



**THE SUPREME COURT OF APPEAL OF SOUTH
AFRICA**

**REPORTABLE
CASE NO: 51/2005**

In the matter between

**THE MEMBER OF THE EXECUTIVE COUNCIL
FOR PUBLIC WORKS, ROADS AND TRANSPORT,
FREE STATE PROVINCIAL GOVERNMENT**

FIRST APPELLANT

**REGISTRAR : PROVINCIAL TAXI REGISTRAR,
PUBLIC WORKS, ROADS AND TRANSPORT,
FREE STATE PROVINCIAL GOVERNMENT**

SECOND APPELLANT

and

**PHUTHANANG TRANSPORT SERVICE (PTY)
LIMITED**

RESPONDENT

**CORAM: HOWIE P, STREICHER, MTHIYANE, HEHER JJA and
MAYA AJA**

HEARD: 12 MAY 2006

DELIVERED: 31 MAY 2006

**Summary: Interpretation and application of s 18 of the Free State Passenger
Transport Act 16 of 1998 read with regulations 7 and 8 of the regulations
promulgated under the Act.**

**Neutral Citation: This judgment may be referred to as MEC Public Works,
Roads & Transport: Free State Provincial Government v Phuthanang Transport
Service [2006] SCA 73 (RSA).**

JUDGMENT

MTHIYANE JA:

MTHIYANE JA:

[1] This appeal is concerned with the interpretation and application of s 18 of the Free State Interim Passenger Transport Act 16 of 1998 (as amended) read with regulations 7 and 8 of the regulations¹ promulgated under the Act. The purpose of the Act is to regulate and control the minibus taxi industry. It seeks to achieve this by creating a mechanism for registering secondary and primary associations or interprovincial associations and their members with a Provincial Registrar. The nature of the association involved in this case is of no moment. The procedure for registration is prescribed by the Act and fleshed out in the regulations. The Act also created an appeal forum in the form of a Provincial Appeal Tribunal, presided over by a Member of the Executive Council of the Provincial Government or his appointee to handle appeals against refusals to register an association. It is the Registrar's refusal to register the applicant as a taxi association and the subsequent failure of an appeal to the MEC that led to this case.

[2] The respondent launched an application in the Free State High Court seeking an order reviewing and setting aside the first and second appellants' refusal to register it as an association in terms of s 18 of the Act. I shall for the remainder of this judgment refer to the first and second appellants as 'the MEC' and 'the registrar' respectively. The applicant succeeded in its application in the High Court which set aside the refusal and ordered that the applicant's application for registration under s 18 of the Act be remitted to the registrar for reconsideration in the light of its

¹ The regulations were published as 'Free State Interim Passenger Transport Regulations' in the Free State Provincial Gazette No. 220 of 1998.

judgment. It further ordered that, pending reconsideration, the members of the applicant who had permits during 1997 be allowed to continue to operate their taxis. The appeal is against that order.

[3] The provisions of the Act relevant to the applicant's application are the following:

'18 Registration of associations, members and non-members

- (1) A secondary and a primary association or inter-provincial association, and each member thereof, or a non-member, must in the prescribed manner and accompanied by the prescribed application fees, submit a written application for registration to the Registrar.
- (2) The Registrar must grant a certificate of conditional registration and a registration number to an association and each of the members of a primary association who upon application satisfies him or her-
 - (a) that it has been in existence for the prescribed minimum period: Provided that the Registrar shall have a discretion to register associations that have been in existence for lesser periods where in his or her opinion this is justified;
 - (b) that the number of its members or, in the case of a secondary association, the number of registered primary associations affiliated to it, meets the prescribed minimum number: Provided that the Registrar shall have a discretion to register associations with fewer members or affiliated registered primary associations, as the case may be, where in his or her opinion this is justified for geographical or demographic reasons;
 - (c) that the constitution submitted by the association has been signed and accepted by each of its members or, in the case of a secondary association, by each of its affiliated registered primary associations and is consistent with and encompasses the provisions of the Standard Constitution and other prescribed requirements;

...

(3) The Registrar must grant a certificate of registration and registration number to an association or inter-provincial association, who upon application satisfies the Registrar that-

- (a) it has been in existence for the prescribed minimum period, subject to the proviso in subsection (2)(a);
- (b) the number of members or affiliated registered primary associations, as the case may be, meets the prescribed minimum number, subject to the proviso in subsection (2)(b);
- (c) the constitution submitted by the association has been signed and accepted by each of its members or affiliated registered primary associations, as the case may be, and is consistent with and encompasses the provisions of the Standard Constitution and other prescribed requirements;

...

(6) If, after considering the application for registration, the Registrar is not satisfied that the applicant has complied with the requirements for registration, he or she must inform the applicant of the requirements not met, and may provide the applicant with advice and assistance in order to enable the applicant to meet the requirements for registration.'

[4] Regulations 7 and 8 provide as follows:

'7 Minimum number of members or primary associations required for registration of association

Subject to s 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.

8 Minimum period that association must have existed to qualify for registration

Subject to s 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.’

