



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

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED ✓	
DATE 3/5/17	SIGNATURE <i>[Signature]</i>

CASE NO: 30586/2014

DATE: 5/5/2017

In the application for leave to appeal brought by

THE ROAD TRAFFIC INFRINGEMENT
AGENCY BOARD

4TH RESPONDENT *A QUO*

In the original matter between

FINES 4 U (PTY) LTD

1ST APPLICANT

BRETT HUDSON (PTY) LTD t/a AUDI CENTRE
JOHANNESBURG (PTY) LTD

2ND APPLICANT

AND

SHERMAN M AMOS, DEPUTY REGISTRAR: ROAD
TRAFFIC INFRINGEMENT AGENCY

1ST RESPONDENT

THE MINISTER OF TRANSPORT

2ND RESPONDENT

THE DIRECTOR-GENERAL, DEPARTMENT OF
TRANSPORT

3RD RESPONDENT

THE ROAD TRAFFIC INFRINGEMENT AGENCY
BOARD

4TH RESPONDENT

MR R MANNAFELA

5TH RESPONDENT

ADV H T MBATHA

6TH RESPONDENT

MR J B JACOBS

7TH RESPONDENT

Ms M LIPPERT

8TH RESPONDENT

MR B RASSEBOYE

9TH RESPONDENT

JUDGMENT IN THE 4TH RESPONDENT'S APPLICATION FOR LEAVE TO APPEAL

PRINSLOO, J

- [1] The fourth respondent applies for leave to appeal to the Supreme Court of Appeal against my judgment dated 22 February 2017.
- [2] The fourth respondent was the only respondent which took an active part in the proceedings before me.
- [3] To avoid confusion, I shall refer to the parties, for purposes of this application, as they were cited in the proceedings before me even though the applicants in those proceedings are now the respondents opposing the application for leave to appeal and the fourth respondent is the applicant for leave to appeal.
- [4] Before me, Mr Hopkins appeared for the fourth respondent and Mr Dreyer SC with Mr Schabort, for the applicants.

[5] The reasons for the conclusions I arrived at appear from the judgment, and I do not intend to embark upon unnecessary repetition.

[6] In the application for leave to appeal, it is stated that I held that the impugned decisions were reviewable on "three broad bases" namely that they were:

- (a) tainted with bias,
- (b) irrational and
- (c) taken without the mandatory statutorily prescribed process being followed.

These three "bases" are then dealt with in the application. Whilst I do not necessarily concede that my conclusions, as they appear from the judgment, can necessarily be limited to these three "bases", I shall deal with the submissions made in respect of each of those subjects.

[7] These subjects or "bases" are categorised into three grounds of appeal by the fourth respondent and I will deal with them along those lines:

- **The first ground of appeal: bias**

[8] This has to do with the scathing letter which the first respondent, Deputy Registrar of the Agency, wrote to Van Niekerk in response to the letter written by the National Chairman of the Justice Project South Africa ("NPC").

[9] The subject is dealt with in paragraphs [28] to [33] of the judgment.

[10] It was argued that the letter of the 1st respondent does not display any bias. My conclusion was that on a general reading of all the exchanges, including the refusal to furnish reasons, the apparent bias and unreasonableness displayed by the first respondent and the refusal to disclose the identity of the representations officers I was left with the impression that there is much to be said for the review grounds offered by the applicants in their PAJA review alternatively their legality review.

[11] I am not persuaded that an appeal on this ground **would** have a reasonable prospect of success as intended by the provisions of section 17(1)(a)(i) of the Superior Courts Act 10 of 2013 ("the Act").

In their comprehensive heads of argument, counsel for the applicants reminded me of recent authorities to the effect that it has now become accepted that the use of the word "would" indicates a measure of certainty that another Court will differ from the Court whose judgment is sought to be appealed against. Counsel, correctly in my view, submitted that "to this extent the threshold for granting leave to appeal has been raised". It seems that this is now generally accepted to be the position.

- **The second ground of appeal: irrationality**

[12] This subject is dealt with in paragraphs [87] and [88] of the judgment. It involves a consideration of the "standing operating procedure" containing a provision to the effect that "representations will always be unsuccessful if the infringer has not actually disputed the road traffic violation or if the infringer's explanation is not supported by any acceptable evidence or else is simply improbable". I came to the conclusion that this is *ultra vires* the provisions of AARTO: there is no provision in AARTO to the

effect that the section 18 representations are limited to a debate on the merits of the infringement. I concluded that there are not, and cannot be, any prohibitions against an infringer advancing a technical argument such as irrationality and/or illegality on the part of the Agency and its officers who failed to comply with the AARTO structure or procedure.

- [13] In support of its argument, the fourth respondent relied on the case of *Agri Wire (Pty) Ltd and Another v Commissioner, Competition Commission, and Others* 2013 5 SA 484 (SCA).

