IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED:

Date: ***15th September 2017*** Signature:

CASE NO: 2016/47802

In the matter between:

VALSIR SPA First Applicant

VALSIR - UNEEQ (PTY) LIMITED Second Applicant

and

SABS COMMERCIAL SOC LIMITED Respondent

Coram: Adams J

Judgment: Adams J

Heard on: 7 June 2017

Decided on: 14 September 2017

Summary: ***Administrative Justice*** *— South African Bureau of Standards ('the SABS') — the Standards Act, 8 of 2008 — Certification of products — failure to timeously issue certification*

ORDER

1. The first applicant's certification in respect of its 'HDPE Plastic Piping Systems for Soil and Waste Discharge' (SANS 8770:2008) be and is hereby extended for a period of six months from date of this order.

2. The respondent shall take a decision, within six months from the date of this order, on the first applicant's application dated the 26th of May 2015 for the renewal of the first respondent's certification (which expired on the 1st of July 2015) in respect of first respondent's 'HDPE Plastic Piping Systems for Soil and Waste Discharge' (SANS 8770:2008).

3. If pursuant to order 2 above the respondent's decision is against the applicants in that it (the respondent) decides not to renew the certification of the first applicant's aforementioned product, that being 'HDPE Plastic Piping Systems for Soil and Waste Discharge' (SANS 8770:2008), then the respondent is ordered to furnish the applicants with full reasons for such refusal within seven days of the date of such decision.

4. The respondent shall pay the applicants' cost of this application.

JUDGMENT

ADAMS J

[1]. This is an application by the applicants for an order compelling the respondent to take a decision on the applicants' renewal application for certification in respect of one of the products of the applicants, that being 'HDPE Plastic Piping Systems for Soil and Waste Discharge'. The original certification

was issued in favour of the applicants by the respondent on the 1st of July 2009 under their registration number: SANS8770:2008. The certification, also styled a 'SABS Permit to Apply Certification Mark', had an expiry date of the 1st of July 2015, hence the renewal application by the applicants to the respondent on the 26th of May 2015, therefore well within time. I pause here to note that, as part of this application, the applicants also applied to Court for an order compelling the respondent to make a decision in respect of the recertification in relation to other products of the applicants. Those certifications were however finalised and permits were issued albeit after the date on which the applicants instituted these present motion court proceedings.

[2]. The applicants also apply for ancillary relief, notably an order that the respondent issues to the first applicant the certification within five days from the date of such order. There is also an application for alternative relief to the effect that, in the event of the respondent subsequent to the commencement of the application refusing to recertify the product of the applicants, the refusal be reviewed and set aside and the respondent be ordered to issue the certification within five days of the order.

[3]. In a nutshell the application by the applicants is for a review of the respondent's action in relation to their request for a recertification of the product in question.

[4]. The aforegoing is a simplification of the case of the applicants. The notice of motion prays for orders totalling thirteen, and the claims are based on three alternative causes of action. Firstly the applicants ask for an order declaring that the respondent's failure to adjudicate upon its applications for recertification constitutes a deemed refusal of the said applications as a result of an effluxion of time. The applicants furthermore pray for an order that exceptional circumstances exist and that an internal administrative appeal need

not have been pursued, and for an order reviewing and setting aside the deemed refusal. There are also further alternative prayers prayed for on the basis of alternative causes of action. In view of the conclusions reached by me and the findings to which I come below, I do not deem it necessary to deal with all of the prayers of the applicants. Suffice to say that I am not convinced that a proper case has been made out by the applicants for an order for the review and setting aside of the respondent's actions.

[5]. The respondent is the South African Bureau of Standards ('the SABS'), which was established by s 2 of the Standards Act, 24 of 1945 ('the Act'), and which in terms of s 3 of the Standards Act, 8 of 2008, continues to exist as a public entity. The SABS is a juristic person, and must operate and perform its functions in accordance with this Act.

[6]. In terms of the preamble to the Act, the purpose of the SABS is to continue as the peak national standardisation institution in South Africa responsible for the development, maintenance and promotion of South African National Standards, with a view to ensuring provision of an internationally recognised standardisation system that continues to support the needs of South African enterprises competing in a fast – paced global economy; and to promote South African National Standards as a means to facilitate international trade and enhancing South Africa's economic performance and transformation.

