

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: 1806/2021P

In the matter between: -

DEKRA AUTOMOTIVE (PTY) LTD

FIRST APPLICANT

DURBAN TEST & DRIVE CC

SECOND APPLICANT

PINETOWN ROADWORTHY CENTRE

THIRD APPLICANT

and

MEC FOR TRANSPORT, KWAZULU-NATAL

RESPONDENT

This judgment was handed electronically by transmission to the parties' representatives by email. The date and time for hand down is deemed to be handed down on 31 October 2022.

ORDER

The following order is made:

1. The Respondent's decision that the applicants cease the performance of any other business aside from the examining/testing of motor vehicles for certification of road worthiness at the registered premises of the applicants' vehicle testing stations, as set out in the letter of demand dated 8 February 2021 of the Road Traffic Inspectorate of the KwaZulu-Natal Department of Transport, is reviewed and set aside.
2. The respondent is ordered to pay the costs of this application.



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2. The respondent is ordered to pay the costs of this application.

JUDGMENT

Delivered on _____

Balton J

[1] The applicants seek to review and set aside the decision of the respondent that the applicants cease the performance of any other business ('the additional services') apart from the examining and testing of motor vehicles for certification of roadworthiness at the registered premises of the applicants' vehicle testing stations as set out in the letter of demand dated 8 February 2021 from the Road Traffic Inspectorate of the KwaZulu-Natal Department of Transport.¹

[2] Mr *Kruger* appeared on behalf of the applicants and Mr *Myeni* on behalf of the respondent.

[3] The first applicant, Dekra Automotive (Pty) Ltd ('Dekra'), operates vehicle testing stations throughout South Africa. The second and third applicants are its franchises. The second applicant operates a vehicle testing station in Sydenham, Durban and the third applicant operates vehicle testing stations in New Germany, Pinetown and Ballito.

[4] The respondent is the political head of the Department of Transport ('the Department'), which is responsible for inter alia the enforcement of the National Road Traffic Act 93 of 1996 ('the NRTA') in the Province.

[5] A vehicle testing station is a centre where motor vehicle fitness on public roads is tested. If the vehicle passes the test, a Certificate of Roadworthiness ('CRW') is issued.

¹ Page 15 of the indexed papers.

[6] Historically, vehicle roadworthy certification was conducted by the relevant municipality in the area in which the owner and/or car dealer registering the vehicle was situated. However, on 1 August 2000, the implementation of the NRTA allowed for roadworthy certification of motor vehicles by authorised private entities. The testing of motor vehicles for the purpose of issuing CRWs falls under the functional areas of the concurrent National and Provincial legislature in terms of Schedule 4, Part A of the Constitution.

[7] On 24 January 2014, the third applicant signed a Vehicle Testing Station Agreement with the respondent, who signed it on 14 January 2014.² On 27 July 2015, the second applicant signed a Vehicle Testing Station Agreement with the respondent, who signed it on 22 July 2015.³

[8] On 8 February 2021, Mr VK Chetty, the Director of the Road Traffic Inspectorate sent a letter to all Municipal Managers and vehicle testing station proprietors in KwaZulu-Natal demanding cessation of any services other than roadworthy examination or testing at the testing stations. The letter reads *inter alia* as follows:⁴

1. The Department hereby wishes to advise that in March 2020 it came to our attention that a number of vehicle testing stations in the Province were visited by the anti-fraud and corruption unit of the Road Traffic Management Corporation (RTMC) and were informed that they cannot conduct any other business on the premises of the testing station aside from the testing of vehicle for roadworthiness. For clarity, the other businesses referred to include but not limited to are, standalone brake test reports, microdot, mechanical workshops and technical reports, etc.
2. The Department's Legal Services Directorate has been consulted in this regard and hereunder is the legal opinion as obtained:
"The testing of motor vehicles within the Republic of South Africa, falls under the functional areas of Concurrent National and Provincial legislative competence in terms of Schedule 4, Part "A" of the Constitution of South Africa. The National Road Traffic Act, (Act No. 93 of 1996) read with its regulations as amended, is the regulatory prescript for this particular functional area. The provisions of the legislation clearly outlines the limited functions of the vehicle testing stations operating under the issued certificate.

