REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 2101/15

In the matter between:

THE MEC FOR TRANSPORT, COMMUNITY SAFETY AND LIAISON FOR THE PROVINCE OF KWAZULU-NATAL in his capacity as the POLITICAL HEAD of the Department of Transport, KZN **1ST APPLICANT**

PROVINCIAL REGULATORY ENTITY **2ND APPLICANT**

and

THE TRANSPORT APPEAL TRIBUNAL **1ST RESPONDENT**

SAGAREN GOVENDER **2ND RESPONDENT**

J U D G M E N T

Delivered on : TUESDAY, 11 OCTOBER 2016

OLSEN J

[1] On 14 July 2014 the first respondent in this review application, the Transport Appeal Tribunal, made an order authorising and directing the transfer to the second respondent, Mr Govender, of an operating licence which had previously been granted in favour of Springfield Safari Tours CC ("Springfield") for the purpose of using a bus to run a road transport service. In February 2015 the MEC for Transport, KwaZulu-Natal (as first applicant) and the Provincial Regulatory Entity, KwaZulu-Natal (as second applicant)

launched this application to review and set aside that decision of the Appeal Tribunal.

[2] Judging from the contents of the founding affidavit delivered by the Appeal Tribunal in support of an application for condonation (which I will mention shortly), the parties became aware that a decision of the Supreme Court of Appeal which would have a material bearing on the role of the Provincial Entity in these proceedings would be handed down in due course, and, apparently for that reason, no further papers were delivered in the review application for some time. The judgment was handed down by the Supreme Court of Appeal in December 2015, and it is common cause that it put paid to the proposition that the Provincial Entity has *locus standi* in the present proceedings. It appears that thereafter what might loosely be called inter-governmental negotiations took place to resolve the present application. Notwithstanding these discussions the applicants decided to set the review down for hearing. As the date allocated for the hearing (20 September 2016) drew near, the Appeal Tribunal, realising that whatever discussions were taking place were not going to yield a result by the appointed date, delivered an answering affidavit in the review application together with an application for the condonation of its late delivery.

[3] When the case was called Mr Padayachee SC, who appeared for the applicants, advised the court that the Provincial Entity was withdrawing its review application, but that the MEC was persisting. The MEC's attitude was that the application for condonation could be granted, but that the matter should be adjourned to allow time for delivery of a reply. The response of Mr Maleka SC (who appeared for the Appeal Tribunal with Ms N Mayet-Beukes) was that the merits of the matter had to be argued and that he accordingly withdrew the application for condonation, being satisfied that he could argue on the applicants' papers.

[4] Because Mr Govender has taken no part in these proceedings I have no idea as to what has happened to the 1983 model bus which he had bought in order to use under the authority of the operating licence which he had

applied to have transferred to him. These proceedings exist only because there is a spat between the two applicants (on the one side) and the Appeal Tribunal over the proper construction of the legislation governing the transfer of such operating licences. Mr Govender could contribute nothing to that debate. He is the unfortunate victim of the decision of the applicants to place this dispute before the courts. Indeed, I was informed from the Bar during the course of argument that there are another five or so of these applications launched by the applicants, which suggests that there may very well be another five victims of this most unsatisfactory state of affairs.

THE STATUTORY AND FACTUAL BACKGROUND

[5] In its relevant part, s50 of the National Land Transport Act No. 5 of 2009 (the "Land Transport Act") provides that no person may operate a road-based public transport service unless he or she holds an operating licence issued in respect of the vehicle concerned. Section 51 of the Land Transport Act is to the effect that such an operating licence may be issued on application made either to the National Public Transport Regulator, a Provincial Regulatory Entity or a municipality to which the operating licence function has been assigned. It is not disputed that the operating licence in question in this case was one which fell to be issued by the second applicant.

[6] Springfield held such an operating licence, issued by the Provincial Entity, in respect of a 1983 Mercedes Benz bus. In February 2013, and in terms of a written agreement, Springfield sold that bus, together with the operating licence attached to it, to Mr Govender. The crux of the applicants' case is their contention that the sale was unlawful because the operating licence was part of the *merx*.

