FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 4794/2009

In the matter between:

THUSANENG TAXI ASSOCIATION	First applicant
HLAPO GEORGE HLAPO	Second Applicant
JACOB TSOTETSI	Third applicant

and

THE MEMBER OF EXECUTIVE COUNCIL: POLICE, ROADS & TRANSPORT	First Respondent
THE PROVINCIAL TRANSPORT REGISTRAR: FREE STATE PROVINCE	Second Respondent

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CORAM: EBRAHIM, J *et* LEKALE, AJ

HEARD ON: 31 JANUARY 2011; 28 FEBRUARY 2011

JUDGMENT BY: EBRAHIM, J

DELIVERED ON: 24 MARCH 2011

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[1] The first, second and third applicants apply in terms of section 6 of the Promotion of Administrative Justice Act, 3 of 2000, ("PAJA") for the judicial review and setting aside of a decision of the second respondent refusing to register first applicant as a taxi association. Second and third applicants

are members of first applicant. In their founding papers the applicants rely on Section 6(2)(d) and (e)(iii) as the jurisdictional basis for these proceedings.

[2] The subsection reads as follows:

> **"(2) A court or tribunal has the power to judicially review an administrative action if-**
>
> ***(d)*** **the action was materially influenced by an error of law;**
>
> ***(e)*** **the action was taken-**
>
> **(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;"**

[3] The application for registration was lodged with the second respondent during 2008. On 5 January 2009 the second respondent, by letter, notified the applicants that their application had been unsuccessful. I quote the relevant letter, verbatim:

"January 5, 2009

FAX: 056 2141479

Tell: 0727741542

Thusanang Taxi Association

P.O. Box 5160

Lengau

9499

RE: Application for Registration of Association

Your application for the Registration of Thusanang Taxi Association refers.

You are hereby informed that the above mentioned application has been declined based on a provision of the Free- State transport Act no 4 (2005).

Section 80 of the Act states that 'the Registrar must register an Association which upon application, satisfies the prescribed minimum period of existence, namely 28 February 1995 and has applied for Registration on or before 31 July 1997'.

Your application does not therefore meet the above requirements.

You have the right to appeal the decision of the registrar with the MEC, Community Safety and Transport.

Yours truly,

ST LEKHEMA

TRANSPORT REGISTRAR"

[4] The applicants thereafter pursued the internal remedy provided for and appealed to the first respondent, who on 18 March 2009 dismissed their appeal. The letter of notification reads as follows:

> "The Secretary
>
> Thusanang Taxi Association
>
> P.O. Box 5160
>
> KROONSTAD
>
> 9503
>
> Dear sir,
>
> **APPEAL: THUSANANG TAXI ASSOCIATION**
>
> 1. I refer to the above matter and to your appeal dated 8 January 2009 against the decision of the Transport Registrar not to register your association.
> 2. After I have considered your appeal, all information submitted and relevant legislation, I agree with the decision of the Registrar.
> 3. Your appeal has therefore been unsuccessful because your association does not meet the requirements that are set out in section 80 of the free State Public Transport Act 2005 (Act NO. 4 of 2005) (the Act) together with regulations 7 and 8 of the Free State Interim Passenger Transport Regulations, 1998 (the Regulations).

4. Kindly note that you have a right to approach the court within 180 days after receipt of this letter for a judicial review if your are not satisfied with the outcome of the appeal.

5. Please find attached copies of the section of the Act and the regulations referred to above for ease of reference.

Mr. ES MAGASHULE

MEC: COMMUNITY SAFETY AND TRANSPORT

Date: 18/03/2009"

[5] Prior to enlightening the reader on the factual matrix surrounding the circumstances of the application for registration, I think it necessary to set out the relevant provisions of the Free State Public Transport Act 2005 (Act No. 4 of 2005 and the applicable Regulations framed under the Free State Interim Passenger Transport Act 1998 (Act 16 of 1998) ("the Regulations")) Section 80 provides:

"**80. Registration of associations.** – The Registrar must register an association which upon application satisfies the Registrar-

(a) that it has been in existence for a period not less than the minimum prescribed period;

(b) that the number of members meets the prescribed

minimum;

(c) that the Registered Constitution and code of conduct submitted by the association has been signed and accepted by each of its members;

(d) that the said Constitution and code of conduct are consistent with and comply with the prescribed requirements;

(e) that the association enjoys the support of relevant municipalities and transport authorities;

(f) that each member of the association holds a valid permit or operating license for each motor vehicle that he or she operates and that his or her operations are within the authority thereof;

(g) that each member of the association has furnished proof to the satisfaction of the Registrar that the member is registered as a tax payer under the Income Tax Act, or, in terms of that Act, is not required so to register; and

(h) that all of the information required by the Registrar in terms of this Act or other legislation has been provided and this information has been verified in the manner prescribed."

Section 23(5) of the Act provides:

"Any regulation made in terms of a law repealed or excluded by

this Act and enforced immediately before the commencement of this Act with regard to matters in relation to which the MEC is competent to make regulations in terms of this section, is regarded for the purpose of this Act, as regulations made in terms of this section until the MEC makes a superseding regulation under this section."

