

SOUTH AFRICA / JUDGMENT

Vawda and Another v Chairman of the Appeal Board and Another (95198/2015) [2017] ZAGPPHC 789; 2018 (1) SACR 695 (GP) (29 November 2017) [2017] ZAGPPHC 789

COURT

North Gauteng High Court, Pretoria

BEFORE

DS FOURIE

CASE / FILE NUMBER

95198/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

CASE

NO.95198/2015

Not

reportable

Not

of interest to other judges

Revised

29/11/2017

In

the Matter between: SE
VAWDA 1st
Appellant
I
VORAJEE 2nd
Appellant
and
THE
CHAIRMAN OF THE APPEAL
BOARD 1st
Respondent
MINISTER
OF THE
POLICE 2nd
Respondent

JUDGMENT

D S FOURIE, J:

- [1] This is an application for an order reviewing and setting aside "the confirmation of unfitness to possess firearms issued by the first respondent against the applicants" dated 7th of October 2015. In addition to this the applicants also apply for an order declaring them to be fit to possess firearms and that their competency certificates and firearms be returned to them by the second respondent. However, during argument counsel for the applicants indicated that the applicants no longer persist with the prayers for this additional relief.
- [2] It is common cause that on 12 March 2015 both applicants were declared unfit to possess firearms in terms of section 102 of the Firearms Control Act, No 60 of 2000 for a period of four years. Both applicants then appealed in terms of the said Act to the first respondent, requesting the declarations of unfitness to be set aside. In a letter dated 7 October 2015 the first respondent indicated that it had decided to refuse the appeal and to confirm the findings of the Registrar. In this letter various reasons have been provided why the appeal was refused and the decision of the Registrar confirmed.
- [3] It also appears that the applicants have decided to follow an unusual procedure by not also applying for a review of the decision taken by the Registrar. As a matter of fact, the Registrar has not even been joined as a party to these proceedings. I should therefore remind myself not to make any finding with regard to the procedure followed or decision taken by the Registrar simply because there is no application to do so and the Registrar is not a party to these proceedings. This means that if the review application against the first respondent is successful and its decision is set aside, the status quo will be restored as it existed after the appeal was lodged but before it was heard. On the other hand, if this application is unsuccessful, that will be the end of the matter for the applicants before me.

FACTUAL**BACKGROUND**

- [4] According to the record of proceedings before the Registrar it appears that on the night in question the applicants noticed a vehicle which was driving very slowly with occupants looking into houses and vehicles. The applicants then blocked the road with their vehicle to prevent the other vehicle from passing through. According to the applicants two of the occupants in the other vehicle then alighted, pointed firearms in their direction and fired shots at them. The applicants then took cover behind a vehicle and fired back. According to the applicants they were acting in self-defence. The suspects then left the scene.
- [5] The police later arrived to investigate the matter. Empty shell casings were found in the vicinity where the applicants had fired shots at the suspects, but no shell casings were found in the vicinity where the suspects had been. It also appears that no motor vehicle was damaged as a result of shots which had been fired. Later that evening and whilst the police was still investigating the matter, an injured person appeared who apparently had been shot in his face. According to a ballistic report which was later obtained, primer residue tests were performed on both applicants and this person who had been injured. The result of these tests was that primer residue (as a result of gun shots being fired) was found on one of the applicants, but none was found on the other applicant or the man who had been injured. Notwithstanding this finding, the applicants indicated that they both had fired shots.

REASONS**FOR DECISION**

- [6] In its letter dated 7 October 2015 the first respondent has indicated that it decided to refuse the appeal and to confirm the findings of the Registrar that the appellants are unfit to possess a firearm. Several reasons have been advanced for the first respondent's decision. They are (reduced to their essential features) the following:
- (a) The applicant's suspicion about the suspects are "not supported by anything tangible found at the scene of the shooting";
 - (b) It was dark at the time and therefore the applicants could not see any object which was held by the driver of the other motor vehicle and "this appears to be an afterthought fabrication of a foundation of the alleged suspicious behaviour by the occupants" of the other vehicle;
 - (c) It is accepted that the applicants "are properly the one's who fired first at the Golf occupants considering their actions of cutting in front of an oncoming vehicle";

- (d) The Board is of the view that the applicants "are not telling the truth in the sequence of how the events unfolded" as the second applicant confirmed that it was dark and they could not make out much. This convinced the Board that the applicants are "not telling the truth of what happened";
- (e) It is common cause that empty shell casings were found in the vicinity where the applicants had fired shots, but no shell casings were found in the vicinity where the suspects had been. This indicates "that it is not the truth that they were first fired at. If that was the truth spent cartridges would have been found" in the vicinity where the other vehicle was.