[7] Section 58 of the Land Transport Act provides that the holder of an operating licence may apply to the entity which issued it for its transfer. An application was accordingly made to the Provincial Entity for transfer of the licence to Mr Govender. The Provincial Entity refused to sanction the transfer.

[8] Section 92 of the Land Transport Act allows for an appeal to the Transport Appeal Tribunal (i.e. the first respondent) against the refusal of an application relating to an operating licence. The Appeal Tribunal is established in terms of the Transport Appeal Tribunal Act, No. 39 of 1998 (the "Appeal Tribunal Act"). Section 12(1)(b) of the Appeal Tribunal Act permits the tribunal to uphold an appeal brought before it and substitute its decision for that of the entity from which the appeal emanates; in which event, in terms of sub-section 12(3), the decision of the Tribunal will be deemed to be that of the entity from which the appeal came. The Appeal Tribunal upheld the appeal made against the refusal by the Provincial Entity to sanction the transfer of the operating licence to Mr Govender. In the result the Provincial Entity became obliged to effect the transfer.

[9] The founding affidavit in this case makes expansive allegations about the extent to which, and manners in which, the conduct and decision of the Appeal Tribunal fell foul of its obligation to render just and lawful administrative action. However all (or nearly all) of them rest upon the proposition that the Appeal Tribunal misconstrued the provisions of s77 of the Road Transport Act, and that it misunderstood the relationship between s77 and s58 of that Act. What is postulated by the applicants is that if the Appeal Tribunal had understood those provisions correctly, as does the Provincial Entity, the Appeal Tribunal could never have upheld Mr Govender's appeal. Against that background Mr Maleka, for the Appeal Tribunal, proposed that there were only two issues which need to be decided in order to dispose of this case. The one is the question as to whether the MEC has *locus standi* in these proceedings; and the other is the correctness or otherwise of the central thesis of the MEC's case, namely that the Appeal Tribunal failed properly to interpret sections 58 and 77 of the Road Transport Act. Mr Padayachee accepted that analysis of the case, and that is the footing upon which it was argued.

[10] Logically the issue of the MEC's *locus standi* comes first. But a decision on that issue requires an understanding of the case sought to be

made by the MEC. I accordingly find it more convenient first to deal with the merits of the case and then with the issue of standing.

THE MERITS OF THE REVIEW APPLICATION

[11] Section 77 of the Land Transport Act reads as follows.

> "77. **No cession, alienation or hiring out of operating licence or permit** –
>
> (1) The authority conferred by an operating licence or permit may not –
>
> (a) be ceded or otherwise alienated by the holder, except in terms of a transfer under s58, and no person may be a party to such a cession or alienation; or
>
> (b) be hired out by the holder or be hired by any other person.
>
> (2) A transaction concluded in contravention of sub-section (1) is invalid and has no legal force."

[12] I experience difficulty in understanding the construction given by the applicants to s77 of the Land Transport Act. I propose to attempt an account, paraphrasing where possible, of the manner in which it was set out in the founding affidavit. Before doing so I should reproduce the provisions of sub-sections 58 (1) and (4), which feature prominently in the account of s77 of the Land Transport Act given in the founding affidavit.

> "**58 Renewal, amendment or transfer of operating licence or permit.**-
>
> (1) The holder of an operating licence issued by a regulatory entity, may apply to whichever of those entities that issued the licence for renewal, amendment or transfer of the operating licence.
>
> …
>
> (4) A person applying to take transfer of an operating licence or permit must have the written consent of the current

holder of the operating licence or permit, or of that holder's executor."

(These two sub-sections are a little confusing, sub-section (1) allowing the holder of an operating licence to apply for its transfer, but sub-section (4) contemplating that the applicant is the proposed transferee who must have the holder's consent. Nothing turns on that in this case. Both Springfield and Mr Govender appeared before the Provincial Entity, and subsequently before the Appeal Tribunal.)

