



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA**

CASE NO: 27540/2022

Heard on: 8/08/2023

Judgment: 30/10/2023

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.

DATE

SIGNATURE

IN THE MATTER BETWEEN:

AFRIFORUM NPC

APPLICANT

AND

THE MINISTER OF TRANSPORT

FIRST RESPONDENT

ROAD TRAFFIC INFRINGEMENT AUTHORITY

SECOND RESPONDENT

THE ROAD TRAFFIC MANAGEMENT

CORPORATION

THIRD RESPONDENT

THE SHAREHOLDERS COMMITTEE OF

THE ROAD TRAFFIC MANAGEMENT

CORPORATION

FOURTH RESPONDENT

THE CHIEF EXECUTIVE OFFICER OF

THE ROAD TRAFFIC MANAGEMENT

CORPORATION

FIFTH RESPONDENT

JUDGMENT

STRIJDOM AJ

INTRODUCTION

1. This application is a review of the decision to promulgate Regulation 108(5)(a) of the National Road Traffic Regulations, 2000, which provides for the expiry of driving licence cards after a 5-year period. The applicant contends that the first respondent does not have the statutory authority, under the National Road Traffic Act, Act 93 of 1996 ('NRT Act') to regulate a period of validity for driving licence cards, and did not comply with the procedures for regulation

making contained in the Act. The applicant also contends that the promulgation of the regulation was irrational.

2. Applicant seeks a declarator that Regulation 108(5)(a) of the NRT Regulations is unconstitutional and invalid.
3. In the alternative, and if the NRT Act does empower the Minister to regulate the validity period of a driving licence card, the applicant contends that the Act is too broad in that regard. Consequently, the applicant seeks a declarator that section 75(1) of the NRT Act be declared unconstitutional and invalid to the extent that it confers unrestricted powers on the Minister to regulate the period of validity of a driving licence card.
4. The respondents contend that the application is lodged with a delay of many years and that the delay does not fall to be condoned. They contend that it ought to be dismissed on this basis.
5. The respondents contend that the Minister was empowered to adopt Regulation 108(5)(a), and that its adoption was lawful and rational. The respondents also contend that the declaratory relief sought in regard to the Criminal Procedure Act ('CPA') is misguided.
6. The respondents also contest the alternative relief, and assert that the empowering provisions in section 75(1) of the NRT Act are constitutional.
7. The applicant further seeks an order declaring any fine or penalty imposed in terms of Schedule 3(g) be delimited to those persons who operate a vehicle on a public road where that person holds no licence, or if his or her licence is suspended or cancelled in terms of the NRT Act, and that it finds no application in respect of drivers whose driving licence cards have expired.

ISSUES TO BE DETERMINED

8. Whether the NRT Act empowers the Minister to make regulations concerning the validity period of a 'driving licence card', in addition to the power to make regulations concerning the validity period of a driving licence.
9. Whether, if so empowered, the Minister complied with the requirements of Section 75 of the NRT Act when promulgating regulation 108(5)(a) of the NRT Regulations and amending it.
10. Whether the Minister acted rationally in providing for a 5-year validity period for 'driving licence cards'.
11. Whether drivers may be fined under the ambit of Schedule 3(g) of the CPA for driving with an expired 'driving licence card', irrespective of the validity of their driver's licence.

THE SALIENT FACTS

12. The material facts appear from paragraphs 24 to 49 of the answering affidavit of the first respondent (the Minister).
13. In 1992 the Minister sought Cabinet approval for the separation of a driving licence and identity document. At the time, all driving licences were recorded in the green Identity Document (the ID).
14. The idea was to replace the driving licence recorded in the ID book with a credit card type driving licence card (driving licence card).
15. At the time of the memorandum to Cabinet, road traffic was regulated in terms of the Road Traffic Act, 29 of 1989 (RTA) and the Road Traffic Regulations,

1990 (RT Regulations). The RTA and the RT Regulations regulated all traffic from 1 June 1990 to 31 July 2000.

