

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Case number: **4611/2022**

Reportable: YES/NO

Of interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

KROONSTAD VEHICLE TESTING STATION (PTY) LTD

Applicant

and

**THE MEMBER OF THE EXECUTIVE COUNCIL: POLICE,
ROADS AND TRANSPORT, FREE STATE**

Respondent

CORAM: LOUBSER, J et JONASE, AJ

HEARD ON: 20 FEBRUARIE 2023

JUDGEMENT BY: JONASE, AJ

DELIVERED ON: The judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLII on 30 MAY 2023. The date and time for hand-down is deemed to be 30 MAY 2023 at 16:00

Introduction:

- [1] The applicant brought an application before this court seeking an order to review and set aside the respondent's refusal of its application for the establishment and conducting of a private vehicle testing station at Botshabelo. The applicant further seeks ancillary relief that the matter be referred back to the respondent for a reconsideration.
- [2] The applicant alleges such a decision for refusal was taken on 03 February 2022.
- [3] The application which is the subject matter herein was made on the 30 January 2018. The applicant received a letter from the respondent dated 15 September 2020 indicating that the applicant's application to operate a private vehicle testing station at Botshabelo was not successful as the application did not comply with the requirements of regulation 128 of the Road Transport Act.
- [4] On 16 September 2020, the applicant sent a letter to the respondent enquiring from the respondent to enlighten it as to which aspects of Regulation 128 the applicant's application was allegedly non-compliant with. Respondent did not respond to the said letter. Again, the applicant sent a letter dated 29 September 2020 being a follow-up letter enquiring for the reasons why the applicant's application was found to be non-compliant.
- [5] On 20 October 2020 the applicant received a letter from the respondent indicating that applicant's application was apparently not accompanied by the prescribed affidavit and the required fee. The applicant indicated that the required fee had not yet been determined by the respondent or communicated to the applicant at any stage prior to the application.
- [6] On 21 October 2020 the applicant expressed its confusion to the respondent by way of a letter indicating that the applicant was unaware that it was required to pay an application fee or that it was ever communicated previously as such.

[7] On 22 October 2020 the applicant sent a letter to the respondent indicating the following:

7.1. *the affidavit that was allegedly omitted from the application was already submitted with the application on 30 January 2020.*

7.2. *the respondent and its department took more than 2 (two) years to revert to the applicant on its application regarding the fee to be paid.*

7.3. *with the previous application that was approved for Kroonstad private testing station no fee was payable or requested by the respondent.*

7.4. *the matter was elevated to the office of the Public Protector and as such the respondent was requested to review his decision on the applicant's application.*

[8] On 19 November 2020 the applicant instructed its attorneys, who on the same date sent a letter to the respondent recording that the application submitted by the applicant was fully compliant with the provisions of the regulations and that the fee which was to be paid was not yet communicated to the applicant, and that the respondent should review his decision within 14 days of receipt of the said letter.

[9] There was a further inordinate delay until the applicant was invited to attend a meeting on 9 February 2021 with one Mashinini where it was indicated that the respondent made an error when he refused the application and subsequent to the said meeting, applicant was informed of the amount to be paid and was also informed that an inspection will be held regarding the application for the Botshabelo testing station.

[10] On 11 February 2021 the applicant deposed to a new affidavit and made payment to the respondent in the amount of R 20 218.00, being the application fee for approval of a private testing station.

[11] On 24 March 2021 the applicant was informed, by way of a letter, by the respondent's Control Provincial Inspector: Inspectorate Sub-Directorate to attend to an inspection on 25 March 2021.

[12] The said inspection was postponed to 29 March 2021, but there was a further delay until applicant approached the Office of the Public Protector for assistance.

[13] On 2 February 2022 the Applicant received a letter from one Mr Thekiso, Acting Head of the Department: Police, Roads and Transport who informed the applicant as follows:

- a) *applicant's application for registration of the new Botshabelo vehicle testing station was received;*
- b) *the department unreservedly apologised for the delay to process the application;*
- c) *the department will conduct an investigation against officials who handled the matter, and*
- d) *he expressed the hope in conclusion that the department's apology will meet applicant's favourable acceptance.*

[14] On 3 February 2022 the applicant received a letter signed by the respondent indicating that the application for permission to operate a private testing station in Botshabelo was unsuccessful. It further stated that the decision was taken in light of the findings of an investigation by the relevant officials which stated that;

- a) *there is a building earmarked for the Vehicle Testing Station consisting of an old factory building.*

- b) *the site indicated did not to have enough space to test vehicles as it had no space for erecting a formal test yard as required by the SANS, for heavy vehicles will not be able to turn around when leaving the testing station because of the building structure and layout of the yard.*
- c) it was established that the applicant does not qualify on Quality Management and System course in terms of SANS 10216: 2010 SANS offered by the SABS.
- d) there was a high possible conflict of interest.

[15] The applicant's concerns with regard to the above are;

- a) it does not explain or substantiate to what extent the building was not suitable.
- b) it does not consider the SANS standards and SABS's requirements for a functional testing station.
- c) it does not take cognisance of the qualification which applicant held and which was in possession of the respondent's official.
- d) it does not state what the conflict might have been and applicant was not afforded any opportunity to address respondent on such possible conflict and without explaining how a conflict could preclude applicant from executing the functions prescribed by the regulations.

[16] On 09 February 2022 the applicant replied, conveying the above concerns and reminded the respondent that the reasons differed from the initial reasons that were given on 15 September 2020. It also expressed the view that applicant was not treated fairly since all the requirements of regulation 128 have been met, as was confirmed in the meeting by the respondent and his officials on 9 February 2021. Further, the applicant requested the respondent to review his decision.