[13] In the founding affidavit the deponent, who is the chairperson of the Provincial Entity's adjudication committee, described how Mr Govender had appeared before the Provincial Entity with a representative of Springfield, a Mr Ramdas, and had disclosed that he had purchased the bus and the permit attached to the bus, and that he now wanted it to be transferred. It was clear, said the deponent, that Mr Govender was not a relative of Mr Ramdas and that the original permit holder had not passed away. From there the deponent proceeded as follows.

(a) In the circumstances, s58 (4) of the Land Transport Act "did not apply, nor did the other exceptions to a ban on transfer of permits or operating licences postulated in other portions of s58 apply".

(b) The alienation (from Springfield to Mr Govender) therefore "fell fully within the embargo and limitation" contained in s77.

(c) Section 77 "debars in general" any cession, alienation or hiring out of an operating licence.

(d) On its plain meaning s77 can only be interpreted to convey that the legislature intended to "stamp out and thus outlaw with legal invalidity" any violation of the restriction it imposed, "unless it fell within the purview of one of the recognised exceptions contemplated in s58(4)".

(e) Whilst s58(1) makes provision for an entity such as the Provincial Entity to entertain an application for transfer, that section by no means opens the flood gates "and consequently s58(1) is subservient to s58(4)".

(f) Section 58(4) allows for consensual transfers of an operating licence between living parties, or where the existing holder has died. But it does not authorise the "sale/alienation of permits", as if it did, there would be a conflict between s58(4) and s77.

(g) Consequently, "transfers are allowed in very confined circumstances but they are certainly disallowed where the raison d'etre for the transfer is alienation."

[14] That summarises, certainly as best I can, the case that the respondents were called upon to meet. Counsel for the MEC was asked to explain what that all meant in argument. He argued that unless one regards the provisions of s77 as placing a complete embargo on any form of alienation of operating licences, s77 has no purpose. He argued that if there was such an alienation (by cession or otherwise) there could not be any transfer under s58(1) of the operating licence despite the fact that s58(1) does not postulate any such exception to the power of the regulatory entity to authorise a transfer. This, as I understood the argument, is the result of reading sections 58 and 77 of the Land Transport Act together.

[15] Counsel for the MEC argued that if, in the course of an application for a transfer of a licence in terms of s58 of the Land Transport Act, the holder disclosed that it had accepted money in exchange for consent to the transfer, it would be confessing to a breach of the provisions of s77, and the application for the transfer of the licence would accordingly have to be refused. He argued that the touchstone by which any breach of s77 could be identified is the passing of money in exchange for the agreement of the holder of a licence to consent to its transfer. According to the applicants, counsel argued, given that a bus and the operating licence attached to it is in the

nature of a small discreet business enterprise, the sale of a bus and the goodwill represented in that enterprise would be quite lawful as long as the operating licence was not sold; or as long as no price was paid for the consent to the transfer of the operating licence. (Counsel was unable to explain how any goodwill could reside in such a bus without the operating licence.) Counsel for the MEC argued that the grant of any application for the transfer of an operating licence in terms of s58 of the Land Transport Act when circumstances such as those discussed above were known to the licensing authority (be it the Provincial Entity or the Appeal Tribunal) was an act of subversion of national legislation.

[16] Finally, counsel for the MEC argued that there is no question of the licensing authority having a discretion to punish parties who have conducted themselves in breach of the MEC's understanding of the provisions of s77 of the Land Transport Act, by refusing to allow a transfer designed to regularise matters. The applicants say that there is a complete legislative prohibition against the grant of any such transfer in the circumstances discussed above.

[17] The argument for the MEC then proceeds along the lines that all avenues of attack laid down in sections 6(2)(e) and (f) of the Promotion of Administrative Justice Act, No 3 of 2000 (and others besides) are available to the MEC who is entitled to an order reviewing and setting aside the decision of the Appeal Tribunal to approve the transfer to Mr Govender of the operating licence in question. Ultimately, according to the MEC, what was done by the Appeal Tribunal was unlawful.

[18] In my view there is no merit in the grounds of review advanced originally on behalf of both applicants, and now only by the MEC.