16. Section 15 of the RTA provided that no person shall drive a motor vehicle on a public road except under the authority and in accordance with the conditions of a licence issued to him or her or of any document deemed to be a licence for the purposes of the RTA. Section 15 further provided that a driver shall not drive a motor vehicle unless he or she kept such licence or document or any other prescribed authorization with him or her in the vehicle.
17. In 1995 the Minister published a working paper in Government Gazette number 16486, dated 23 June 1995, setting out the rationale and need for the introduction of a driving licence card and inviting the public to submit comments.
18. Paragraph 5 of the working paper dealt, inter alia, with the period of validity of the proposed driving licence card. It stated the following:

‘Although the drivers’ licences held by a person are valid for the life time of the holder (should it not have been suspended or cancelled in terms of the Road Traffic Act, 1989 or should the holder’s medical condition not have deteriorated beyond the minimum requirements for purposes of safely driving a motor vehicle), the document reflecting the licences has to be replaced a number of times during this period. The intention is not to introduce a medical examination at the re-issue, but remain with a declaration by the applicant together with an eyesight test. The number of times of replacement depends on the material used as well as the harshness of the environment the document is exposed to, for example frequent handling, high temperature, ultraviolet rays, liquids, etc.

In order to ensure that the document does not deteriorate beyond an acceptable level without the holder having applied for the replacement thereof, and to ensure that the photograph reflected on the document continues to resemble the holder, it is proposed that all documents be re-issued every 5 years.

In terms of the Road Traffic Act, 1989, a PrDP will be valid for a period of two years and be re-issued to successful applicants.

The limited life of the card and the proposed re-issue thereof would nullify false licences in circulation at the end of the 5-year period and discourage potential forgery, thereby improving law enforcement and confining the scope of counterfeits.'

19. The working paper also dealt with the proposed language to be used on the driving licence card, advertisement, fingerprint, costs of the driving licence card and the proposed layout of the driving licence card.
20. Comments were received from the public to the published working paper. These comments were received in 1995 and considered. Due to the extensive delay in bringing the present application, such comments are no longer available and cannot be produced and placed before this Court.
21. The NRTA was published in November 1996. During 1997, the Department of Transport commenced the process of formulating and preparing the first set of regulations to be made under the NRTA. The first draft regulations were published under the NRTA in 1997 under notice number 1521 of 1997, in Government Gazette number 18383 dated 27 October 1997. These draft Regulations included provisions relating to the driving licence card. The public was invited to make comments. Comments were received and considered. The comments received at the time are no longer available due to the extensive passage of time.
22. Whilst the draft Regulations sought to be promulgated under the NRTA were still in the process of finalisation, and to operationalise the introduction of the driving licence card, the Minister amended the RT Regulations by way of notice number 276 of Government Gazette number 18692 dated 23 February 1998 to introduce the driving licence card for the first time in South Africa.

23. The public was invited to make comments on the proposed amendments. Comments were received and considered. The comments received are no longer available due to the extensive passage of time.
24. The draft Regulations incorrectly provided that a valid driving licence would expire within a period of five years. This was amended in Regulation 240(2) to provide that the validity period of a driving licence is indefinite unless suspended or cancelled in terms of the RTA. Regulation 247(5) provided that a driving licence card shall expire five years after the date on which it had been ordered from the Card Production Facility in terms of sub-regulation (1) (i) and shall be replaced by the Card Production Facility on application in terms of Regulation 247A. The Regulations under the RTA came into force on 1 March 1998. Regulation 247(5) limited the validity period of a driving licence card to five years – even prior to the promulgation of the NRT Regulations, including Regulation 108(5)(a).
25. The NRTA came into effect on 1 August 2000. At the time the NRTA came into effect, certain provisions of the RTA had to remain in place to ensure due implementation of the NRTA. The Department of Transport provided clarity by way of a guideline on the provisions of the RTA that would remain in place and the provisions of the NRTA that would come into effect on 1 August 2000. The guideline was necessary because the NRTA was to be implemented alongside certain provisions of the RTA. The guideline was published in Government Gazette volume 421, number 21424 of 31 July 2000, under General Notice 2740 of 2000.
26. The NRTA at the time provided that any relevant provision of the RTA shall remain in force until such time as the corresponding provision of the NRTA was put into operation. Members of Executive Councils (MECs) were assigned the functions and powers of administrator by way of a proclamation signed by the President, with respect to the sections of the RTA that remained in force.
27. Of importance for the present application is that sections 12, 14 and 75 of the NRTA came into force on 1 August 2000.

