THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 254/10

In the matter between:

MORULENG AND DISTRICT TAXI ASSOCIATION **First Appellant**

JOHANNES BOITUMELO MOKATSE **Second Appellant**

and

NORTH WEST PROVINCIAL DEPARTMENT OF TRANSPORT & 27 OTHERS **Respondents**

Neutral citation: ***Moruleng and District Taxi Association v North West Provincial Department of Transport & 27 others*** **(254/10) [2011] ZASCA 138 (23 September 2011)**

Coram: Harms AP, Maya, Bosielo and Shongwe JJA and Plasket AJA

Heard: **29 August 2011**

Delivered: **23 September 2011**

Summary: National Land Transport Transition Act 22 of 2000 – conversion of radius-based permits into operating licences – requirements – granting of operating licences reviewed and set aside.

ORDER

On appeal from: North West High Court (Mafikeng) (Leeuw AJP, Hendricks J and Kgoele AJ sitting as a court of appeal):

1. The appeal is upheld.
2. The fourth to twenty fourth respondents and the twenty sixth respondent shall pay the appellants' costs, including the costs of two counsel, jointly and severally, the one paying, the others to be absolved.

3. The order of the court below is set aside and replaced with the following order:
   (a) The appeal is upheld with costs, including the costs of two counsel.
   (b) The order of the court below is set aside and replaced with the following:

   (i) The decision of the second respondent to grant operating licences to the members of the fourth respondent for the route from Moruleng to Mogwase and back is reviewed and set aside.
   (ii) The respondents shall pay the costs of the applicants jointly and severally, the one paying the others to be absolved.

JUDGMENT

BOSIELO JA (Harms AP, Maya and Shongwe JJA and Plasket AJA concurring)

[1] This is an appeal against a judgment of the full court of the North West High Court, Mafikeng (per Hendricks J, Leeuw AJP and Kgoele AJ concurring), in terms of which the court set aside a judgment of the court of first instance (per Landman J) and found that the operating licences issued to members of the fourth respondent (the Mogwase Taxi Association) were properly issued and thus valid. The appeal is with the leave of this court.

[2] For some time the taxi industry across the country has been plagued by the so-called taxi wars. These wars, which in many instances resulted in the unnecessary loss of lives of innocent people who were caught in the cross-fire, revolve primarily around disputes involving routes. Not surprisingly, the dispute herein revolves around a disputed claim to provide a mini-bus taxi type service on a particular route. The disputed route herein is described as the Mogwase–Moruleng taxi route in North West Province. Members of the first appellant, the Moruleng and District Taxi Association, have the right to operate the route. Members of the Mogwase Taxi Association applied for the conversion of their radius-based permits into route-based licences for this route by the North West Provincial Operating Licence Board (the Board). The applications were successful and the Moruleng and District Taxi Association then sought to have the decisions reviewed and set aside.

[3] What follows are the background facts leading to this appeal. The Moruleng and District Taxi Association and Mogwase Taxi Association are rival taxi associations. During or about 1983 the members of first appellant broke away from fourth respondent to form their own separate association. Before the new National Land Transport Transition Act[1] as amended (the NLTTA) was passed, members of both first appellant and fourth respondent had radius-based permits which authorised them to undertake

[1] The National Land Transport Transition Act, 22 of 2000 which came into operation on 1 December 2000. (This was repealed by section 94 of the National Land Transport Act of 2009 which came into operation on 8 December 2009).

public transport services for commuters on the disputed route. The main purpose of the NLTTA is to transform and restructure the Republic's land transport system.

[4] The NLTTA aims to achieve a smooth transition from the old system of radius-based permits to route-based operating licences, (s 2 of the NLTTA). The old Road Transportation Act[2] provided for radius-based permits; the radius was calculated on kilometres from a specific point. In terms of this system, a permit holder was authorised to conduct a taxi business from one point to any destination which fell within the radius covered by the permit. This system provided a fertile ground for perennial clashes and concomitant violence between taxi drivers and taxi associations as they fought over lucrative routes. At one stage the flames of these taxi wars had spread to almost every part of the country. One assumes that the NLTTA was introduced as an attempt to regulate the taxi industry better and more efficiently and hopefully to stop the ubiquitous taxi wars. Undoubtedly, the vision is to convert old taxi permits from the uncertain radius-based description to a more specific route-based licence. In terms of s 85(3)(f) and (g) of the NLTTA such an operating licence is required to disclose a detailed route or routes to be used for operation of the taxi and specifications of the relevant street names, road numbers, beacons or landmarks for each city, suburb, town, village or settlement as well as authorised ranks or terminals and other points where passengers would be picked up or allowed to alight. Clearly this was intended to ensure that each taxi driver operate strictly within the terms of his or her operating licence.

[5] From as far back as 1998 a dispute had been simmering between the members of both first appellant and the fourth respondent regarding who was in law entitled to operate on the disputed route. Many attempts to resolve this dispute through the intervention of, amongst others, the transport authorities and the local police failed. Regrettably, at some stage the dispute got out of hand and became violent. In an attempt to resolve this impasse legally, and acting on the advice of the Registrar of the Department of Transport, North West Province, members of the fourth respondent

[2] The Road Transportation Act 74 of 1977.

applied to the Board in terms of s 79 of the NLTTA for the conversion of their permits into operating licences for the disputed route to legalise their operations on the disputed route. The applications were granted.