[19] Section 58(1) of the Land Transport Act provides in clear and certain terms that the holder of an operating licence may apply to transfer it to another person. The application is to be made to the regulatory entity which granted the licence. Section 58(4) provides the qualification that the proposed transferor must consent to the proposed transfer. Section 58 of the Land

Transport Act imposes no qualification that a transfer is impermissible if the consent of the transferor is secured by the payment of money or any other consideration at all.

[20] Turning to s77, one sees immediately that it also draws no distinction between transfers generated by the payment of a price or any other consideration, and transfers which are unsweetened by the passing of any consideration. Its purpose is plainly to outlaw underhand transfers of authorities conferred by operating licences, whether permanently (that being prohibited under sub-section 77(1)(a)) or temporarily (that being prohibited under sub-section 77(1)(b)).

[21] Insofar as s77(1)(a) is concerned (i.e. the sub-section which the MEC says was breached when Springfield sold the bus with its permit to Mr Govender), it does not forbid the cession or alienation of the authority granted by an operating licence; what it forbids is such a cession or alienation otherwise than through the mechanism provided by s58 of the Land Transport Act. A cession or alienation otherwise than through a transfer sanctioned under s58 of the Act is forbidden whether or not money or any other consideration changes hands.

[22] Sub-section 77(2) deals with a transaction concluded in contravention of sub-section (1). To be in contravention of sub-section (1), the transaction must be one by which the holder purports to effect a transfer of the authority conferred by the holder's operating licence to another without the sanction of the issuing authority granted in terms of s58 of the Act. The purpose of sub-section (2) is to make it perfectly clear that such a transfer can never take place simply because the transaction will be invalid and without legal force. The result will be that the holder remains the holder and retains its status as the only person authorised by the licence to run the transport service, and the intended transferee gets nothing.

[23] The effect of s77 is that operating licences can never become bearer instruments, and the authorities they confer can never be transferred from one

person to another without that transfer being sanctioned and effected in the manner provided for in s58 of the Act. It is impossible in law for any underhand transfer to take place. One of the purposes and effects of s77 of the Land Transport Act is that, as long as they are properly maintained to reflect the decisions of a licensing authority, the records of the authority will constitute irrefutable proof of the identity of the person who may lawfully operate a road based public transport service under any particular operating licence or permit. The advantage of this for prosecutions for breaches of s50 of the Act is self-evident. The contention of the applicants that s77 is meaningless unless interpreted as they would have it done is accordingly wrong.

[24] In the circumstances I conclude that it is the Provincial Entity, and not the Appeal Tribunal, which has misdirected itself concerning the legislation under which it functions.

[25] Although on the MEC's case it is irrelevant, it should be mentioned that the sale agreement between Springfield and Mr Govender provided that the application for the transfer of the permit or operating licence was to be made within 7 days of signature of the agreement. That, and their subsequent conduct in proceeding under s58 of the Land Transport Act, suggests that Springfield and Mr Govender knew what was required. The sale agreement did not in its terms purport to be an instrument of cession or alienation of the authority evidenced by the operating licence in question. If it had, the authority would not have passed to Mr Govender, who would have been liable to prosecution for breach of s50 of the Land Transport Act if he had run the service.

[26] The founding affidavit contains one or two allegations of other defaults on the part of the Appeal Tribunal which arguably might subsist independently of the complaint at the centre of this case, that the Appeal Tribunal misconstrued sections 77 and 58 of the Land Transport Act. Mr Padayachee did not raise them in argument. In my view he was correct to approach the matter on the basis that the success or failure of the review on the merits

turns solely on the issues already discussed concerning s77 and s58 of the Land Transport Act. Having said that, I have considered those complaints and see no merit in them.

THE CHALLENGE TO THE MEC'S *LOCUS STANDI*

[27] The Appeal Tribunal's challenge to the standing of the MEC has to be assessed with respect to the case which the MEC places before the court. The merits of that case are not relevant. The question is whether the MEC has standing to ask the court to rule upon the case. (*Giant Concerts CC v Rinaldo Investments (Pty) Ltd & Others* 2013 (3) BCLR 251 (CC), para 32.)