[7]. In terms of s 4 of the Act the objects of the SABS are to-

(a) develop, promote and maintain South African National Standards;

(b) promote quality in connection with commodities, products and services; and

(c) render conformity assessment services and matters connected therewith.

[8]. In terms of ss (2), and in order to achieve its objects, the SABS may inter alia -

(a) develop, issue, promote, maintain, amend or withdraw South African National Standards and related normative publications serving the standardisation needs of the South African community;

(b) provide reference materials, conformity assessment services, and related training services in relation to standards, including a voluntary SABS Mark Scheme proving assurance of product conformity;

(c) obtain membership in international and foreign bodies having any objects similar to an object of the SABS;

(d) review involvement in international standards committees regularly to ensure resources are targeted where they are of most relevance to South Africa;

(e) establish and maintain the necessary expertise at internationally acceptable level;

(f) co-ordinate, interact and manage the international and bilateral interaction with other national standards bodies from other countries;

(g) provide information services to deal with enquiries about standards, handle the sale and distribution of South African National Standards and related publications, as well as similar publications from international and foreign bodies;

(h) provide the South African enquiry point to maintain the South African notification system in terms of the Technical Barriers to Trade Agreement of the World Trade Organisation;

(i) provide a research and development programme in terms of the need for new standards, improvement of existing standards, standardisation of test methodology and the sketching of future scenarios that might affect the standards environment;

(j) develop a procedure through which other bodies with sectorial expertise can be recognised as Standards Development Organisations and through which the standards of such organisations can be published by the SABS as South African National Standards;

(k) perform, in so far as it is not repugnant to or inconsistent with the provisions of any Act of Parliament, such functions as the Minister may assign to the SABS;

(l) use technical committees to develop and amend South African National Standards.

[9]. The application of the applicants is brought in terms of the provisions of the Promotion of Administrative Justice Act, 3 of 2000 ('the PAJA Act'). There can be no doubt that the respondent, in dealing with the application for the recertification of the applicants' product, was performing an administrative action as defined in the s 1 of the PAJA Act. The SABS is an organ of state exercising a public power and performing a public function in terms of legislation, that being the Standards Act.

[10]. The relevant portions of S 6 of the PAJA Act, under the heading 'Judicial Review of Administrative Action', provides as follows:-

'(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.

(2) A court or tribunal has the power to judicially review an administrative action if -

(a) ... ...

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) ... ...

(g) the action concerned consists of a failure to take a decision;

(3) If any person relies on the ground of review referred to in subsection (2) (g), he or she may in respect of a failure to take a decision, where-

(a) (i) an administrator has a duty to take a decision;

(ii) there is no law that prescribes a period within which the administrator is required to take that decision; and

(iii) the administrator has failed to take that decision,

institute proceedings in a court or tribunal for judicial review of the failure to take the decision on the ground that there has been unreasonable delay in taking the decision; or

(b) (i) an administrator has a duty to take a decision;

(ii) a law prescribes a period within which the administrator is required to take that decision; and

(iii) the administrator has failed to take that decision before the expiration of that period,

institute proceedings in a court or tribunal for judicial review of the failure to take the decision within that period on the ground that the administrator has a duty to take the decision notwithstanding the expiration of that period.'

Background Facts

[11]. On the 26th May 2015, the applicants applied for the renewal of the first applicant's SABS certifications in respect of four products. The present application was launched more than a year later on 15th of June 2016 after it became apparent to the applicants that the respondent did not intend issuing the certifications in respect of the products for which permits were applied for.

[12]. After the institution of these motion proceedings and the service of the application, the respondent on or about the 24th June 2016 recertified three of the four products of the applicants, leaving one more permit to be renewed as per the application for renewal. It requires emphasising that the three renewal certificates were only issued some twelve months after the applicants had filed the renewal applications with the respondent, and shortly after the notice of motion herein was served on the respondent.

[13]. What is left of the application concerns the certification by the respondent of the HDPE plastic piping systems for soil and waste discharge (SANS 8770:2008) ('the plastic piping systems').

[14]. In relation to the certification of the plastic piping systems, it is common cause that the applicants applied in good time on the 26th May 2015 for the renewal of the certification. The applicants had paid to the respondent the relevant testing fee in relation to the certifications in question during July 2015.

[15]. The reason for the respondent's failure to timeously renew the certification of the applicants' product, as it was required to do by law, was the fact that it did not have the facilities to test the plastic piping systems in terms of the standards set out in SANS877O:2008. The applicants' plastic piping systems had however been tested extensively internationally by reputable institutions at the request of the applicants. The tests were conducted by ILAC accredited Test Laboratories, ILAC being the International Laboratory Accreditation Corporation, of which South Africa is a signatory member.