² Pages 68-84 of the indexed papers.

³ Page 67 of the indexed papers.

⁴ Page 15 of the indexed papers.

Where a legal entity has made an application to the relevant authority for the performance of vehicle testing services, the authority processes and issues the certificate for those services only.

Where the proprietor is conducting other exclusive business under the banner of the vehicle testing registration, such be thoroughly investigated by the relevant authority."

3. In light thereof, you are to with immediate effect, cease performing any other business aside from the examining/testing of motor vehicles for certification of roadworthiness at the registered premises of the vehicle testing.'

[9] The applicants' attorneys, Jordaan Smit Incorporated, responded to the Road Traffic Inspectorate in a letter which reads *inter alia* as follows:⁵

'Our client, either directly or through franchised branches, conducts *inter alia*, services relating to roadworthiness, technical inspections and conditioning reports on vehicles upon request.

It is our instructions that your correspondence as referred to above seeks to prohibit existing rights of vehicle testing stations in the province. The decision by your department to suspend the rendering of services other than the certification of roadworthiness is unlawful in that same does not coincide with the relevant legislation and the department's intent to amend the Road Traffic Act, Act 93 of 1996 including amendments thereto, is noted with concern.

The decision made by your department is unilateral does not comply with the rules of natural justice and is therefore subject to correction in a court of law.

It is therefore our instructions to demand that you recall said decision made by your department and well so within the next 24 (twenty four) hours, our client will have no other option but to proceed with the necessary legal action to compel your office to recall your decision. We furthermore hold instructions to request the appropriate costs order against the department.

We await your reply on or before 12h00, Friday, 12 February 2021.'

[10] The Road Traffic Inspectorate failed to respond to the applicants' letter and the applicants launched an urgent application for interim relief pending the finalisation of this review application.

[11] On 25 February 2021, the court granted the applicants interim relief, suspending the decision of the respondent, pending finalization of this review application.

⁵ Pages 16-17 of the indexed papers.

The applicants' version

[12] The applicants operate their vehicle testing stations in accordance with the provisions of Chapter IV of the NRTA. They have been operating Roadworthy Certification Centers since 2008 and have since added additional services including, but not limited to:

- (a) Safety checks for large bus and transport operators who need to check the brakes on trucks once a year and on buses every six months.
- (b) Multipoint check condition reports.
- (c) Technical reports.
- (d) Provision of number plates; and
- (e) Datadot or microdot services.

[13] These services do not detract from the purpose of vehicle testing stations but contribute to the purpose of the NRTA to ensure improved road worthiness of motor vehicles and thereby the safety of road users.

[14] The decision to demand the cessation of any other services was arbitrary, irrational and failed to afford the applicants an opportunity to be heard.

[15] The applicants, in providing the additional services, do not contravene the NRTA or the National Road Traffic Regulations, GN R225, GG 20963, 17 March 2000 ('regulations') and have conducted such additional services for several years without complaint from the authorities. As such, the applicants have a legitimate expectation to continue to conduct such services without interference by the provincial authorities. The respondent's decision also impacts on the safety of the public which relies on the applicants.

[16] There is no express statutory prohibition against the provision of additional services at vehicle testing stations.

[17] In the replying affidavit, the applicants contend that the respondent knew that the applicants supplied additional services at Dekra testing stations. The respondent's representative, Mr Du Plessis, the Commander: Training and Advice, KZN Traffic Training College ('Mr Du Plessis') referred to the provision of additional services in a submission he made to the Road Traffic Inspectorate dated 26 October 2017.⁶

[18] The applicants have a legitimate expectation to continue supplying these additional services without interference by the respondent.⁷ The respondent knew that there was no clear statutory prohibition to the provision of additional services and the applicants were supplying such additional services. The respondent cannot deny that the provision of additional services contributes to road safety.⁸

The respondent's version

[19] Section 39 of the NRTA provides that when the Department receives an application that complies with the prescribed requirements for registration of the testing station concerned, it shall register and grade such testing station on the conditions and in the manner prescribed. The second and third applicants have been registered and graded to conduct vehicle tests for purposes of issuing CRWs in terms of the NRTA. These testing stations are authorised to conduct these tests and nothing else.