[17] On 13 April 2022 the applicant sent a letter to the respondent enquiring into the progress made with regard to applicant's letter dated 9 February 2022. No response was received to the said letter.

[18] The applicant also referred to the Public Protector's report which urged the respondent to review his decision and applicant informed the respondent that applicant will have no choice other than to apply to this court for relief if the respondent does not attend to applicant's queries regarding his decision.

Issues:

The issues for determination by this Honourable Court are as follows;

- a) whether or not the applicant should be granted condonation for the late filing of this application, and
- b) whether or not the respondent's decision should be reviewed and set aside.

Condonation:

[19] This application is brought in terms of PAJA,¹ or where it is found to be applicable, in terms of the principle of legality.

[20] In terms of PAJA, applications for review should be brought within 180 days from the date on which the decision was made or from the date the applicant should have known about the decision having been taken.

[21] In this matter, the impugned decision was taken on 3 February 2022 and the applicant brought this review application on 21 September 2022.

¹ Act 3 of 2000

[22] Section 9 of PAJA provides that;

“(1) The period of –

(a) 90 days referred to in section 5 may be reduced; or

(b) 90 days or 180 days referred to in sections 3 and 7 may be extended for a fixed period, by agreement between the parties or, failing which agreement, by a court or tribunal on application by the person or administrator concerned.

(2) The court or tribunal may grant an application in terms of subsection(1)(b), where the interest of justice so require.”

[23] Soon after 3 February 2022, the applicant referred the outcome of its application to the Public Protector to investigate the respondent's conduct in determining the application under review herein.

[24] On 30 March 2022, the office of the Public Protector found that, *inter alia*, the respondent's ill-treatment of the applicant was not only illegal but also unreasonable and that corrective steps are required to be taken.

[25] The referral of this matter to the Public Protector was not in line with the requirements of PAJA but with the cardinal rules governing the principle of legality. It is so because in terms of PAJA the applicant should have brought this application within 180 days from 3 February 2023, being the date the applicant had full knowledge of the outcome of its application. A review under the principle of legality should be within a reasonable time.

[26] Even if it was in terms of PAJA, there would be a reasonable explanation furnished by the applicant which will be incumbent upon this court to grant the application for condonation.

Analysis:

[27] The Constitution provides that;

“Section 2: *This Constitution is the supreme law of the Republic; law and conduct inconsistent with it is invalid, and the obligation imposed by it must be fulfilled.”*

Section 33: (1) *Everyone has a right to administrative action that is lawful, reasonable and procedurally fair.*

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

(3) *National legislation must be enacted to give effect to these rights, and must-*

(a) *provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;*

(b) *impose any duty on the state to give effect to the rights in subsections (1) and (2); and*

(c) *promote an efficient administration.”*

[28] The said provisions empowered the Parliament to enact **PAJA** which clearly gives a meaningful definition of what constitutes administrative action.

- [29] The exercise of a public power is subject to the principle of legality².
- [30] The principle of legality includes rationality and accountability which imposes a duty upon the functionary exercising a public power to provide reasons for its act or decision.
- [31] Review in terms of both the PAJA and the principle of legality stems from the rule of law.
- [32] Section 33(1) and (2) of the Constitution as well as the PAJA gives effect to the rule of law in respect of only administrative action.
- [33] The principle of legality gives effect to the rule of law in relation to all other exercises of public power, such as executive power³.
- [34] The SCA, in the above case at **para 38**, held that;

“It does not matter in this case that the application for the review is based on the principle of legality rather than the PAJA. No procedural differences arise and the grounds of review that apply in respect of both pathways to review derive ultimately from the same source- the common law- although, in the PAJA, those grounds have been codified.”

- [35] The respondent’s decision to be reviewed and set aside is that:
- a) the building where testing to be conducted is an old factory building without substantiating as to what extent the building was not suitable.
 - b) The site did not have enough space to test vehicles as there was no space for erecting a formal test yard as required by SABS standards for heavy

² **PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA v SOUTH AFRICAN RUGBY UNION AND OTHERS 2000(1) SA 1 (CC) at PARA 148**

³ **MINISTER OF HOME AFFAIRS v THE PUBLIC PROTECTOR [2018] ZASCA 15**

motor vehicles, as it will be impossible to turn around in the yard when leaving the testing station because of the layout of the building.

- c) The director of the applicant apparently did not qualify on a Quality Management and System course in terms of SANS10216:2010 offered by the SABS, without taking cognisance of the qualification which he held and which was in possession of the respondent's official.
- d) The applicant's director apparently had a possible conflict of interest, without stating what that conflict might have been and without affording him any opportunity to address him on such possible conflict and without explaining how a conflict of interest could preclude him from executing the functions prescribed in the regulations.

[36] When the respondent took that decision, he acted in exercising a public power and performed a public function in his capacity as an executive functionary.

[37] The applicant ought to have been afforded an opportunity to make representations to clear issues which needed to be provided with further information for the respondent to arrive at a fair decision.

[38] The respondent's decision was based on irrational considerations and such the said decision is susceptible to be reviewed and set aside on the principle of legality.

[39] This court finds that this application was brought within a reasonable time. As such, there is no need for the application for condonation.

[40] In the premises I make the following order;

1. The respondent's decision to dismiss the application of the applicant to operate a vehicle testing station at Botshabelo is hereby reviewed and set aside.

2. The matter is referred back to the respondent for his reconsideration.
3. The respondent is to pay the costs of this application on the attorney-client scale.

S.S. JONASE AJ

I concur:

P. J. LOUBSER J

On behalf of the Applicant:

Instructed by:

Adv. J.S. Rautenbach

Blair Attorneys

BLOEMFONTEIN

On behalf of the Respondent:

No appearance