28. The NTR Regulations 9 came into force on 1 August 2000. The guideline published by the Department of Transport under notice 24740 of 2000 applied to the Regulations. Regulation 108(5) also came into force on 1 August 2000.
29. After a period of implementation of the NRT Regulations, it became apparent that Regulation 108(5) as it stood and was implemented created certain operational problems. Driving licence card holders complained that they could not be penalised for renewing a driving licence card before the date of expiry, as Regulation 108(5) provided that a new driving licence card would expire five years from the date on which it was ordered. The provision also created a problem as individuals that renewed their driving licence cards just before expiry could not provide a duly issued and valid proof of driving licence after the expiry of the person's driving licence card. This required consideration and a possible amendment to Regulation 108(5)(a) of the NRT Regulations.
30. During 11 June 2004, the Minister published draft regulations for the amendment of Regulation 108(5)(a) and the introduction of Regulation 108(6) to address the problems mentioned above.
31. Public comments were received and considered. The public comments received pursuant to the publication for public comment are no longer available and cannot be provided to this Court due to the inordinate delay in bringing this application.
32. The amending Regulations were published in Government Gazette Notice number, R.881 of 23 July 2004. At the time of this publication, the Shareholders Committee was not yet operational and could not have made any decisions.
33. To appreciate the amendments introduced, and that the amendments did not introduce for the first time the five-year validity period for a driving licence card, it is important to contrast the provisions of Regulation 108(5) prior to its amendment in 2004 and after its amendment, with the introduction also of Regulation 108(6).

34. Prior to its amendment in July 2004, Regulation 108(5) read as follows:

'(a) Subject to regulation 101(2)(a), a driving licence card shall expire five years from the date on which it has been ordered from the Card Production Facility, which date shall be indicated on that card.

(b) The holder of a driving licence card may apply for a new card in the manner contemplated in regulation 109 and the new card shall be authorised and issued in the manner contemplated in regulation 109(3).'

35. As amended in July 2004, Regulation 108(5)(a) and the new Regulation (6) read as follows:

'(a) Subject to regulation 101(2)(a), a driving licence card shall expire five years from the date on which it has been ordered from the Card Production Facility: Provided that where a person has applied for a new driving licence card in the manner contemplated in paragraph (b) on or before the expiry date of the driving licence card held by such person, the new driving licence card shall expire five years from the date after the expiry date of the driving licence card held by such person.

(6)(a) Notwithstanding the provisions of sub-regulation (5)(a), where a person has applied for a new driving licence card in the manner contemplated in sub-regulation (5)(b) on or before the expiry date of the driving licence card held by such person and a driving licence of the person concerned has not been suspended or cancelled, that card shall remain valid until the new driving licence has been issued in terms of sub-regulation (3) but not for more than three months after the expiry date of such driving licence card.

(b) The provisions paragraph (a) shall only apply if the holder of the driving licence card is in possession of the driving licence card previously

issued to him or her and proof of the fees paid in terms of regulation 109(2)(c) for a new driving licence card as contemplated in regulation 108(1).'

CONDONATION

36. It was argued by the applicant that delay cannot be relied on by the respondents to avoid adjudication in this matter for the following reasons:
- 36.1 Although the relief sought encompasses review relief, it is not confined to review relief;
- 36.2 The declaratory relief that is sought is not dependent on the invocation of PAJA. In accordance with section 172 of the Constitution, a court 'must declare any law or conduct that is inconsistent with the Constitution to the extent of its inconsistency' and 'make any order that is just and equitable'. Consistency with the Constitution must be evaluated, and the declaration made if there is such inconsistency. Delay in bringing an application for declaration of constitutional invalidity does not provide a basis for a court to decline the exercise of jurisdiction.
- 36.3 The particular form of administrative action here concerned – the making of regulations – has continuous effect.
- 36.4 The delay does not affect the justiciability of the challenge to constitutionality of section 75(1) of the NRT Act, or the justiciability in respect of Schedule 3 to the CPA.