[6] The appellants instituted review proceedings in the high court to have the decision of the Board reviewed and set aside on the basis that the operating licences were not properly issued. Although conceding that members of the fourth respondent had previously held radius-based permits to operate in the disputed area, the appellants contended that members of the fourth respondent never operated on the disputed route as required by s 80(1) of the NLTTA. In their response members of the fourth respondent denied that the conversion of their taxi permits into operating licences were not issued properly. Essentially, they asserted that they complied with all the statutory requirements prescribed by the NLTTA. Concerning the requirements of regular service as envisaged in s 80(1), the respondents contended that they provided the regular service as required by the NLTTA as, although they concede that they did not actually operate on this disputed route, their radius-based permits nonetheless covered the disputed route before the conversion.

[7] Members of the fourth respondent had also raised a point in limine that the application for review offended the provisions of s 7 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) in that it was not instituted without unreasonable delay and not later than 180 days after the date, subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded or where no such remedies exist, on which the person 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 court of first instance upheld the point in limine and dismissed the application for review. Aggrieved by the judgment, the appellants appealed to the full court, which found that the court of first instance had erred in upholding the point in limine. The full court upheld the appeal against the order upholding the point in limine but dismissed the appeal on the merits.

[9] In refusing the application to review and set aside the decision by the Board to grant the members of the fourth respondent the conversions, the court below held that 'it cannot therefore be established that the Mogwase operators did not apply for the Moruleng–Mogwase route. On the probabilities, they must have applied that is why the said route is specified on their operating licences.' Concerning the requirement of a regular service as contemplated in s 80(1), the court below held that 'Section 80 does not cater for a situation where an applicant is prevented from operating on a specific route in compliance with the stipulated 180 days' period. That being the case, it must be accepted on the probabilities that the Mogwase operators did apply to operate on the said route and that the Board, in the exercise of its discretion, correctly granted the conversions'. The appellants' appeal is against these findings. I pause to state that the first to third respondents (North West Provincial Department of Transport, North West Provincial Operating Licence Board and the Chairperson of the North West Provincial Operating Licence Board) are not parties to the appeal.

[10] It is regrettable that we were not furnished with copies of the minutes of each of the meetings held by the Board where the applications for conversions by members of the fourth respondent were considered. It appears from the record that these minutes were lost and could not be found. As a result it was difficult for us to determine with certainty what factors the Board considered before granting the applications for conversion. The affidavit of Mr Kubheka, the second respondent's acting secretary, was of no use to us because of the paucity of relevant information. This is due to the fact

that he was only employed by second respondent after the conversions had already been granted.

[11] However, for purposes of this judgment, I am prepared to accept that members of the fourth respondent did submit applications for the conversion of their radius-based permits to route-based operating licences in terms of s 79 of the NLTTA. The question for determination remains whether they met the requirements of the NLTTA, in particular s 80 thereof.

[12] The application for a conversion of a permit into an operating licence is governed by s 79 of NLTTA. The relevant parts of the section provide:

'S 79 Continuation and conversion of existing permits

(1) Subject to this Part, any permit issued for an indefinite period and any permit issued for a definite period which, on the commencement of this Act, has not yet expired, remains in force temporarily as provided for in this section.

(2) The holder of such a permit may have it converted to an operating licence in accordance with this Part by applying for the conversion, in the manner prescribed by the MEC –

(a) in the case of a permit for an indefinite period, before the expiry of the period determined by the Minister under s 32(2).'

[13] Section 32(1) provides peremptorily that all permits must be converted to operating licences by the date mentioned in s 32(2). A failure to apply for a conversion of a permit will result in such a permit lapsing.

[14] Section 80 in turn sets out a necessary pre-condition for the conversion of a permit into an operating licence. It reads as follows:

'S 80 Conversion of permits not allowed in certain circumstances

> (1) A permit may not be converted to an operating licence unless the transport service that it authorises, has been provided on a regular basis for a period of at least 180 days before the date on which application is made for conversion, except where the permit was issued less than 180 days before the date of such application.
> (2) The applicant must furnish proof to the satisfaction of the board that the requirement set by subsection (1) has been met, by supplying written confirmation from the relevant planning authority, or by such other method as the board deems sufficient.'

[15] It should thus be clear that before an application for a conversion of a permit into an operating licence can be granted, there must be proof to the satisfaction of the board, that the applicant has provided a transport service for a period of at least 180 days before such application. Such proof must be in the form of a written confirmation from the relevant planning authority which is in charge of the area where the transport service is to be provided or any other means that the Board may choose.

[16] There was a debate between the respective counsel regarding the interpretation to be accorded to s 80(1). Does the section require the transport service to be actually rendered as submitted by the appellant's counsel or does it require the mere providing or making of such transport available as contended for by the respondents' counsel?

