

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 2196/2005

In the matter between:-

COPPER CURVE INVESTMENTS CC t/a
NALEDI PRIVATE TEST STATION
(Registration No. CK2004/045568/23)

Applicant

and

THE PREMIER OF THE FREE STATE

1st Respondent

MEC : FOR TRANSPORT ROADS & PUBLIC
WORKS, FREE STATE PROVINCE

2nd Respondent

CORAM:

HANCKE J *et* C.J. MUSI J

HEARD ON:

10 OCTOBER 2005

JUDGMENT BY:

HANCKE J

DELIVERED ON:

14 OCTOBER 2005

- [1] The applicant applies for the review and setting aside of the
second respondent's decision to refuse to register the

applicant in terms of regulation 130 issued in terms of the National Road Traffic Act, No. 93 of 1996 ("the Act").

- [2] It is the applicant's case that before he started off, he engaged the services of an expert in this field who was involved in various applications for the registration of private testing stations throughout the country. The expert advised the applicant that according to the Act and the Regulations, the applicant was obliged to first set up a proper test station, fully equipped with personnel, equipment and quality documentation at the premises, whereafter he can apply for the registration of the private test station to the second respondent who would thereafter authorise an inspection from the South African Bureau of Standards (SABS).
- [3] The applicant alleges that he purchased a premises for the amount of R205 147,60. Thereafter he erected and set up a private test station according to the prescribed requirements by *inter alia* erecting a building and a walk-in inspection pit; he installed all the necessary equipment at the cost of about R583 567,71. After he completed the set-up, he offered

employment to six employees. Thereafter he made an application to the second respondent on 19 January 2005.

[4] After his application was submitted, he was informed by an employee of the second respondent that the second respondent instructed the SABS as required and prescribed by the Act and Regulations to inspect, evaluate and recommend the private test station, which was done on 24 February 2005. After the inspection the SABS recommended that the applicant should be registered as an A grade private testing station.

[5] Since the said recommendation the applicant made numerous inquiries (in total more than 300 telephone calls), to the office of the second respondent in an attempt to find out whether the applicant was registered, but without success. According to the applicant's expert, Mr. van der Nest, a similar application and procedure in other provinces, which is also governed by the same National Act and Regulations, usually takes between three to seven days to

finalise. About two and a half months later, on 9 May 2005 the applicant was informed that the second respondent refused to register the applicant as a private test station.

- [6] After the applicant approached his attorney the respondents were requested on 12 May 2005 to give reasons for his decision to refuse to register the applicant as a private test station. Despite the intervention of Mr. Venter, the legal advisor of the first respondent, no reasons were forthcoming. On 20 May 2005 Mr. Venter confirmed that there were no other internal remedies and procedure to follow in accordance with the Promotion of the Administrative Justice Act, No. 3 of 2000 (PAJA) and the only remedy available to the applicant was to bring an application for review to this court. The present application was then filed on 25 May 2005. In the meantime the second respondent notified the applicant in writing on 23 May 2005 that the application was not approved, whereafter reasons for the decision was furnished on 30 June 2005. In reply thereto the applicant filed a supplementary affidavit dealing with the allegations

contained in the reasons dated 30 June 2005.

[7] The second respondent opposes the application mainly on the following two grounds:

1. Insofar as the applicant seeks to be furnished with the reasons for the second respondent's decision, it ought to have proceeded in terms of PAJA. The application is therefore premature by reason of the applicant's failure to follow the prescribed process outlined in PAJA; and
2. The second respondent acted within the confines of the Act and the Regulations and correctly came to the conclusion that he was not satisfied that the prescribed requirements for registration of the testing station concerned have been met.

[8] As far as non compliance with PAJA is concerned, section 5 of PAJA reads as follows:

- “5. (1) Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.
- (2) The administrator to whom the request is made must, within 90 days after receiving the request, give that person adequate reasons in writing for the administrative action.....”