[20] The deponent to the respondent's opposing affidavit, Mr Roshan Singh, the Chief Provisional Inspector of the Road Traffic Inspectorate contends that it came to his attention that the applicants and other testing station proprietors were conducting other services apart from assessing vehicles for roadworthy certificates. Several stakeholder meetings, consultations and workshops were

⁶ Page 96 of the indexed papers.

⁷ Applicants' heads of argument, para 20.

⁸ Applicants' heads of argument, para 20.

held to address *inter alia* this issue. The proprietors have been informed that vehicle testing stations are exclusively for the purpose of CRWs and any other services that they wish to provide must not be done at the testing station. The additional services performed by the applicants are beyond the authority granted to them to operate a testing station in terms of the NRTA.

[21] Regulation 136 of the regulations deals with the manner in which registration of a testing station may be suspended or cancelled. The procedure is clear, and it provides for notification to a proprietor before the respondent takes such a decision.

[22] In September 2019, the proprietors of testing stations were advised that they were not permitted to provide any other services on the premises of a vehicle testing station, besides those permitted by the NRTA and regulations.

[23] The respondent does not demand that the applicants terminate those services, they can provide them anywhere else. It simply requires that they do not conduct them at the registered testing stations because it creates a conflict of interest and is not permitted in terms of the regulatory framework.

[24] The regulatory framework provides for an agreement to be entered into between the respondent and each testing station as contemplated in Schedule 3 of the regulations. The second and third applicants have each concluded such agreements ('the agreements').⁹

[25] The additional services are not expressly prohibited by legislation, but the scheme of the NRTA and regulations make it plain that the additional services ought to be specifically authorised before they can be conducted at a testing station. Clause 6 of both agreements deals with the testing station's obligations. In terms of clause 6.13.2.2 of the agreement, the second and third applicants were obliged to seek authorisation from the respondent prior

⁹ Pages 51-67: Agreement with respondent and second applicant; pages 68-84: Agreement with respondent and third applicant.

to providing additional services at the testing station. This was not done. The agreements thus expressly prohibit the provision of such services without the written approval from the respondent.

Issues

[26] Two issues arise for consideration. The first is whether the NRTA prohibits the provision of additional services. This requires an analysis of the relevant provisions of the NRTA and the agreements entered into with the second and third applicants which the respondent relies on. The second is whether the applicants have a legitimate expectation to continue to provide the additional services.

Statutory and contractual provisions

[27] In terms of regulation 137(a) of the regulations:

'A testing station proprietor shall—

(a) notify the MEC of the province concerned within 14 days of any change in particulars or circumstances in relation to any information provided to the MEC on the testing station;

[28] Clause 6.13 of the agreements¹⁰ provides the following:

6.13: The Testing Station hereby agrees to:

6.13.1 notify the MEC in writing of no less than 30 (thirty) days prior to any change in its ownership or corporate structure and provide detailed information on such changes in ownership or corporate structure, including but not limited to:

6.13.1.10 effecting any change in the purpose of the Testing Station, nature of services offered by the Testing Station, location of the Testing Station;

6.13.1.12 providing any additional services at the Testing Station;

6.13.2 apply for registration and grading:

6.13.2.1 no less than 90 (ninety) days before effecting any contemplated change in its location, ownership or corporate structure, including but not limited to any change of legal entity, name or ownership; and

6.13.2.2: receive written approval from the MEC prior to effecting any such changes, failing which the Testing Station acknowledges that the Testing Station premises may be closed pending suspension and/or cancellation, registration and grading in terms of this Agreement...

¹⁰ Pages 51-67: Agreement between respondent and second applicant; pages 68-84: Agreement with respondent and third applicant.