[28] These being review proceedings brought under the Promotion of Administrative Justice Act, the MEC seeks to vindicate rights given in s33 of the Constitution. The MEC's standing to do so must accordingly be assessed in the light of the provisions of s38 of the Constitution.

[29] Before considering the MEC's claim to standing it would be convenient to give a brief account of the circumstances in which the Provincial Entity came to withdraw from this litigation. Counsel for the applicants advised the court that the Provincial Entity was withdrawing from the proceedings because the judgment in *Registrar of Pension Funds v Howie NO* [2016] 1 All SA 694 (SCA) put it beyond doubt that the Provincial Entity lacks standing. In my view that judgment has implications also for the enquiry into the standing of the MEC in the present matter.

[30] *Howie* concerned an assertion by the Registrar of Pension Funds of a right to challenge a decision made by the Appeal Board which overturned a decision made by the Registrar. The Registrar claimed standing to do so quite independently of any decision by the affected parties to challenge the decision of the Appeal Board. As it was put in paragraph 8 of the judgment

> "[t]he dispute is not between the Registrar and an outside party aggrieved by the decisions. It is an internal quarrel between the

> Registrar and the Appeal Board over the correctness of the Registrar's decision."

Accordingly the Registrar asserted a right to launch review proceedings in which it would adopt an adversarial position in relation to the Appeal Board.

[31] The allegations made by the Registrar in support of her challenge to the decision of the Appeal Board included a charge that the Appeal Board had made a decision that was so unreasonable that no reasonable person could have so exercised the powers of the Board. The court pertinently raised the issue that the effect of this was to undermine public confidence in the Appeal Board.

[32] Concerning the Registrar's claim to have standing because she should be regarded as acting in the public interest, the following was said in paragraph 16 of the judgment in *Howie*.

> "Counsel urged upon us that the Registrar performs important functions and has an interest, shared by the public, in the correctness of her decisions. My difficulty with this is that the existence of the Appeal Board pre-supposes that the legislature was of the view that some of the decisions by the Registrar might be incorrect, and that there needed to be a mechanism to challenge and correct those decisions. The view of the legislature was that when an appeal against the decision of the Registrar succeeds, the Registrar is wrong and the Appeal Board right, or expressed more charitably, as between the Appeal Board and the Registrar the Appeal Board's decision is taken to be correct."

In paragraph 24 of the judgment the court observed that allowing the Registrar to challenge decisions of the Appeal Board on review would "upset the statutory relationship between the two". The judgment proceeded as follows.

> "[Recognising that the Registrar has *locus standi*] would be inconsistent with the purpose of creating the Appeal Board and has the potential to undermine it in performing its functions. If one of the parties affected by it is unhappy with a decision by the Appeal Board they are free to review it. Recognising an independent right in the Registrar would permit of challenges to a decision accepted by the parties affected thereby. The Registrar does not point to any aspect of her regulatory functions that would be detrimentally affected if she cannot challenge decisions by the Appeal Board."

[33] Reverting to the present case, the principal argument advanced by counsel for the MEC is that the MEC approaches this court in the public interest, and therefore has standing in terms of s38(d) of the Constitution.

[34] Standing in terms of s38(d) of the Constitution does not exist merely because the person claiming it declares that he or she is acting in the public interest. A person claiming such standing must show that he or she is genuinely acting in the public interest. (*Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 (1) SA 984 (CC), para [234]; approved in *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 (4) SA 125 (CC), paras [16] and [17].) In *Ferreira v Levin* O'Reagan J listed the following factors as relevant to determining whether a person is genuinely acting in the public interest, without advocating any closed list.

(a) Whether there is another reasonable and effective manner in which the challenge can be brought.
(b) The nature of the relief sought.
(c) The extent of its general or prospective application.
(d) The range of persons or groups affected by any order the court might make, and the opportunity such persons may have to address the issue.

[35] In paragraph 18 of the judgment in *Lawyers for Human Rights* Yacoob J went on to say the following.