Regulation 7 reads:

"**7. Minimum number of members or primary associations required for registration of association** – Subject to section 18 of the Act –

(a) the minimum number of members which an association must have before it may be registered in terms of the Act, shall be 20 (excluding a conditional member referred to in the Standard Constitution);

(b) the minimum number of primary associations based in the Province to be affiliated to a secondary association before it may be registered in terms of the Act, shall be two."

Regulation 8 reads:

"**8. Minimum period that association must have existed to qualify for registration –**

> Subject to section 18 of the Act, an association must have been in existence since 28 February 1995 in order to be registered in terms of the Act."

[6] It was common cause between the parties at the hearing of the present proceedings that the applicant qualified for registration on the basis of Regulation 7(a), its membership being of the order of 64 members when the initial application for registration was submitted. Both parties were agreed that the success of the present proceedings depended on whether or not the applicants fell foul of the provisions of section 80(a) of the Act and/or of Regulation 8.

[7] The proceedings for review commenced before my brother Lekale AJ and I on 28 February 2011. Due to insufficient clarity in the respondents' papers as to their defence, I postponed the hearing, at the respondents' costs, and granted both parties leave to supplement their papers. A fresh set of affidavits from both parties was received and in addition the respondents used the opportunity to raise, *in limine*, an objection to the application on the basis that it had been launched outside of the time limits prescribed in

subsection 7(1) of PAJA which provides:

> **"(1) Any proceedings for judicial review in terms of Section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date,**
>
> **(a) subject to sub-section (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in sub-section (2)(a) have been concluded or**
>
> **(b) Where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons."**

[8] The first applicant came into existence with a membership list of 64 members in 1989 in Kroonstad. This was not disputed by the respondents.

As with all provincial administrations, taxi operators in the Free State are under legal obligation to operate their taxis under licence, which can only be obtained if the operator is a member of a duly registered taxi association.

The first applicant applied for registration as a taxi association for the first time under the provisions of the Free State Interim Passenger Transport Act, 1998 (Act 16 of 1998) and was conditionally registered as such on 27 November 1998. Full registration was denied to the first applicant on the same grounds as those upon which its subsequent application for registration was refused outright *viz* failure to comply with the statutory minimum requirements as to membership and period of existence. In both instances, the Regulations which were applicable were Registration 7 and 8 quoted in this judgment.

[9] The essence of the respondents' defence is that the first applicant has not enjoyed continued existence since 28 February 1995. Respondents allege that subsequent to first applicant being conditionally registered, it merged with another taxi association from Kroonstad, the Moakeng Taxi Association, to form a new association called the Moqhaka Association. According to the respondents the first applicant thereupon ceased to exist as an independent taxi association, with its own legal persona. It became a new

entity called the Moqhaka Association.

[10] The applicants contend that there was an attempted merger, which did not get off first base, because the members of first applicant and Moakeng Taxi Association could not agree on a constitution which would satisfy all of them. The respondents counter this with the retort that the Moqhaka Taxi Association was very much in existence with elected officials from both Moakeng Taxi Association and the first applicant and that it operated on the basis of a standard constitution applicable to all taxi associations.

[11] In addition, the respondents have argued that first applicant was, in fact, deregistered as a taxi association and that the merger was registered with second respondent, as the Moqhaka Taxi Association. Accordingly they have denied a failure of the merger and referred us to the fact that the applicants submitted the requisite application fee for a new application as proof that the first applicant was a new association requiring registration for the first time in 2008.

[12] Mr. Wessels, on behalf of respondents, seeks an order dismissing the review application with costs on two grounds

viz on the merits and on the ground of having failed to abide the 180 day time period prescribed for the bringing of review proceedings (Section 7(1) PAJA). In this regard he argues that the belated application for condonation brought by the applicants is fatally flawed for lack of prospects of success on the merits and because the applicants have not provided a full explanation for the delay. He argued that the explanation provided is blatantly false and does not cover the entire period of the delay. He relied exclusively for his submissions in this regard on **MINISTER OF AGRICULTURE AND LAND AFFAIRS v CJ RANCE (PTY) LTD** 2010 (4) SA 109 (SCA).

[13] In the founding affidavit supporting the application for condonation, the applicants place the reason for the delay squarely on the shoulders of the second respondent, in that notification of the dismissal of their appeal only reached them by post on 27 March 2009. The respondents deny this and point to a faxed transmission of the notification on 19 March 2009 (annexure “MN2” and “MN3”) to the supplementary answering affidavit), which the applicants deny receiving.

They calculate the 180 day period as of the date of receipt of notification, which on my arithmetic, means that the founding papers in the main application were timeously issued on the 23rd September 2009, being the 180th day. Only service on the respondents was effected after that period had expired. On my interpretation of subsection 7(1) of PAJA, the proceedings were timeously instituted.