GROUNDS OF REVIEW

- [7] In their founding affidavit the applicants address each of the reasons advanced by the first respondent which appears to be an attempt to formulate grounds of review, although it has not been done so explicitly. The nub of what the applicants are relying upon can be summarised as follows:
 - (a) no evidence was presented "to the effect that we had been lying or that no such vehicle was in the area";
 - (b) the first respondent is malicious in what it states to be "a fabrication without any evidence to the contrary being led by the police";
 - (c) the first respondent cannot accept that, because no other cartridges were found, the applicants' version is a fabrication as it was confirmed by the police that the "scene had been contaminated";
 - (d) the reasoning of the first respondent "is illogical and nonsensical, malicious and *ma/a fide*" . The applicants were not afforded "due and fair process" and this is in contravention of "the principles of the Promotion of Administrative Justice Act".
- [8] In addition to these allegations, the applicants in their supplementary founding affidavit also rely on an alleged irregularity, i.e. the appeal was considered without a file being available to the Board, suggesting that the record of proceedings before the Registrar was not considered by the first respondent.
- [9] I shall first consider the question whether or not proper grounds of review have been raised on the papers. Section 6(1) of the Promotion of Administrative Justice Act, No 3 of 2000 ("PAJA") provides that any person may institute proceedings for the judicial review of an administrative action. A number of specific grounds, as well as a general ground of unlawfulness, are listed in subsection (2). The question is whether the facts pleaded by the applicants can be regarded as a clear formulation of a ground of review as referred to in subsection (2)? In *Yannakou v Apollo Club* 1974 (1) SA 614 (A) at 623G Trolip JA said the following in this regard:

"Hence, if he relies on a particular section of a statute, he must either state the number of the section and the statute he is relying on or formulate his defence sufficiently clearly so as to indicate that he is relying on it ..."

[10] It is not necessary to refer specifically to the statute or section relied on, provided that the case is formulated clearly. Put differently, it is sufficient that the facts pleaded justify the conclusion that the provisions of the statute apply (*Fundstrust (Pty) Ltd v Van Deventer* 1997 (1) SA 710 (A) at 725H-J and 726A). The applicants specifically referred to PAJA without identifying any of the grounds listed in subsection (2). However, it has been pleaded that:

- (a) there is no evidence indicating that the applicants had been untruthful;
- (b) the absence of other cartridges does not justify the conclusion that the applicants' version is a fabrication;
- (c) the first respondent's reasoning is illogical and nonsensical.

[11] Having regard to the principles referred to above, I am satisfied that the facts pleaded in the applicants' founding affidavit as well as the supplementary founding affidavit, and the reference to PAJA therein, are sufficient to justify the conclusion that the provisions of PAJA, more particularly section 6(2)(e)(iii) and (vi) as well as (f)(ii) are being relied upon. These subsections refer to an action that was taken:

- (a) because irrelevant considerations were taken into account or relevant considerations were not considered;
- (b) arbitrarily or capriciously;
- (c) is not rationally connected to the purpose for which it was taken or the information which was before the administrator.

DISCUSSION

[12] I shall first deal with the suggestion that the appeal was considered without a file or the record of proceedings, i.e. the decision was taken arbitrarily or capriciously. The applicants rely on a document dated 5 October 2015 and signed by the Chairperson of the Appeal Board indicating "no file available".

[13] However, in the first and second respondents' answering affidavit the Chairperson of the Appeal Board gives the following answer in this regard:

"It is also admitted that the first respondent had the transcription of the record available to him during the consideration of the appeals of the first and second respondent. It was necessary for the first respondent to have all documents available to him to give due and proper consideration to all the facts presented when considering the appeal".

[14] There is also the letter of 7 October 2015 in which the first respondent has provided reasons for its decision. In the introductory

paragraph thereof reference is made to "the minutes of the unfitness inquiry". Furthermore, paragraph IV thereof contains a direct reference to an explanation given by the second applicant "on page 11 of the transcribed record". Part of the record is then quoted in this paragraph of the letter. No doubt, it appears that when the appeal was considered, both the minutes of the unfitness inquiry and the record of proceedings were before the first respondent. The alleged irregularity relied upon in this regard is therefore without any merit.