> "The issue is always whether a person or organisation acts genuinely in the public interest. A distinction must however be made between the subjective position of the person or organisation claiming to act in the public interest on the one hand, and whether it is, objectively speaking, in the public interest for the particular proceedings to be brought."

In my view this observation resonates with the concerns expressed in *Howie* as to whether it is in fact in the public interest to allow the Registrar to challenge the decisions of the Appeal Board, bearing in mind the tendency of such proceedings to undermine public confidence in the body designated by the legislature to have the final and authoritative say in decisions of the kind made in the first instance by the Registrar.

[36] The Provincial Entity is an entity established by the MEC as required by s23 of the Land Transport Act. It is a body which consists of "dedicated officials of the provincial department" appointed by virtue of their specialised knowledge, training or experience of public transport or related matters. It is accountable to the head of the provincial government. The officials appointed to the entity must have no financial or business interest in any sector of the public transport industry. They are nevertheless civil servants answerable in effect to the provincial executive structure.

[37] The Appeal Tribunal, also created and appointed in terms of national legislation, is a very different body. It consists of between five and nine members appointed by the National Minister of Transport after consultation with every member of the Executive Council in every province responsible for road transport matters. (See sub-section 4(1) of the Appeal Tribunal Act.) The persons appointed must be fit and proper persons on the grounds of their knowledge of or experience in "financial, economic, commercial, legal or other matters relating to the functions of the Tribunal", and the Minister is obliged to

invite members of the public to nominate persons who meet those criteria (sub-section 4(2) of the Appeal Tribunal Act). Sub-section 3(2) of the Act is to the effect that the Tribunal "must be impartial and must perform its functions without fear, favour or prejudice". The Tribunal is obliged, in terms of sub-section12(4)(b), and upon request by any person whose rights have been adversely affected by a decision made by the Tribunal, to provide written reasons for its decision.

[38] In terms of sub-section 12(2) of the Tribunal Act no decision taken by the Tribunal "may be inconsistent with National Land Transport Legislation or the Cross-Border Road Transport Act, 1998, as the case may be". Given the ambit of appeal jurisdiction furnished to the Tribunal, and that express constraint upon the exercise of that jurisdiction, the conclusion is inescapable that the legislature intended the Tribunal itself to interpret the legislation where any doubt might be said to arise, in order to ensure that what it does is not inconsistent with the legislation. (The legislation in question includes the Land Transport Act.)

[39] The Appeal Tribunal is accordingly entrusted with final decision making powers in connection with matters which might be brought before it on appeal, including applications such as the present one, where Mr Govender sought to have an operating licence for a bus transferred to him. It is clear that the legislative intent behind each of the Land Transport Act and the Appeal Tribunal Act is that the one decision upon the strength of which persons participating in the industry may safely arrange their affairs is a decision made by the Appeal Tribunal.

[40] It goes without saying that a party to an appeal, concerned that the Appeal Tribunal has breached his or her rights to administrative justice, would have the right and standing to challenge that particular decision on review. But that is not what has happened here. The persons directly affected by the decision (Springfield and Mr Govender) are satisfied with the decision. Unconcerned with the rights of those affected parties, the MEC for Transport in this province seeks to trample upon them in order merely to resolve a

quarrel between the provincial department (including the members of the department's Provincial Entity) and the Appeal Tribunal over the interpretation of two sections of the Land Transport Act. In my view it is not in the public interest that the MEC should be permitted to do that. If the MEC is permitted to intervene in that fashion,

> (a) the ultimate security that the appeal process is intended to achieve for industry participants is undermined;
>
> (b) public confidence in the Appeal Tribunal is at risk;
>
> (c) no advantage the public or industry participants enjoy by reason of the operation of s58 of the Land Transport Act would be advanced.

Furthermore, it would undermine the legislative intent behind the establishment of the Appeal Tribunal that it should act impartially and free of executive direction, if its members have to look over their shoulders when performing their independent duties, lest any decision not favoured by the executive should result in review proceedings. It is not objectively speaking in the public interest to allow the MEC standing in this matter.