[29] The agreements entered into by the respondent with the second and third respondents respectively reads as follows:

'5.0 Duration of Agreement

5.1 This Agreement shall commence on the 07th day of July 2015 and shall remain in full force and effect for 5 (five) years and shall terminate on the 06th day of July 2020.

5.2 In the event that the Testing Station wishes to extend or renew this Agreement beyond the 06th day of July 2020 for additional periods, with each additional period not to exceed 3 (three) years at any given time, the Testing Station shall make a written request for such extension or renewal to the Department no later than 90 (ninety) days prior to the termination of this Agreement and such request shall include: . . . ' ¹¹

'5.0 Duration of Agreement

5.1 This Agreement shall commence on the 20th day of December 2013 and shall remain in full force and effect for 5 (five) years and shall terminate on the 19th day of December 2018.

5.2 In the event that the Testing Station wishes to extend or renew this Agreement beyond the 19th day of December 2018 for additional periods, with each additional period not to exceed 3 (three) years at any given time, the Testing Station shall make a written request for such extension or renewal to the Department no later than 90 (ninety) days prior to the termination of this Agreement and such request shall include: . . . ' ¹²

[30] The applicants submit that the respondent interprets both the NRTA and its regulations to prohibit the provision of additional services by testing stations but has failed to point to any such express statutory prohibition. Further, the agreements do not contain any prohibition to that effect.

[31] The respondent submits that in terms of regulation 137 read with clause 6.13 of the Agreements, the applicants had an obligation to inform the respondent and obtain written approval before providing additional services unless they had informed the respondent in the initial application. The applicants were obliged to obtain written authorization from the respondent. Failure to notify the respondent amounts to a breach of both the regulations and the agreement.

¹¹ Page 55 of the indexed papers.

¹² Page 72 of the indexed papers.

[32] It is noted that the agreement with the third applicant was entered into and signed by the respondent on 14 January 2014¹³ and the agreement with the second applicant was entered into and signed by the respondent on 22 July 2015.¹⁴ In terms of clause 5 of both agreements, the agreement with the third applicant terminated on 19 December 2018 and with the second applicant on 6 July 2020. The respondent has not provided any further agreements to indicate that there was a current written agreement in place and since both agreements have terminated due to the effluxion of time, the respondent cannot rely on the said agreements.

[33] The respondent contends that the NRTA and the regulations are clear that vehicle testing stations ought to conduct tests and assess vehicles in line with the requirements thereof. The respondent submits that neither the NRTA nor the regulations deal with other services that can be provided at the vehicle testing station and such silence is because the legislature did not contemplate such services being conducted at its approved testing stations.

[34] It can equally be said that such silence could indicate that such services may be conducted at the vehicle testing stations. In the absence of any current agreements in force between the parties and any prohibitory legislation, I cannot find any substantiation for the respondent's contention that the NRTA prohibits the provisions of additional services. Further, on the facts of this case it is not possible to even find that there was an implied prohibition. In *Minister of Police and Others v Fidelity Security Services (Pty) Limited* (CCT 195/21) [2022] ZACC 16 (27 May 2022) the court held that:

'Words cannot be read into a statute by implication unless the implication is necessary in the sense that, without them, effect cannot be given to the statute as it stands and to the ostensible legislative intent.'

Legitimate expectation

[35] The applicants submit that:

¹³ Page 84 of the indexed papers.

¹⁴ Page 67 of the indexed papers.

- (a) The respondent knew that the applicants supplied additional services at their vehicle testing stations in terms of the letter dated 26 October 2017.¹⁵
- (b) The approval for the vehicle testing station does not state that the approval was granted subject to the applicants not providing additional services.
- (c) The respondent alleges that several meetings were held in September and November 2019 with vehicle testing station proprietors to inform them not to provide additional services. The applicants were not invited to any of these meetings and the minutes of the meetings do not reflect that the issue of additional services was discussed.
- (d) The applicants have a legitimate expectation to continue supplying the additional services without interference by the respondent.