[15] I shall now consider the remaining part of the review application. Upon a proper consideration of the reasons advanced, it appears that the first respondent has come to the conclusion that the applicants' version is an "afterthought fabrication" and that they were "not telling the truth" of what had happened. It therefore appears that a credibility finding was made against the applicants on appeal and that this is the main reason why the appeal was refused. The challenge is not to consider the merits or correctness of the decision itself, but to focus on the way or manner in which the decision was reached (Hoexter, *Administrative Law in South Africa*, 2nd Edition, p 65, par 2.3). Put differently, did the first respondent take into account irrelevant considerations or fail to consider relevant considerations resulting in a decision not being rationally connected to the purpose for which it was taken?

[16] It was pointed out by the first respondent that the applicants' suspicions about the suspects are not supported by any tangible

evidence found at the scene of the shooting. In this regard it has been pertinently emphasized that empty shell casings were found in the vicinity where the applicants had fired shots, but no shell casings were found in the vicinity where the suspects had been.

[17] It was pointed out by the applicants that according to the evidence of the Police the scene had already been contaminated when they arrived. In addition to this, would it be any different if a revolver was used by the suspects?

[18] Many ordinary people, especially those issued with a competency certificate in terms of the Firearms Control Act, know the basic difference between a pistol and a revolver. Almost any person attending a shooting range where handguns such as revolvers and pistols are being used, will also be able to tell the difference. It is therefore not necessary to be an expert to realise that when a pistol is fired empty shell casings will automatically be ejected, whereas in the case of a revolver empty shell casings remain inside the revolving chamber until they are removed manually. No doubt, this and the evidence of the Police about scene contamination are relevant considerations which were obviously overlooked and not considered by the first respondent. Furthermore, and what is more concerning, this lack of consideration prompted the first respondent to conclude out of the blue that the applicants were untruthful. This, in my view, amounts to an irrational conclusion.

- [19] Unfortunately, this is not the end of the matter. The first respondent also relied on evidence by the applicants themselves that it was dark at the time and therefore they could not see any object which was allegedly held by one of the suspects. Reference was also made to the second applicant who confirmed that it was dark and that they could not make out much. The first respondent then concluded that the applicants' version appears to be an "afterthought fabrication" and that they were not telling the truth of what had happened.
- [20] The applicants have pleaded that there is no evidence indicating that they had been untruthful. It was also pointed out that according to the evidence of the second applicant it was dark, but he also explained that he could see into the vehicle as it was not "pitch black". There was no evidence to contradict this

explanation and the question again arises how did the first respondent, taking into account all the evidence in this regard, come to the conclusion that the applicants were not telling the truth?

- [21] Visibility during night time is a factual question. It depends on a variety of circumstances, for example, the presence or absence of streetlights or other sources of light such as nearby buildings, houses or even moonlight. It is also common knowledge that when there is some backlight, and depending on the circumstances, it is possible to see the silhouette of an object, or that of a person, without being able to identify any more detail. Was this possibility ever considered by the first respondent in view of the undisputed evidence presented by the second applicant that it was not "pitch black" and that he could see inside the other vehicle? Obviously not. Furthermore, was the explanation of self-defence ever considered? Obviously not, because by then a credibility finding had already been made against the applicants. Taking into account the

reasons

advanced by the first respondent, it appears to me that again the first respondent failed to take into account relevant considerations such as those mentioned above and that again, for no good reason, it was concluded that the applicants were untruthful. Put differently, the evidence and the finding of untruthfulness are not rationally connected.

- [22] Taking into account all the considerations referred to above, I have to conclude that the decision of the first respondent to refuse the appeal and to confirm the Registrar's decision should be set aside and the matter should be referred back to the first respondent for a proper reconsideration of the appeal.

ORDER

In the result I make the following order:

1. The decision of the first respondent to refuse the appeal of the first and second applicants and to confirm the findings of the section 102 inquiry that the applicants are unfit to possess a firearm, is reviewed and set aside;

2. The matter is remitted to the first respondent for reconsideration in terms of section 8(1)(c) (i) of Act 3 of 2000, which must be completed within a period of one month from date of service of this order on the first respondent;
3. The Appeal Board established in terms of section 128 of Act No 60 of 2000 is ordered to pay the costs of the application.

DS FOURIE

Judge of the High Court

PRETORIA

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