- 36.5 Insofar as the applicant, on behalf of its members, is challenging the imposition of fines under the CPA and placing reliance on the consideration that fines are, as a fact, issued on a daily basis, the challenge to the regulations may be treated as a 'collateral' challenge.
37. It was argued by the respondents that this application should be dismissed merely on account of the applicant's inordinate delay in bringing the direct challenge against Regulation 108(5)(a).
38. The rule that a driving licence card is valid for five years was introduced into our law more than a quarter of a century ago, by an amendment to the Road Traffic Regulations in Government Notice 276 on 28 February 1998. In its current form, encapsulated in Regulation 108(5)(a), the rule was promulgated nearly 20 years ago.
39. It was submitted by the respondents that the making of regulations constitutes administrative action under the Promotion of Administrative Justice Act, 3 of 2000 (PAJA), and that the time-bar in section 7(1) of PAJA applies.¹ It was further argued that once PAJA applies, the applicant had no election to base its challenge to Regulation 108(5)(a) directly on the Constitution, because of the principle of subsidiarity.²
40. The explanation offered by the applicant for the extensive delay can be summarised as follows:³

40.1 'The lawfulness of the purported regulation of the period of validity of the driving licence card arose only recently, because the grace-period

¹ Mostert NO v Registrar of Pension Funds and Others 2018 (2) SA 53 (SCA) para 40 - 42

² Mazibuko & others v City of Johannesburg & Others 2010 (4) SA1 (CC), para 73; My Vote Counts NPC v Speaker of the National Assembly and Others) CCT 121/14) [2015] ZA CC 31 (30 September 2015) para 161

³ Caselines: 001 - 34 to 36

for renewals ended on 5 May 2022; because of backlogs with renewals in light of Covid-19; the breakdown in the relevant card machine; and the potential new validity period to be introduced.

40.2 Regulation 108(5)(a) has effect on holders of driving licences on a daily basis.

40.3 The Court has an obligation to declare the regulation invalid under section 108(5)(a) and delay ought not to prevent this.

40.4 The applicant is not to be blamed for any delay in bringing the application. Had it become aware of the alleged constitutional state of affairs sooner, it would have 'undoubtedly brought this application as early as possible.'

41. In essence, the applicant wants its extensive delay to be overlooked merely because it contends that Regulation 108(5)(a) is unconstitutional and the Court must declare it invalid under section 172(1)(a) of the Constitution.

42. At common law, the review of any exercise of public power must be brought within a reasonable time.⁴

43. Where an exercise of public power is administrative action, section 7(1)(b) of the Promotion of Administrative Justice Act, Act 3 of 2000 (PAJA) provides that a review must be instituted without unreasonable delay and not later than 180 days after the date on which the person concerned was informed of the

⁴ *Wolgroeiërs Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad* 1978 (1) SA 13 (A); *Madikizela Mandela v Executors, Estate Late Mandela* 2018 (4) SA 86 (SCA)

action, became aware of the action and the reasons for it might reasonably have been expected to have become aware of the action and the reasons.

44. A delay of more than 180 days in bringing a review of administrative action is unreasonable *per se*. Absent a court deciding that the interests of justice dictate the allowance of an extension, the court has no authority to entertain a review brought outside the 180-day period.⁵
45. In **South African Dental Association**⁶, the SCA decided that an applicant cannot avoid the provisions of PAJA, where PAJA applies, and seek to rely on the constitutional principle of legality or section 33 of the Constitution. PAJA contains grounds of review based on legality, including *ultra vires* or lack of legal authority, and the constitutional invalidity of administrative action, such as the making of regulations. It provides these grounds in section 6(2)(a)(i), 6(2)(f)(i) and 6(2)(i). PAJA covers the field regarding the grounds on which the applicant relies.
46. The applicant ought to have brought its application without unreasonable delay and not later than 180 days after it might reasonably have been expected to have become aware of the action and the reasons.
47. It was submitted by the respondents that the period of 180 days started running when, taking a broad view, the general public might reasonably have been expected to have become aware of the action, i.e., Regulation 108(5)(a) or the decision to introduce it. They submit that this will be the time when Regulation 108(5)(a) was first published in the Government Gazette.