[9] As to a reduction of the 90 days period referred to in section 5(2) of PAJA, section 9 reads as follows:

“Variation of time

9. (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 such
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) where the interests of
justice so require.”

(My underlining.)

[10] It is clear that the time limits referred to in section 5 of PAJA
are indicative/directory and not peremptory. See **Judicial
Review of Administrative Action in South Africa** (Revised
First Edition) by J R de Ville p. 292.

[11] Having regard to the considerable time wasted since the
applicant applied for registration; the date on which the
decision was taken; the considerable amounts of money
expended by the applicant; the fact that the applicant has to
maintain the established test station at a monthly expense of
approximately R40 000,00 without generating any income
from it; the fact that the second respondent eventually

furnished reasons for his decision, and the fact that there is no prejudice, I am of the view that it is in the interests of justice that the applicant's non-compliance should be condoned.

- [12] As for the merits: The court's power to review any administrative action derives from section 33 of the Constitution of the Republic of South Africa, Act 108 of 1996 and PAJA, which has codified the grounds of judicial review to a large extent. An applicant who seeks to review administrative action is generally required to identify both the facts and legal basis upon which his or her cause of action is based.

BATO STAR FISHING (PTY) LTD v MINISTER OF ENVIRONMENTAL AFFAIRS AND OTHERS 2004 (4) SA 490 (CC).

- [13] The *onus* is on the applicant to establish the grounds on which a court can review a functionary's decision.

KIMBERLEY GIRLS HIGH SCHOOL v HEAD,
DEPARTMENT OF EDUCATION NORTHERN CAPE
PROVINCE AND OTHERS 2005 (5) SA 251 (NC).

[14] The registration of testing stations is provided for in chapter V of the National Road Traffic Act, No. 93 of 1996 (“the Act”). Section 38 provides that any person desiring to operate a testing station shall apply in the prescribed manner to the MEC concerned for the registration of such testing station.

[15] In terms of section 39 if the MEC is satisfied that the prescribed requirements for registration of the testing station concerned have been met, he or she shall register and grade such testing station on the conditions and in the manner prescribed. Regulation 130 deals with the manner of registration of testing stations and reads as follows:

“(1) The MEC shall, upon receipt of an application for registration of a testing station made in terms of

regulation 128 –

a) require from the inspectorate of testing stations
to –

- i) evaluate the testing station concerned
according to code of practise SABS
0216 'Vehicle test station evaluation';
and
- ii) recommend the appropriate grading
thereof in terms of regulation 132;

(b) with due regard to the evaluation and
recommendations of the inspectorate of testing
stations, satisfy himself or herself that the testing
station concerned complies with the requirements
referred to in regulation 129;

(2) (a) If the MEC is satisfied as to the suitability of the
testing station in terms of subregulation (1), he or
she shall –

- (i) subject to the conditions he or she may
deem fit, register and, in terms of regulation
132, grade such testing station;

(b) If the MEC is not satisfied as to the suitability of
the testing station in terms of subregulation (1), he

or she shall refuse to register such testing station,
and shall notify the applicant accordingly."

[16] By way of a letter dated 23 May 2005 the second respondent notified the applicant's attorney as follows:

"Currently be informed that having considered the application by your client I am not satisfied as to the suitability of the testing station and consequently the application is not approved."

[17] Before reaching a decision the second respondent does not personally conduct investigations. He states that it is standard practice and has become customary that officials of the SABS, such as T.H. Nxumalo, would conduct the inspections, alternatively, investigations and prepare a report in terms of which they would set out their evaluation of the testing station concerned and recommend the appropriate grading thereof.

[18] According to Mr. Nxumalo, a senior surveillance auditor: Vehicle testing stations, the said testing station was

inspected in accordance with the requirements as promulgated in the National Road Traffic Act and Regulations regarding the opening and functioning of a testing station. The date of inspection was 2005-02-22/24. His report is dated 24-02-2005. The following is stated *inter alia* in his report:

“4. FINDINGS

- 4.1 A total of 5 findings were made during the inspection of which none were observations and findingsreport is herewith enclosed.
- 4.2 A copy of the findingsreport was handed to the management of the testing station.