Counsel for the fourth respondent submitted that this was a matter that concerned the Competition Commission's power to create an internal policy document that gives them the authority to grant immunity to whistle blowers, and it was held that this was not inconsistent with the broad powers given to the Commission to "bust cartels" even though that specific power was not expressly provided for in the Competition Act, Act 89 of 1998. Similarly, so it was argued, in this matter, RTIA's Operating Manual is not expressly authorised in the AARTO Act but its provisions are consistent with achieving the broad objectives given to RTIA.

- [14] On behalf of the applicants it was argued, correctly in my view, that *Agri Wire* does not find application in this matter. The representations officer has to duly consider a representation and cannot be hamstrung in exercising that duty. The prescribed measure to reject a representation where the infringer does not dispute committing the offence, is not a measure enabling a representations officer to perform his function. Indeed, it amounts to unlawfully fettering the discretion of the representations officer.

In this sense, the present matter, and the creation of paragraph 18 of the Operating Manual, is distinguishable from what was found in *Agri Wire*: it was submitted by counsel for the applicants that the representations officers' power to consider representations requires them to take into account any reasonable grounds on which those representations may be based – see sections 18(2) and (4)(2)(b) of the AARTO Act. This would include the grounds contained in the representations, to the effect that the AARTO regime or procedure was not followed. The discretion of the representations officers cannot be fettered by the dictates of an Operating Manual as it does not afford them the opportunity to make an informed decision. I agree with these submissions. It follows that the decisions by representations officers to reject representations on the ground proposed in paragraph 18 of the Operating Manual are irrational and fall to be reviewed for that reason.

- [15] In the result, I am also not persuaded that this second ground of appeal is one which would have a reasonable prospect of success.

- **The third ground of appeal: remedy**

- [16] In the judgment, and more particularly in paragraph 23 thereof, it was illustrated that it is common cause between the parties that, in imposing fines and penalties on the second applicant, the respondents completely failed to comply with the statutorily prescribed AARTO regime. The mandatory requirements were not met. In the judgment, there was extensive references to the contents of the "AARTO Pilot Project Status Report" of 26 July 2013 where it was acknowledged that the AARTO regime was not complied with and -

"the cases that cannot be complied with in terms of an enforcement order will eventually need to be cancelled/withdrawn from the e-NATIS system.

Due to the fact that the RTIA is not complying with the administrative prescription of sending out courtesy letters and enforcement orders all infringement notices are legally null and void.

It therefore makes all law enforcement fruitless and wasteful expenditure.

National roll-out cannot be considered unless the RTIA is financially sustained to comply with section 30."

- [17] In paragraph 8 of the application for leave to appeal, the following is stated on behalf of the fourth respondent:

"In para 40 of the judgment, the Court *a quo* held that RTIA did not follow the statutorily mandated process and, in so doing, the 'representations officers acted beyond their statutorily conferred powers' and that this 'offends the principle of legality which dictates that they may exercise no power and perform no function beyond that conferred upon them by law ...' With respect, these statements are entirely **correct**. (The emphasis is that of the applicant.) We take no issue with the finding that because RTIA did not strictly comply with a mandated procedure, the infringement notices that were issued cannot be enforced. In other words, we accept that RTIA cannot permissibly compel Fines 4 U to pay fines issued in an *ultra vires* manner. However, the court *a quo* then set aside the impugned decisions taken by the representations

officers, after finding that the process was *ultra vires*. It is, with respect, submitted that the court *a quo* erred in its choice of remedy and that 'setting aside' ought not to have followed a finding that the impugned decisions were reviewable on the basis of legality."

[18] It is difficult to understand why a successful legality review should not have followed upon a finding that the officials acted beyond their statutorily conferred powers. This is common cause. It seems to me that these are exactly the circumstances under which a legality review is indicated.

[19] Counsel for the fourth respondent argued, correctly, that "legality may, on occasion, be overwritten by competing considerations including those of practicality". Counsel referred to the well-known case of *Oudekraal Estates v City of Cape Town* 2004 6 SA 222 (SCA) at paragraph [36] and *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 4 SA 113 (CC) at paragraph [85]. It seems to me that the situation is clearly explained in *Chairperson, Standing Tender Committee and Others v JFE Sapela Electronics (Pty) Ltd and Others* 2008 2 SA 638 (SCA) where the learned Judge says the following in paragraph [28] at 649J-650B:

"In appropriate circumstances a Court will decline, in the exercise of its discretion, to set aside an invalid administrative act. As was observed in *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 6 SA 222 (SCA) paragraph [36] at 246D:

'It is that discretion that accords to judicial review its essential and pivotal role in administrative law, for it constitutes the indispensable moderating tool for avoiding or minimising injustice when legality and certainty collide.'

A typical example would be the case where an aggrieved party fails to institute review proceedings within a reasonable time ..."

On a general reading of these decisions, it is clear that a Court will decline to set aside an invalid administrative act, in the exercise of its discretion, when failure to do so could result in prejudice to the respondent or to third parties. In the present case, no case was made out by the fourth respondent which suggests such prejudice or injustice. It is clear, as argued by counsel for the applicants, that the fourth respondent will suffer no prejudice if the invalid administrative acts, the invalidity of which is common cause, are set aside, as was done in this judgment under attack.