[16]. When it became apparent that the respondent did not have the facilities to test the plastic piping systems, the applicants proposed to the respondent that the ILAC accreditation be accepted as proof that the products met SABS standard. This proposal was not acceptable to the respondent, which insisted that it would recertify the first applicant's product only after it had done the necessary testing. This was despite the fact that the first applicant's product is in all respects compliant with the European and international standards and it enjoys the equivalent quality certifications in Europe and internationally.

[17]. On the 23rd of May 2016, that is some twelve months after the applicants applied for renewal of the certification, the respondent advised the applicants in writing in an electronic communiqué that it (the respondent) proposed an extension of the certification of the plastic piping systems, pending the finalisation of applicants' renewal application, subject to certain terms and conditions incorporated into a draft agreement. This proposal was not acceptable to the applicants, who remained adamant that the respondent should discharge its statutory duties and issue the renewal certification.

[18]. The stance of the applicants were simply that, if regard is had to the provisions of the PAJA Act, the respondent, being an administrator as defined in the said Act, is under a duty to deal fairly with and make a decision on their

renewal application. The fact that the respondent did not have the necessary resources to discharge their statutory duties was, so the applicants contended, no justification for their failure to perform their public function which they are duty bound to do by statute.

[19]. The respondent, on the other hand, contends that its settlement proposal was an administrative decision, and therefore it cannot be accused of having failed to take a decision as envisaged under Section 6(2)(g) of the PAJA Act. The applicants, if dissatisfied with the decision, so it was submitted by the respondent, should have applied for a review of the decision.

[20]. The applicants countered this argument by submitting that the proposal by the respondent, which were couched in somewhat equivocal terms and which, by no stretch of the imagination, could have amounted to a decision. It was not an 'administrative decision' reviewable under the PAJA Act because, if it was not accepted, did not adversely affect the rights of any person and would not have had a direct external legal effect.

[21]. In the alternative, so the applicants submitted, even if the court finds that the proposal made by the respondent amounts to administrative action, which is reviewable under PAJA, then that decision stands to be reviewed and set aside because it is ultra vires of the powers assigned to the respondent in terms of the Standards Act, 8 of 2008.

Analysis

[22]. The respondent had from during May 2015 to during June 2016 (when these review motion proceedings were instituted) to make a decision on the applicants' application for a renewal of the certification in respect of the plastic

piping systems. They failed to do so, and the reason for such failure was due to its limited testing capabilities for this specification. On the 26th of July 2015 the respondent advised the applicants in writing as follows:

> 'SANS 8770 – we have limited testing capability for this specification at present, hence we are unable to provide a test report. We are in the process of partnering with accredited laboratories in order to provide full testing to this specification; We will provide feedback on the way forward once we have identified the laboratories that can provide full testing capability'.

[23]. By their own admission, the respondent was incapable of performing its public function as required by legislation. This, in my view, is the reason why a decision was not taken on the application by the applicants for a renewal of the certification in respect of the plastic piping systems.

[24]. On the 23rd of May 2016, that is some twelve months later, the respondent purported to make a decision on the recertification application of the applicants by sending out a generic communiqué to all of its affected clients, addressed to 'Valuable Client'. The missive went under the heading 'SABS expired mark permits within the plastic pipe industry' and gave a detailed explanation for the delay in the issue of the renewal certification relative to expired permits. The letter also proposed an 'interim solution for customers whose permits have expired', which took the form of a draft agreement to be concluded between the respondent and its clients. It was made clear by the respondent that this agreement would be based strictly on certain terms and conditions imposed by the respondent.

[25]. In my view, there are two difficulties with the respondent's purported 'decision'. Firstly, it was made some twelve months after the recertification request was submitted to them by the applicants. Secondly, it did not deal with the applicants' application for the renewal of the expired permit. What it did was

to provide an interim solution pending the decision. There simply was no decision. The advice to the clients was singularly equivocal in that, if the proposed solution was rejected by any particular client, as was the case with the applicants, then the communiqué can and should be regarded as *pro non scripto*, which would in turn mean that no decision had been made. I am in agreement with the submission made on behalf of the applicants that the respondent has a duty, as an administrator, to either accept or refuse the first applicant's application for certification of its plastic piping systems. It is not at liberty to force the applicants to sign a contract and to delegate that function to a third party.