[17] To my mind it is clear from the wording of s 80(1) that the requirement that a transport service be rendered on a regular basis for at least 180 days before the application for conversion is the jurisdictional fact which an applicant has to meet. It is a pre-condition which must be met before an applicant can get a conversion. The pertinent question to be answered is whether members of the fourth respondent rendered the required transport service on the disputed route at least 180 days before they applied for conversion as required by s 80(1). The other question would be whether they furnished the second respondent with the written confirmation of such transport service from the relevant planning authority as required by s 80(2).

[18] It is clear to me that the purpose of the section is to ensure proper conversion of the radius-based permits which were issued in terms of the old legislation to new route-based operating licences provided for by the NLTTA. In line with s 81(1) of the NLTTA the conversion is intended to ensure that an applicant for an operating licence retains the same authority as that which he or she enjoyed under the old permit. The corollary hereof is that nobody should be granted an operating licence on a route on which he or she did not operate within the prescribed period. It follows that in order to achieve this, the board must be satisfied that the particular route was utilised by an applicant before the application for conversion. This must be done by submitting together with the application for conversion, 'a detailed description of the route(s) or network(s) on which, or, where applicable, the particular areas in which, the vehicle has been used for the service to which the permit relates for the period of at least 180 days prior to the date of application…' (Regulation 5(1)(k) of the regulations promulgated in the North West Extraordinary Provincial Gazette No 5851, 25 February 2003). Evidently it would militate against the spirit and purport of the section to grant an applicant rights to operate on a route on which he or she never operated at least 180 days before the application for conversion. I am of the view that the provisions of s 80(1) and (2), which constitute essential jurisdictional factors for a valid conversion, are peremptory. The Board has no discretion to condone non-compliance with the section. A failure to comply renders the granting of the application invalid.

[19] Addressing this peremptory requirement of the NLTTA the court below had found that it could not be said that members of the fourth respondent did not operate on the disputed route at least 180 days before the date on which the application for the conversion of their radius-based permits into route-based operating licence as required by s 80(1) of the NLTTA. This conclusion was based on the finding by the court below that members of the fourth respondent were in fact unlawfully prevented from operating on the disputed route, first by an interdict obtained by the appellants against them and secondly by violence levelled against them. I do not agree.

[20] Firstly the interdict was directed against stopping members of the fourth respondent 'from using the areas of the Mogwase taxi rank marked 1 and 2 on the attached diagram…'. It is clear that this interdict did not prevent members of the fourth respondent from operating on the disputed route during the relevant period. This interdict was issued pending the application for the present review by the appellants of the decision of the Registrar of Transport to award permits to members of the fourth respondent to operate on the disputed route.

[21] Secondly, there is no evidence on record to support the finding by the court below that members of the fourth respondent were prevented from operating on the disputed route by violence. All that the evidence shows is merely that there were protracted and acrimonious disputes between members of the two taxi rivals. To the contrary, counsel for the fourth respondent contended before us that members of the fourth respondent did not operate on the disputed route because, in an attempt to avoid ongoing confrontations with members of the appellants, they opted to comply with the advice given by the Registrar, Department of Transport, North West embodied in a letter dated 28 May 1999 to submit their applications for the conversion of their radius-based permits into route-based operating licence for its members to regularise their permits, instead of insisting on operating this route.

[22] In any event the finding by the court below on this crucial aspect is refuted by the telling concession made by one Isaia Nke who deposed to an answering affidavit on behalf of the fourth respondent where he unequivocally conceded that the fifth to twelfth, fourteenth to twenty fourth as well as the twenty sixth respondents did not operate on the disputed route for at least 180 days before the applications were made as required by the NLTTA. To my mind this concession is subversive of the finding by the court below.

[23] Having found that the respondents did not render a transport service on this disputed route on a regular basis at least 180 days before the application for the conversion of their permits into operating licences as required by s 80 of the NLTTA, I am constrained to find, as I hereby do, that their applications for conversion of the permits into operating licences for the disputed route were invalid and should not have been granted.

[24] In the result I make the following order:

1. The appeal is upheld.
2. The fourth to twenty fourth respondents and the twenty sixth respondent shall pay the appellants' costs, including the costs of two counsel, jointly and severally, the one paying, the others to be absolved.
3. The order of the court below is set aside and replaced with the following order:
   (a) The appeal is upheld with costs, including the costs of two counsel.
   (b) The order of the court below is set aside and replaced with the following:

   (iii) The decision of the second respondent to grant operating licences to the members of the fourth respondent for the route from Moruleng to Mogwase and back is reviewed and set aside.
   (iv) The respondents shall pay the costs of the applicants jointly and severally, the one paying the others to be absolved.

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L O Bosielo
Judge of Appeal

APPEARANCES:

For Appellants:	C A Da Silva SC (with him M S Mangolele) Instructed by: A O Ndala Inc., Mmabatho Matsepes Attorneys, Bloemfontein
For Fourth to Twenty-Seventh Respondents:	J H F Pistor SC (with him C J Zwiegelaar) Instructed by: S M Mookoletsi Attorneys, Mmabatho NW Phalatsi & Partners, Bloemfontein