[36] The respondent submits that it sought to enforce compliance with the regulatory framework and the fact that there has not been enforcement does not create a reasonable expectation. Furthermore, the respondent has no obligation to engage the applicant before enforcing the law.

[37] The applicants' contention that they were entitled to a fair hearing before the respondent's 'decision' was made is premised on the contention that the applicants had a legitimate expectation to continue supplying additional services without interference by the respondent.

[38] According to Hoexter *Administrative Law in South Africa* 2 ed (2012) at 324:

'The doctrine [of legitimate expectation] holds that where a person has on the basis of a promise or a past practice acquired a reasonable expectation as to an administrator's future conduct, the administrator ought not to disappoint the expectation without at least hearing the person. In other words, procedural protection is offered instead of direct enforcement of the representation.'

¹⁵ Page 96 of the indexed papers.

[39] The applicants contend that 'the practice of the applicant to provide additional services is clear and not disputed, even if it were done *in contravention of the NRTA*, as the respondent would have it.'¹⁶ This statement by the applicants contradicts the requirement that an applicant must show that its expectation was one that is based on a representation that is *competent and lawful* for the decision-maker to make.¹⁷ However, the respondent has nevertheless conceded that the NRTA does not expressly prohibit the provision of additional services, only that prior authorisation is required.¹⁸

[40] The applicants contend that additional services have been supplied *to the knowledge of the respondent* by the applicants at the vehicle testing stations for as long as the testing stations have been registered,¹⁹ and thus a practice has been established that the applicants would be permitted to continue to carry out these services.

[41] The applicants base their contention that the respondent had knowledge that the applicants supplied additional services on the fact that in the motivation letter²⁰ attached to the replying affidavit, Mr Du Plessis referred to the fact that additional services were being provided by the applicants.

[42] The said letter dated 26 October 2017 reads inter alia as follows:

1. PURPOSE

The purpose of this submission is to obtain the Head: Transport, Mr. BS Gumbi's approval in principle in respect of an application for the registration of a vehicle testing station as received from Pinetown Roadworthy Centre represented by Mr S Maharaj and to obtain the Head of Department's signature on the attached letter.

2. BACKGROUND

2.1 The Motor Transport Services Directorate on 24 August 2017 received an application for the registration of a grade A vehicle testing station from Pinetown Roadworthy Centre, Pinetown represented by Mr S Maharaj.

¹⁶ Applicants' heads of argument, para 22.

¹⁷ *National Commissioner of Police and Another v Gun Owners South Africa* 2020 (6) SA 69 (SCA) para 38.

¹⁸ Respondent's heads of argument, para 12.

¹⁹ Applicants' replying affidavit, para 14.2, p. 91 of the record.

²⁰ Page 96 of the indexed papers.

2.2. Mr. Maharaj has complied with the requirements for the application and registration of a vehicle testing station in terms of the National Road Traffic Act, 1996 (Act No. 93 of 1996) attached as Annexure A.

2.3 Mr. Maharaj has in his motivation cited the following reasons for the need for a vehicle testing station in the Pinetown area.

- He has served in the industry in the past 20 (twenty) years.
- His experience was initially as a Manager for the AA and more recently as owner and operator of Ballito Test and Drive and Pinetown Roadworthy Centre.
- During his tenure he has acquired the necessary skills and experience to perform his tasks in accordance with the Road Traffic Act and the prescripts of the Department.
- Mr Maharaj has never been convicted nor found guilty of any misdemeanour which would jeopardize the Road Traffic Act or could have brought disrepute to his character.
- Mr Maharaj is a member of the Dekra Franchise Group and due to Dekra being appointed by the oil companies to conduct a safe loading pass, roadworthy and patron tests on all contractors carrying their products, Mr Maharaj's customers have been inconvenienced to test their vehicles outside of KZN due to him not having an A grade testing station in KZN.
- Dekra has also been appointed to conduct all pre inspections and final inspections for all Man Truck and Bus vehicles and Man Truck and Bus is located in Pinetown.
- Dekra is also appointed to conduct all inspections on agility vehicles for Mercedes SA which are cars, trucks and buses in Pinetown.
- Following Mr Maharaj's investigation it has been established that there is no such facility within the close proximity and based on the number of customers that call on his business, *it would follow that a grade A testing station in this area would be both beneficial to the local community and his existing clients.* (my emphasis)

2.4 Mr Maharaj has gained the support of the Ethekwini Municipality to establish a vehicle testing station at the said site, attached as Annexure B.