[26]. This means that s 6(2)(g) of the PAJA Act finds application in that the respondent has performed a reviewable administrative action in that it failed 'to take a decision'.

[27]. It was submitted by Mr Tsatsawane, who appeared on behalf of the respondent, that before renewal certifications are issued, the relevant products which are made in Italy must be tested for compliance with the relevant certification requirements prescribed in the relevant South African National Standards. The respondent cannot, so it was submitted, issue the renewal certifications without it having tested the products or without the products having been tested by an accredited laboratory. For purposes of this testing, the test samples must be selected by the respondent's auditors and not by the applicants. This is stating the obvious, but more importantly the testing is part and parcel of the respondent's duties and the administrative action it is required by legislation to perform. To say that we are not able to do what we are required to do by statute does not amount to a decision.

[28]. The testing of the products for compliance with the relevant certification requirements is conducted by the respondent or by a testing laboratory

accredited by the respondent or a laboratory with which the respondent has an agreement to test products for compliance with South African National Standards.

[29]. The testing is an intricate and complicated process, which explains the delay in the issue of the certification. This was the argument by Mr Tsatsawane or how I understood him. However, this submission loses sight of the fact that by, their own admission, the respondent did not have the capacity to do the test. This, as rightly submitted by the applicants, is the respondent's problem and should not be used as justification for its failure to perform its statutory functions.

[30]. Furthermore, so it was argued by Mr Tsatsawane, the respondent is in law not obliged to accept test reports from any other laboratory. This regime cannot be changed to suit a particular customer such as the applicants. However, the point is this: the respondent must ensure that it has the capacity to perform its public and statutory functions.

[31]. It was submitted on behalf of the respondent that as far as the renewal certificate in respect of SANS 8770:2008 is concerned, the respondent has decided to extend the applicants' certificate subject to certain conditions. That is the decision taken by the respondent and it has been communicated to the applicants in writing. The applicants simply do not like this decision and contend that it amounts to a failure to take a decision. This is wrong in fact and in law, so the submission was concluded. For the reasons mentioned supra, I do not agree with these submissions. It requires emphasising that for a period of approximately twelve months the respondent failed to deal with the renewal applications of the applicants, only to thereafter attempt to impose on the applicants an 'interim solution', which does not deal with the renewal application.

[32]. I also reject the respondent's submission that the proposed draft agreement presented to the applicants by the respondent was pursuant to the decision made by it (the respondent) in respect of the renewal application. The communiqué was certainly not couched as a decision made in respect of the application dated the 26th May 2015 by the applicants for the renewal of the certification of their product. What it did was to deal expressly with permits which had expired or were about to expire. Nowhere in this communication is the renewal application of the applicants dealt with.

[33]. What the contents of this missive demonstrate unequivocally is that the respondent, due to inefficiencies and inadequacies in its operations and systems, do not have the capacity to perform administrative actions as an administrator and take decisions in accordance with its legislative imperatives. The respondent does not have available to it the luxury of side stepping its public function to recertify the product. It cannot, instead of making a decision with regard to the renewal application, unilaterally prescribe a procedure and a process to be followed in purported compliance with its duties to decide on the application. It cannot be said that giving an explanation for its failure to make a decision and to further explain how it intends dealing with the matter in the distant future amounts to taking a decision as envisaged by the PAJA Act.

[34]. The applicants also seek an order that the certification of their HDPE Plastic Piping Systems for soil and waste discharge under SANS877O:2008, which expired on the 1st of July 2015, be extended for a period of six months from date of the order.

[35]. The respondent opposes the application for this relief on the basis that the applicants had rejected the offer for an extension, which formed part of the respondent's proposal mentioned supra. I have already indicated that, in my judgment, the respondent could not in law follow that course. It was furthermore

submitted on behalf of the respondent that the extension which the applicants seek cannot be without conditions and the Court is in law incompetent to grant the said relief.

[36]. The court cannot itself, so it was submitted by the respondent, extend the duration of the expired certificates. The Court has no powers to do so. If it did, so the argument went, the court would be violating the doctrine of separation of powers, because the powers to do so are vested in the respondent and not the court. In any event, the products in issue have not yet been fully tested to determine compliance with SANS877O:2008 and the court cannot itself conduct such tests.