[14] Mr. Wessels contends for, in my view, an erroneous construction of subsection 7(1). He argues that the legislature clearly intended a distinction to be drawn between the date when the person concerned is informed of the administrative action (decision) taken and the date on which proceedings instituted in terms of internal remedies such as the internal appeal proceedings under consideration in the present review application, have been concluded. That would mean the effective date in the present case would be 18 March 2009 when the appeal was dismissed and not 27 March 2009 when the applicants were informed of the dismissal. As authority for this proposition, he has referred to **BRÜMMER v MINISTER FOR SOCIAL DEVELOPMENT AND OTHERS** 2009 (6) SA 323 (CC) (per Ngcobo CJ). His

reliance on this authority is severely misconceived as it is in fact authority for the diametrically opposed construction contended for by the applicant: that the *dies induciae* is calculated from the date the applicant was informed of the decision of the appeal. At p. 350, par. [77] the learned Chief Justice held:

> "The period of 180 days must be calculated from the date when the requester receives notification of the decision on internal appeal."

In these circumstances therefore the application for condonation was unnecessary and accordingly I make no order in this regard.

[15] I deal now with the merits of the respondents' decision. The crux of the matter is whether or not a merger did take place. Mr. Wessels, quite correctly, has reminded me of the trite legal principle that a court, in motion proceedings for final relief must, in the event of conflict, accept the respondent's version. This is so save that the rule only applies provided the respondent's allegations are, in the opinion of the court,

not such as to raise a real, genuine or *bona fide* dispute of fact or one so farfetched or clearly untenable that the court is justified in rejecting them merely on the papers - **PLASCON-EVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD** 1984 (3) SA 623 (A) at 634 E – 635 C.

[16] In **WIGHTMAN t/a JW CONSTRUCTION v HEADFOUR (PTY) LTD AND ANOTHER** 2008 (3) SA 371 (SCA) at 375 - 376 par. [13] Heher JA lays down a useful guide to be employed in determining a real, genuine and *bona fide* dispute of fact.

> "[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess

> knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter."

[17] A bald allegation by the respondents in their answering affidavit that the merger was founded on a standard constitution applicable to all associations does not, in my view, satisfy this test. No attempt is made by the respondents to set out supporting facts and evidence, for

example, a copy of the standard constitution and the resolution of members adopting it as their constitution upon which the merged new association, the Moqhaka Taxi Association, was to operate. This, is in fact what, in my view, lends the lie to the respondents' allegation for, had such a constitution in fact have been adopted and put in place, it would have been an easy matter to annex it as evidence. In this regard it should be noted that Section 80(c) of the Act requires the Registrar to be satisfied that the Registered Constitution and Code of Conduct submitted by the applicant association has been signed and accepted by each of its members before he or she can register such an association. Moreover, upon proper contemplation and analysis of this allegation, it appears to me to be totally devoid of truth, because of the impracticality of such a course. It seems to me that the primary purpose of adopting a constitution in the present case (in addition to giving the new association an independent legal persona as a voluntary association) would have been fundamentally, to regulate the manner in which the various taxi operators who had merged with one another were to conduct themselves concerning matters such as their trade routes, fares to be charged, and the operating

times of taxis as well as the allocation of other administrative and executive functions. I ask myself how a standard constitution applicable to all and any taxi association, is able to do this bearing in mind that each association consists of different members, presumably conducts their taxi operations on different routes and charges different fares. That, after all, is the very rationale for having different associations, so that monopolies may be contained and restricted and taxi wars and taxi violence averted. How does one embrace these objectives if a standard constitution is to apply each and every time a merger takes place and a new taxi association is formed?

[18] The respondents' bare and ambiguous denial of the applicants' factual averment that no merger took place, because no constitution could be agreed upon, is untenable against the broad circumstantial matrix existing in the case of taxi operators hoping to join to form an association for the benefit of all its members. I am accordingly enjoined by the law to take a robust view and accept the applicants' version – **WIGHTMAN**, *supra*.

[19] I find that no real genuine and *bona fide* dispute of fact exists on the papers as to the continued existence of the first applicant since its inception in 1989. I find further that it has continued to operate, without interruption, as an association and an independent entity since 1989, when it began functioning as an association, despite being erroneously deregistered by second respondent during 2008. More specifically I find that no merger of the kind referred to earlier in this judgment occurred. Since the first applicant is and has always been on all fours with the requirements of the law for registration as an association since 1989, second respondent's decision to refuse to register first applicant as an association, was clearly unlawful.

[20] 20.1 The decision is accordingly set aside.

20.2 The first applicant's application for registration as a taxi association is remitted to the office of the second respondent for consideration afresh.

20.3 The costs of these proceedings are to be borne by the respondents, jointly and severally, the one paying, the other to be absolved.

S. EBRAHIM, J

I concur.

L.J. LEKALE, AJ

On behalf of applicants:	Adv. A.H. Burger SC Instructed by: Naudes Attorneys BLOEMFONTEIN
On behalf of respondents:	Adv. M.H. Wessels SC With him: Adv. S. Motloung Instructed by: J H Engelbrecht Office of the State Attorney BLOEMFONTEIN Ref: 610/200901382/P6 T/zm

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