[41] If the MEC has a genuine concern that the intention behind s77 of the Land Transport Act is undermined by misinterpretation, the political avenue is available to correct the perceived malfunctioning legislative provision. The legislation is the responsibility of the National Minister, and it is to the office of that Minister, and not the courts, that the MEC should turn to seek an outcome which the Provincial Executive would regard as satisfactory; that being achievable, it seems to me, only by an amendment to the Act. That process would allow for public participation, and especially for input from industry participants who would undoubtedly have something to say concerning the relative merits of the conflicting views as to what should be the proper scope of operation of s77 of the Land Transport Act, and the relationship it should have with s58.

[42] The MEC also claims standing under s 38(a) of the Constitution, which allows it to anyone acting in their own interest. To some extent the basis of

that claim to standing overlaps the claim to public interest standing, and is connected to the role of the MEC as overseer of the implementation of the Land Transport Act in this province. The basis of the claim is that the MEC is charged with the issuing of licences, and finds himself in the position of issuing licences which have been granted unlawfully because of the mis-application of the provisions of s77 of the Land Transport Act.

[43] Claims to standing (personal or public interest) on the basis of oversight responsibilities may be glibly made in any number of administrative contexts, and the acceptance of them without more will lead in many cases to unwarranted interference with the rights, legitimate expectations or interests of the directly affected parties by an overseer whose legitimate interests are actually unaffected by the decision he or she seeks to impugn. (See the query raised in para [20] of the judgment in *Howie* concerning *Rajah & Rajah (Pty) Ltd v Ventersdorp Municipality and Others* 1961 (4) SA 402 (A).)

[44] The following considerations seem to me to determine that the claim to standing on the grounds discussed immediately above cannot be sustained.

(a) The party allegedly responsible for the performance of reviewable administrative action is the Appeal Tribunal. To the extent that being the "responsible minister" is relevant, that person is the national Minister of Transport, not the MEC.

(b) The result of the decision of the Appeal Tribunal is that Mr Govender will operate his transport service under an operating licence. That cannot prejudice the MEC. On the contrary, it is to his administrative advantage that the operator and the bus are brought within the ambit of regulatory control.

(c) The issue as to whether it is permissible or not for a proposed transferee to pay a price to a proposed transferor for the latter's consent to a proposed transfer has no discernable bearing or effect on any duty or function of the MEC under the Land Transport Act. Certainly, none has been described in the founding papers.

(e) In fact, in terms of s62 of the Land Transport Act the party responsible for issuing the licence is the party which has withdrawn from this application, the Provincial Entity.

(f) That aside, what subsection 62(2) reveals is that once the requirements of subsection 62(1) have been satisfied (matters such as the production of a tax clearance certificate and a current roadworthy certificate), the issue of the operating licence is mandatory. It is a mechanical function, not implying that the issuing authority by that act carries any responsibility for the fact that the grant, renewal, amendment or transfer of the licence was authorised, whether by the Provincial Entity or the Appeal Tribunal. The authorisation of an operating licence (or the transfer of one) renders its issue lawful.

[45] I conclude that the MEC does not have standing in these proceedings.

THE PRESENTATION OF THE CASE AND COSTS

[46] Mr Maleka asked that an order as to costs should be made against the MEC in this case. The Appeal Tribunal is obviously funded by the National Minister. An order for costs in a case like this has the effect of shuffling State resources from one budget to another. It is regrettable that any State resources had to be allocated to legal costs in this matter. (I was informed from the Bar that the impact of s41 of the Constitution on this case could not be argued as it involved a dispute or disputes of fact. Nevertheless, in my view these proceedings ought never to have been instituted.)

[47] There is another most unfortunate feature of this litigation which justifies Mr Maleka's contention that I should make a costs order placing the burden thereof on the budget of the MEC. In paragraph 13 of the judgment in *Howie* Wallis JA made the observation that permitting the Registrar standing in proceedings in which it is said that the Appeal Board made a decision so unreasonable that no reasonable person could have made it, has the

tendency to undermine public faith in the Appeal Board, something obviously not in the public interest. What was said by the Registrar in *Howie* pales into insignificance when compared with the allegations and statements made in the founding affidavit in this case.