[5] The Act came into effect on 20 November 1998 and the regulations on 27 November 1998. The operation of the Act was backdated to 1997. Prior to their commencement a ‘general information document’ (for lack of a better description) was issued by the National Department of Transport to assist prospective applicants for registration. This document issued as ‘General Information Regarding the Registration of a Taxi Association’ foreshadowed threshold requirements for registration embodied in s 18 of the Act and amplified by regulations 7 and 8. It is not clear when the general information document was issued. Suffice it to say that it preceded the Act and the regulations. Although the application was made before the effective dates of the Act and regulations the application purported to be made in law of the legislation and was treated by all as such. At the time the application was considered the Act and the regulations had come into effect.

[6] The applicant lodged its application for registration with the registrar on 17 June 1997. It appears that the application form submitted to the registrar contained particulars of the applicant, the date of its incorporation (28 November 1996) and the names and addresses of its office bearers. The application was refused by the registrar on two grounds. The first was that the applicant had been established after 28 February 1995. The second was that the association did ‘not have a minimum number of 20 members as contemplated by the Act’.

[7] On 18 September 2000 the applicant lodged an appeal with the MEC against the refusal. The applicant’s appeal was dismissed on the

same two grounds as those advanced by the registrar. But in addition the MEC raised a further difficulty: that the applicant's constitution was defective in that its terms 'were principally not in keeping with the provisions of the Standard Constitution provided for in the Act'. In terms of section 1 of the Act 'Standard Constitution' means 'a prescribed set of rules and procedures that govern the affairs of registered associations, and includes a Code of Conduct, a Grievance Procedure and a Disciplinary Procedure for members, or affiliated registered primary associations, as the case may be, of those associations'. The MEC took the view that the applicant's constitution did not meet the prescribed standard and the application for registration failed on that account as well.

[8] The question is whether the registrar was justified in refusing the application for registration. The outcome of the decision depends upon the interpretation and application of the Act and the regulations to the facts advanced on the applicant's behalf. The relevant provisions of the Act and the regulations are clear and unambiguous and must therefore be given their ordinary meaning. Mr Ploos van Amstel, for the applicant did not attempt to persuade us otherwise. He argued, however, that in refusing to register the applicant the registrar had not applied his mind properly to the matter and that the court *a quo* was correct in setting aside his decision and that of the MEC.

[9] The sole issue raised on appeal by Mr Moerane for the appellant was that when the application for registration was lodged with the registrar it was not accompanied by an application by each member of the applicant as required by s 18(1) of the Act. If that point is good it is of course decisive of the appeal and disposes of all the other issues raised on behalf of the respondent.

[10] Although the Chairperson of the applicant, Mr Tholo Daniel Motsoeneng, states in his affidavit that the applicant had 35 members at the time of the application, of whom 22 members had legal permits and the other 13 had applied for permits, only the applicant, Phuthanang Transport Services, applied for registration. This is, however, contrary to 18(1) of the Act which requires that ‘each member . . . must in the prescribed manner submit a written application for registration to the registrar.’ It is therefore clear that the application was defective for failure to comply with the peremptory provisions of the Act.

[11] Confronted with the applicant’s failure to meet the threshold minimum membership requirements, Mr Ploos van Amstel referred us to seven legal permits which were filed of record in this appeal. It was not clear whether these permits were originally attached to the applicant’s application for registration. This was by all accounts a desperate attempt to salvage a case that was desparately slipping from the applicant’s hands. As correctly pointed out by Mr Moerane for the appellants, the dates on the permits concerned clearly indicate that they could not have accompanied the application for registration on 16 June 1997. The first of these permits is dated 26 February 1999 and the rest bear much later dates. Even if these certificates were indeed attached they would still not have assisted the applicant because s 18(1) of the Act required that each member of the association ‘must in the prescribed manner . . . submit a written application for registration to the registrar.’

[12] The court *a quo* held that there had been substantial compliance with the requirements for registration and that the registrar should have registered the applicant as such under s 18 of the Act. I do not agree. In s 18(2)(a) and (b), a discretion is indeed conferred on the registrar to

register associations that have been in existence for a lesser period than the prescribed minimum period and those who have less members than the prescribed minimum. But the proviso is that the registrar can condone non-compliance ‘where in his or her opinion this is justified for geographical or demographic reasons.’ It is plain from the wording of the section that the exercise of discretion is not there for the asking. Nor can it be exercised in *vacuo*. It was for the applicant to place facts or information before the registrar, which the latter could then have considered in order to come to a proper decision as to whether non-compliance with the section could be condoned. We are not privy to such information and there is a total absence of clarity from the papers as to what would have justified the exercise by the registrar of the discretion. In fact the appellant’s case throughout was that it had a membership of more than 20. But when it lodged its application for registration only the applicant, Phuthanang Transport Service (Pty) Ltd, did so. In my view the applicant did not comply with the provisions of s 18 of the Act and regulations 7 and 8 and the application was therefore correctly refused. The court *a quo* should have found accordingly.

[13] In the result the appeal succeeds with costs, including costs consequent upon the employment of two counsel. The order of the court *a quo* is set aside and replaced with the following:

‘The application is dismissed with costs.’

KK MTHIYANE
JUDGE OF APPEAL

CONCUR:

**HOWIE P
STREICHER JA
HEHER JA
MAYA AJA**