[37]. I disagree with these submissions.

[38]. S 8 of the PAJA Act provides as follows relative to remedies in proceedings for judicial review:

> '(1) The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders-
>
> (a) directing the administrator -
>
> (i) to give reasons; or
>
> (ii) to act in the manner the court or tribunal requires;
>
> (b) ... ...
>
> (c) setting aside the administrative action and-
>
> (i) remitting the matter for reconsideration by the administrator, with or without directions; or
>
> (ii) in exceptional cases-

(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or

(bb) ... ...

(d) declaring the rights of the parties in respect of any matter to which the administrative action relates;

(e) granting a temporary interdict or other temporary relief; or

(2) The court or tribunal, in proceedings for judicial review in terms of section 6 (3), may grant any order that is just and equitable, including orders-

(a) directing the taking of the decision;

(b) declaring the rights of the parties in relation to the taking of the decision;

(c) directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties; or

(d) as to costs'.

[39]. S 8 grants the court, hearing an application for the judicial review of an administrative action, the power to grant an order, including interim relief, which is just and equitable. In the circumstances of this matter, I am satisfied that it is just and equitable to grant an order for an extension of the expired certification. What weighs heavily on my mind in that regard is the fact that the respondent, despite its legal and statutory imperative to issue certification, is not in a position to do so due to what can only be described as operational inadequacies and inefficiencies. A period of twelve months had elapsed before the respondent attempted to comply with its administrative duties. The respondent also does not dispute the claim by the applicants that objectively speaking and having regard to the fact that the product has been tested by

reputable laboratories and found to be compliant with the standards applicable and prescribed by the respondent. Until the expiry of the certification on the 1st of July 2015, the product was fully compliant with the standards imposed by the respondent.

[40]. For these reasons, I am of the judgment that it would be just and equitable that I extend the certification which expired due to the respondent's ineffectiveness. The fact that the respondent does not have the necessary capacity to test the applicants' product for compliance with the requirements for certification under SANS877O:2008 was confirmed in the respondent's e-mail dated the 26th July 2015, in which email it was confirmed by the respondent that they 'have limited testing capability for this specification at present, hence we are unable to provide a test report'.

[41]. In these circumstances, the applicants are entitled to interim relief for an extension of the validity of the certification as well as an order that the respondent takes a decision on their application for recertification. In view of this finding, it is not necessary for me to deal with the application for the other relief. As indicated supra, I am in any event not persuaded that the applicants have made out a proper case for the other relief claimed. In particular, I do not believe that the applicants are entitled to an order reviewing and setting aside the actions of the respondent.

Costs

[42]. It has been submitted on behalf of the applicants that I should grant a punitive cost order against the respondent on the scale as between attorney and client.

[43]. I do not believe that a case has been made out for such an order. I therefore intend granting an ordinary cost order, which I believe would be just and equitable.

ORDER

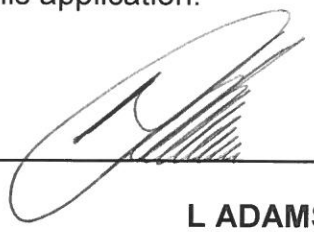
In the circumstances I make the following order:

1. The first applicant's certification in respect of its 'HDPE Plastic Piping Systems for Soil and Waste Discharge' (SANS 8770:2008) be and is hereby extended for a period of six months from date of this order.

2. The respondent shall take a decision, within six months from the date of this order, on the first applicant's application dated the 26th of May 2015 for the renewal of the first respondent's certification (which expired on the 1st of July 2015) in respect of first respondent's 'HDPE Plastic Piping Systems for Soil and Waste Discharge' (SANS 8770:2008).

3. If pursuant to order 2 above the respondent's decision is against the applicants in that it (the respondent) decides not to renew the certification of the first applicant's aforementioned product, that being 'HDPE Plastic Piping Systems for Soil and Waste Discharge' (SANS 8770:2008), then the respondent is ordered to furnish the applicants with full reasons for such refusal within seven days of the date of such decision.

4. The respondent shall pay the applicants' cost of this application.



L ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	7th June 2017
JUDGMENT DATE:	15th September 2017
FOR THE APPLICANTS:	Adv Lafras Uys
INSTRUCTED BY:	M J Hood & Associates
FOR THE RESPONDENT:	Adv Kennedy Tsatsawane
INSTRUCTED BY:	Gildenhuys Malatji Incorporated