5. RECOMMENDATION

- 5.1 Registration as a grade A testing station is recommended.

6. CORRECTIVE ACTION

- 6.1 Corrective action correspondence from the testing station was received on 24-02-2005 and the corrections were verified by the inspectorate of

vehicle testing stations.”

[19] In reaction to the said report, the second respondent states the following:

“I have not received any report, as it is customary, that sets out the verification of the corrections by the so-called inspectorate of vehicle testing stations. It is apparent from Nxumalo’s report that he did not personally verify the corrective action that was allegedly taken as he states that the verification was made by the inspectorate of vehicle testing stations. At the time of the posing to this affidavit, no objective proof had been submitted by the applicant, or any one that such verification was in fact done.”

[20] It is also important to note what was stated by Mr. Nxumalo in his affidavit, namely that he confirms that the applicant complied with all requirements as set out in the Act, that there were no deficiencies and/or shortcomings in the equipment of the applicant’s private testing station and that his report was properly submitted and there was compliance with all the prescribed prerequisites in the Act and Regulations.

[21] It is clear that the second respondent never afforded the applicant an opportunity to submit proof of, nor Mr. Nxumalo to clear up, anything which was not clear to the second respondent. On a proper evaluation of Mr. Nxumalo's report it is clear that corrective action have been taken and that Nxumalo recommended the registration of the applicant as a grade A testing station.

[22] It is important to note that Mr. Nxumalo was the second respondent's agent who conducted the inspections on his behalf. Consequently, the applicant cannot be blamed if Mr. Nxumalo's report is allegedly indistinct, unclear or vague in any respect. To make a finding that the applicant was not suitable for registration on that basis is, in my view, so unreasonable that no reasonable person could have so exercised the power or performed the said function, as envisaged by section 6(2)(h) of PAJA. **BATO STAR FISHING**-case *supra* at par. [44]. It is clear that the second respondent's action is not rationally connected to the

information before him. (See 6(2)(f) (cc) of PAJA). It also constitutes action that was procedurally unfair as envisaged by section 6(2)(c) of PAJA.

- [23] Mr. Joubert, on behalf of the applicant, submitted that if the usual order is granted, namely to set aside the respondent's decision and to have the matter remitted to the second respondent, nothing is to be gained. According to his argument it is clear that there is a lack of fairness and a reasonable possibility of prejudice to the applicant if the matter is referred to the second respondent for reconsideration. **GAUTENG GAMBLING BOARD v**

SILVERSTAR DEVELOPMENT LTD AND OTHERS 2005

(4) SA 67 (SCA) at 79 – 80: De Ville op. cit. p. 204. In view of the circumstances set out above I am of the view that the present application should be regarded as “exceptional” within the meaning of section 8(1)(c)(ii)(aa) of PAJA. It is also clear that the applicant has complied with all the prescribed requirements set out in the regulations and that this court is entitled to review the application and grant the

relief claimed.

[24] As far as the first respondent is concerned: the application was not opposed by the first respondent; the applicant is therefore not entitled to an order of costs against the first respondent.

[25] In view of the conclusion reached by me, it is not necessary to deal with the other arguments advanced on behalf of the applicant.

[26] Consequently the following orders are issued:

1. An order is granted in terms of prayers 1 and 3 of the notice of motion.
2. The second respondent is ordered to pay the costs of the application.

S.P.B. HANCKE, J

I agree.

C.J. MUSI, J

On behalf of applicant : Adv. D.J. Joubert
Instructed by:
Naudes Attorneys
BLOEMFONTEIN

On behalf of 2nd respondent : Adv. T.J.B. Bokaba
Instructed by:
The State Attorney
BLOEMFONTEIN

/sp