- [20] The case of the fourth respondent that the relief claimed "is academic" was, in my view, compellingly countered by the applicants during the main proceedings, and again when opposing the application for leave to appeal. The issue was dealt with in the judgment in paragraphs [78] to [84]. It was therefore necessary for the applicants to apply for the unlawful administrative acts to be set aside on review. It is trite that "our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside" – *Oudekraal* at 242B-C.

- [21] Counsel for the fourth respondent even suggested, in the application for leave to appeal, that the correct order would have been a declarator to the effect that the administrative actions were unlawful. It is put as follows in the application for leave to appeal:

"An order reviewing the representations officers' decisions and declaring them to be unlawful on account of a statutorily mandated procedure not being followed was required, but setting aside was not."

It is difficult not to accept that this argument amounts to little more than semantics. It was argued on behalf of the applicants, correctly in my view, that to review and set aside an unlawful administrative act is tantamount to a declaration of its unlawfulness. It was argued that a mere declaration of unlawfulness would have been inadequate in the absence of a review and setting aside of the unlawful action. With this submission I also agree. I add that the argument that a declarator would have been more appropriate only emerged during the hearing of the application for leave to appeal and not during the main proceedings.

[22] In all the circumstances, I have come to the conclusion, and I find, that there is no reasonable prospect that another Court would come to a different conclusion with regard to the third ground of appeal. In the result, the application for leave to appeal ought to be refused because "it may only be given where the Judge or Judges concerned are of the opinion that –

"(a)(i) the appeal would have a reasonable prospect of success" ... section 17(1)(a)(i) of the Superior Courts Act."

[23] Mr Hopkins also relied, in support of the application for leave to appeal, on the alternative ground for granting leave to be found in section 17(1)(a)(ii):

"There is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration."

There are no conflicting judgments, but the "compelling reason" was argued to be a situation where this matter "raises extremely important issues not only of a legal nature but, indeed, of practical consideration too. Moreover, the issues raised are of national importance."

In countering this argument, counsel for the applicants submitted that the judgment cannot be said to impact nationally or cause prejudice because it only affects the relationship between the fourth respondent (and other respondents) and the applicants. The judgment has pronounced on the administrative action taken by the respondents in its relationship with the applicants and nothing more. I was reminded by counsel for the applicants that the fourth respondent, in the main proceedings, echoed these sentiments in its heads of argument in the following terms:

"However, there are no factors in this case that would interest the broader public nor are there any factors in this case that are of a greater public interest. Audi is only seeking to review two different kinds of decisions taken by the representation officers. These decisions are peculiar to its own circumstances because they were taken on the basis of reasons that Audi gave to the representation officers. They were also rejected because the reasons were improper and/or inadequate. Nobody else is interested in this nor could they be. Other infringers in the AARTO Act will presumably provide substantive reasons when they make representations to RTIA's representation officers. Other cases will therefore be completely different to this one. This case has no value to anybody else."

Against this background, the apparent change of stance by the fourth respondent is difficult to understand or, with respect, take seriously.

In the result, where there is no clear evidence of "some other compelling reason" of the nature contended for, it must also be concluded that there is no justification for granting leave to appeal on the basis of the provisions of section 17(1)(a)(ii) of the Superior Courts Act.

[24] I add, that counsel for the applicants also argued that the application for leave to appeal should fail in view of the provisions of section 17(1)(b) of the Superior Courts Act which stipulate:

"17(1) Leave to appeal may only be given where the Judge or Judges concerned are of the opinion that –

(a) ...

(b) the decision sought on appeal does not fall within the ambit of section 16(2)(a) ..."

Section 16(2)(a) provides:

"(i) When at the hearing of an appeal issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.

(ii) Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs."

[25] It is difficult to see what practical result or effect a decision sought to set aside the review of admittedly invalid administrative action can have. Indeed, this question becomes even more pronounced if one considers that the fourth respondent, in the main proceedings, stated that "nobody else is interested in this nor could they be ... Other cases will therefore be completely different to this one. This case has no value to anybody else."

[26] In the result, it seems that the fourth respondent has also failed to pass the test foreshadowed in section 17(1)(b), so that, for that reason too, the application for leave to appeal falls to be dismissed.

Costs

[27] Both parties employed the services of two counsel in the main proceedings. There is no reason why the applicants can be penalised for having taken the precaution of employing the services of the same two counsel to oppose the application for leave to appeal.

The order

[28] I make the following order:

1. The application for leave to appeal is dismissed.
2. The fourth respondent is ordered to pay the costs of the application which will include the costs flowing from the employment of two counsel.



W R C PRINSLOO
JUDGE OF THE GAUTENG DIVISION, PRETORIA

HEARD ON: 20 APRIL 2017

FOR THE APPLICANTS: J H DREYER SC WITH J W SCHABORT

INSTRUCTED BY: GRIESEL & BREYTENBACH ATTORNEYS

FOR THE 4TH RESPONDENT: K HOPKINS

INSTRUCTED BY: MAJAVU INCORPORATED