[48] In an early paragraph of the founding affidavit the deponent stated that the application was brought "with due deference to the powers and authority of the first respondent as an appeal tribunal". Within three lines of that statement the deponent accused the Appeal Tribunal of flagrantly disregarding the relevant legislation. Things got progressively worse from there. (My highlighting of the worst features is employed below.)

(a) It was alleged that the Appeal Tribunal "had fundamentally misconstrued or perhaps **deliberately misinterpreted** the provisions of s77".

(b) The Appeal Tribunal was accused of "**legal incompetence** in the exercise of power (***indeed an abuse of power is a more precise adjective in this instance***)".

(c) Then the following appears. "**Such thinking as was employed** by the [Appeal Tribunal] was completely unjustified and demonstrates a **closed-mind and infantile approach**".

(d) It is suggested that the Appeal Tribunal indulged in "word-play" to avoid striking down the sale agreement for non-compliance with s77 of the Land Transport Act, and that doing so was "demonstrative of interest in the cause; bias; **malice or corruption**" on the part of the Appeal Tribunal.

(e) Finally, one sees this. "This displayed **despotic behaviour reminiscent of an abuse of power** where the [Appeal Tribunal's] **bias was so extensive that it would do anything to allow appeals**, …"

[49] The arrogance and the sense of impunity which characterises these statements are breathtaking.

[50] The deponent to the founding affidavit, those who signed affidavits supporting what was said in the founding affidavit, and the lawyers responsible for the presentation of the founding affidavit, are deserving of censure for what they have done.

[51] Insofar as the MEC is concerned, he was cited as the political head of the transport department. That involves at the least political responsibility for an unjust and vicious assault on a public body and the persons appointed to it. Of course, if the MEC was aware of the contents of the affidavit, there is also personal responsibility.

[52] Concerning the role of the lawyers who represented the applicants in these proceedings, they drafted or allowed the presentation on affidavit of statements of that kind without any factual basis to support them. (Where the language is merely insulting, its use is forbidden and can never be justified.) A re-reading of the judgment in *Findlay v Knight* 1935 AD 58 illustrates that, to all intents and purposes, since time immemorial it has been so that the privilege granted to lawyers in the presentation of the cases of their clients may not be misused. *Findlay v Knight* was a case about defamation; the context there was different, but the rules are the same. The following appears at page 71 of the judgment.

> "The other principle of public policy which underlies qualified privilege is that the process of the court shall not be wantonly used for the purpose of defaming either litigants or third parties. The courts cannot allow advocates or attorneys to use the process of the courts for an illegitimate purpose; for manifestly the law cannot countenance an abuse of the privilege."

If anything the advent of the Constitution made these matters even clearer. The founding affidavit constitutes an assault on the dignity of the members of the Appeal Tribunal.

I make the following order.

> **The Rule Nisi granted on 26 March 2015 is discharged with costs, including the costs of two counsel, and including any costs that may have been reserved.**

_____

OLSEN J

Date of Hearing:	TUESDAY, 20 SEPTEMBER 2016
Date of Judgment:	TUESDAY, 11 OCTOBER 2016
For the Applicants' :	MR R PADAYACHEE SC
Instructed by:	NGCOBO POYO & DIEDRICKS INC APPLICANTS' ATTORNEYS 190 HOOSEN HAFEJEE STREET PIETERMARITZBURG (Ref.: 12/D031/029/JK) (Tel No.: 033 – 341 9240)
For the First Respondent :	MR V MALEKA SC with Ms N MAYET-BEUKES
Instructed by:	THE STATE ATTORNEY FIRST RESPONDENT'S ATTORNEY c/o J LESLIE SMITH & COMPANY INC 332 JABU NDLOVU STREET PIETERMARITZBURG (Ref.: Sipho Mthethwa/ah/15NL1031) (Tel.: 033 – 845 9700)