5. RECOMMENDATION

IT IS RECOMMENDED THAT IN TERMS OF SECTION 38 OF THE NATIONAL ROAD TRAFFIC ACT, 1996 (ACT NO. 93 OF 1996), READ WITH REGULATION 129 (4) OF THE SAID ACT, THE APPLICATION MADE BY THE PINETOWN ROADWORTHY CENTRE REPRESENTED BY MR S MAHARAJ FOR THE REGISTRATION OF A GRADE A VEHICLE TESTING STATION IN PINETOWN BE APPROVED IN PRINCIPLE, AND THE ATTACHED LETTER BE SIGNED BY THE HEAD: TRANSPORT.²¹

[43] The applicants also state that the 'respondent used this provision of additional services as part of the motivation for the approval.'²² It is necessary to consider the said letter when deciding whether a legitimate expectation has been proved.

²¹ Page 96 of the indexed papers.

²² Applicants' replying affidavit, para 7.2, p. 87 of the indexed papers.

[44] The letter indicates that Mr Du Plessis was simply recording the fact that Mr Maharaj had, in his *own* motivation for the need for a vehicle testing station in Pinetown, stated that additional services were already being provided to customers.²³ The letter also acknowledges that the respondent was aware of the additional services at the testing station.

[45] The question that then arises is whether the MEC was aware that the applicant would be providing additional services once the vehicle testing centre was registered. The letter indicates that the MEC was aware of the additional services but failed to request the applicants to cease the provision of the services and allowed the practice to continue thus giving rise to a legitimate expectation of procedural fairness in the event that the MEC were to decide to disallow the provision of those services.

[46] In *Administrator, Transvaal, and Others v Traub and Others* 1989 (4) SA 731 (A), the court referred to a number of English cases where the doctrine was developed:

'It is clear from these cases that in this context "legitimate expectations" are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis (Attorney-General of Hong Kong case supra at 350c.) ... The following extracts from the speeches of Lord Fraser and Lord Roskill are of particular relevance: "But even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the Courts will protect his expectation by judicial review as a matter of public law.... Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue...."'

[47] In light of my findings above and in particular the concession by the respondent that the NRTA is silent on the provision of additional services, I am of the view that the applicants have a reasonable expectation to expect that the provisions of additional services were in order.

[48] The silence in the NRTA cannot only be interpreted in favour of the respondent as various inferences can be drawn from that. Many of the issues could have been alleviated if the NRTA was clear in respect of additional

²³ See para 2.3 of the letter, page 96 of the indexed papers.


services and if the respondent ensured that agreements are timeously terminated or renewed.

[49] The respondents ought to have given the applicants an opportunity to be heard prior to stopping the provision of additional services. There is no proof that the applicants were present at any of the meetings which the respondent submits it held in September and November 2019. Procedural fairness requires all interested parties, including the applicants, to have been present at such meetings.

Accordingly, the respondent's decision in the circumstances of this case is procedurally unfair and ought to be reviewed and set aside.

[50] The following order is made:

1. The respondent's decision that the applicants cease the performance of any other business aside from the examining / testing of motor vehicles for certification of road worthiness at the registered premises of the applicants' vehicle testing stations, as set out in the letter of demand dated 8 February 2021 of the Road Traffic Inspectorate of the KwaZulu-Natal Department of Transport, is reviewed and set aside.
2. The respondent is ordered to pay the costs of this application.



BALTON J

Appearances:Appearances:

Date of hearing:

7 March 2022

Date of delivery:

31 October 2022

For the applicant:

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