⁵Opposition to Urban Tolling Alliance v South African National Roads Agency Ltd [2013] 4 ALL SA 639 (SCA) para 26

⁶ South African Dental Association v Minister of Health [2016] 1 ALL SA 73 (SCA) paras 41 - 42

48. To obtain an extension of the 180-day time period in section 7(1) of PAJA, the applicant must make out a case that the interest of justice favour the extension of the time-period under section 9 of PAJA.
49. In **Ggwetha**,⁷ Nugent JA explained the purpose and function of the delay rule under section 7(1) of PAJA and its common law predecessor as follows:

'It is important for the efficient functioning of public bodies...that a challenge to the validity of their decisions by proceedings for judicial review should be initiated without undue delay. The rationale for that longstanding rule...is twofold: First, the failure to bring a review within a reasonable time may cause prejudice to the respondent. Secondly, there is a public interest element in the finality of administrative decisions and the exercise of administrative functions.'
50. It was stated in **Khumalo**⁸ by the Constitutional Court that:

'In addition, it is important to understand that the passage of a considerable length of time may weaken the ability of a court to assess an instance of unlawfulness on the facts. The clarity and accuracy of decision-makers' memories are bound to decline with time. Documents and evidence may be lost, or destroyed when no longer required to be kept in archives. Thus, the very purpose of a court undertaking the review is potentially undermined where, at the cause of a length delay, its ability to evaluate fully an allegation of illegality is impaired.'
51. Any explanation offered for the delay must be reasonable and must cover the entirety of the delay. The explanation of the applicant is not reasonable and does not cover the entirety of the period of delay.

⁷ Ggwetha v Transkei Department Corporation Ltd and Others 2006 (2) SA 603 (SCA)

⁸ Khumalo and Another v member of the Executive Council for Education: KwaZulu Natal 2014 (5) SA 579 (CC); Department of Transport and Others v Tasima (Pty) Ltd 2017 (2) SA 622 (CC)

52. The fact that Regulation 108(5)(a) has effect on holders of drivers' licences on a daily basis does not justify the delay. At best, it serves to emphasize why a timeous challenge should have been brought.
53. The application is a direct challenge against Regulation 108(5)(a). It is not a collateral or defensive challenge because the applicant does not bring the application defensively against coercive conduct by the respondents under Regulation 108(5)(a). The delay remains relevant to the challenge.
54. A collateral challenge is a challenge ordinarily raised as a defence to a compulsion arising from an alleged unlawful exercise of public power.

PREJUDICE

55. In **Liberty Life v Kachelhoffer NO**⁹ the following was stated:

'The enquiry into whether prejudice is present or not entails comparing the present position of the other parties involved with what it would have been had proceedings been instituted within a reasonable time. Prejudice will be considered to be present if, because of the delay, the recollection of the parties or the person whose decision is being reviewed, have paled; persons who have to depose to affidavits or testify, are no longer available, and where documentary or other forms of evidence are no longer available...'

56. The first to third respondents highlighted the following in respect of prejudice in their answering affidavit:

⁹ 2001 (3) SA 1094 (C)

- 56.1 'As a result of the delay, it is essentially impossible for the respondents to place before the court the relevant material that influenced the decision to adopt the rule';
- 56.2 The people who were around at the time of the relevant decision are proverbially 'long gone' from their roles, and several people have occupied the Minister's office since the 5-year driving licence card validity period was decided.
- 56.3 The original deadline for comment on the proposed rule was in July 1885, some 27 years ago. Further comments were called for within 30 days of the publication, on 27 October 1997, of the draft regulation's introducing the rule. Afriforum sought to criticise the unavailability of these comments sought some 25 and 27 years ago. But that unavailability is a significant prejudice resulting from Afriforum's own delay.
57. In my view, the effluxion of time has compromised the ability of the Court to properly evaluate the legality of the decision sought to be challenged.
58. The delay is bound to prejudice the State's ability to present a full record and full recollection of all the reasons, considerations and processes that informed a particular decision.

CONCLUSION

59. Section 172(1) of the Constitution cannot be interpreted that a court must entertain the merits of every review, regardless of the delay and the absence of a proper justification for that delay. If it meant that there would be no scope for the delay rule in our common law, section 7 of PAJA would be meaningless.
60. I concluded that the explanation for the delay offered by the applicant is not reasonable and failed to cover the entirety of the period of the delay. To extend the 180-day time period would not be in the interest of justice and would be prejudicial to the respondents.
61. In the result, the application is dismissed with costs, including the costs of two counsel, where applicable.

STRIJDOM JJ
ACTING JUDGE OF THE HIGH COURT
OF SOUTH AFRICA GAUTENG DIVISION
PRETORIA

Appearances:

For the Applicant:

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Adv D Groenewald

Instructed by:

Hurter Spies Inc.

For the First & Second Respondents:

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