maximum prices should be. Until then, it did not bind any party and, in my view, did not constitute administrative action."*

CONCLUSION

[17] Applying the approach suggested in *PG Group*, and by parity of reasoning, I am driven to conclude that the decisions of the City in this matter in regard to the PTA's members applications for renewal did not constitute administrative action and are accordingly not reviewable under PAJA.

[18] And, I have already observed that it has been conceded by the PTA that the decisions of the PRE cannot be reviewed at this stage by virtue of its member's failure to exhaust their respective internal appeals to the TAT. The application therefore cannot succeed.

Accordingly it is ordered that:

A. The application is dismissed.

B. The applicant is directed to pay the costs of both the first and second respondents.

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GAMBLE, J