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

Case No: 1671/10

In the matter between:

CHUNDRAKUMAR SOOKRAJ	APPLICANT
and	
MEC FOR TRANSPORT, KZN	FIRST RESPONDENT
THE MANAGER: VERULAM LICENCING	
AND TESTING CENTRE	SECOND RESPONDENT
THE MINISTER OF TRANSPORT	THIRD RESPONDENT

JUDGMENT

Delivered on: 22 March 2012

MNGUNI J

Introduction

[1] This is an application to review and set aside the decision of the first respondent refusing to issue the applicant with a Professional Driving Permit (PDP) together with an application for urgent interim relief pending the outcome of such review application.

[2] The proceedings were instituted on 4 March 2010 and are opposed by the respondents. On 15 March 2010 the matter came before Swain J who granted the order in the following terms:

'1. Upon the pleadings in this matter becoming closed, the parties shall, through

counsel, approach the senior civil Judge with the view of obtaining directions as to when this matter shall be heard on an urgent basis.

2. Costs are reserved.

3. The application be and is hereby adjourned sine die.'

Factual Background

[3] In order to understand the present dispute and to address the contentions raised thereon, it is necessary to set out the background in some detail. The applicant has been a professional driver of heavy duty vehicles since 1999. He was authorised to drive goods vehicles with a gross vehicle mass exceeding 3500 kilograms. He is therefore obliged to obtain a PDP as is contemplated in regulation 115 of the National Road Traffic Regulations (National Regulations) determined as at 1 July 2008 by GN R155 in GG 30763 of 8 February 2008. On 25 July 2007 he was convicted on contravention of section 65(2)(a) of the National Road Traffic Act 93 of 1996 ("the Traffic Act") and was sentenced to pay a fine of R3 000 or to undergo 30 days' imprisonment half of which was suspended for a period of three years on certain conditions.

[4] In terms of regulation 122(1) of the National Regulations, he is obliged to re-apply for PDP every two years. He was last issued with same on 5 December 2006 and it lapsed on 5 December 2008. In November 2008 he made an application for the renewal on a prescribed form, submitted the necessary documentation and paid a prescribed fee for such permit to be

issued to him. By a letter of 19 February 2009 the Department of Transport informed him that in view of the time lapse of the convictions recorded against him, he should re-apply during July 2012. The letter incorrectly recorded the conviction of 25 July 2007 as that of drunken driving instead of contravention of section 65(2)(a) of the Traffic Act.

[5] On 28 July 2009 he instituted motion proceedings in this Court (first High Court application) under case number 6405/09 seeking an order, on urgent basis, in the following terms:

'1. That this application is urgent and that the Rules of this Court relating to form and time periods be and are hereby dispensed with.

2. That the first and second respondents be and are hereby called upon to show cause, why an order in the following terms should not be granted:

(a) That in the event that the First Respondent has not yet considered the Applicant's application for a Professional Driving Permit in accordance with the provisions of Regulation 125:-

i. That the First Respondent is hereby directed to consider the Applicant's application for a Professional Drivers Permit in accordance with the procedures prescribed by the Regulations and the Act;

ii. That the Second Respondent is hereby directed to comply with the provisions of Regulation 125 (2) of the Regulations.

(b) That in the event that the First Respondent has considered the Applicant's application for a Professional Driving Permit, and has refused same, that the said decision is hereby reviewed and set aside and replaced the following order:-

i. That the Second Respondent be and is hereby directed to issue a

Professional Driving Permit to the Applicant in accordance with the provisions of the National Road Traffic Regulations read with the National Road Traffic Act.

(c) That the First Respondent be ordered to pay the costs of this application.

(d) That the Second Respondent be ordered to pay the costs of this application only in the event that he/she opposes the application.

3. That the Second Respondent is hereby directed to issue to the Applicant an extension Professional Driving Permit or Permits or temporary Professional Driving Permit or Permits such permits to remain of force and effect pending the finalization of this application.

4. Further and/or alternative relief.'

The application was adjourned to 31 July 2009 and on that date the parties concluded a settlement agreement in the following terms:

'(1) The applicant shall lodge a referral of the application for professional driving permit in terms of the Provisions of regulation 125 of the regulations in terms of the National Road Traffic Act, by no later than 5 August 2009.

(2) The Head of the Department of Transport for the Province of KwaZulu-Natal shall issue a temporary Professional Driving Permit upon the application referred contemplated in paragraph 1 above, being lodged.

(3) The aforesaid application under case number 6405/09 is withdrawn.

(4) Each party to pay its own costs.

(5) This is the entire agreement between the parties and no cancellation, variation, amendment or alteration of this agreement shall be of any force and effect unless, reduced to writing and signed by the parties and their lawfully appointed representatives.'

[6] The applicant subsequently lodged a referral of his application to the first respondent and was issued with a temporary PDP in accordance with the provisions of the settlement agreement of 31 July 2009. On 18 November 2009 the applicant's attorneys received a written notification from the Directorate, Road Traffic Inspectorate, Department of Transport, KwaZulu-Natal, advising him that his application was not approved because he was convicted of 'driving whilst under the influence of intoxicating liquor' on 25 July 2007 and that only two years and three months had then lapsed since the conviction and therefore did not satisfy Regulation 117(c) of the National Regulations.

[7] The decision of 18 November 2009 drove him to institute the second motion proceedings on 27 November 2009 in which he sought an interim relief pending the outcome of a review application (the second High Court application). On 14 December 2009 the matter served before Gorven J and in the hearing it became apparent that the second respondent had not yet furnished a recommendation whether the application should be re-considered in terms of the provisions of regulation 125(2) of the National Regulations. Consequently, the matter was adjourned sine die and the applicant undertook to take steps to ensure that the second respondent complies with the provisions of regulation 125(2) of the National Regulations.

[8] On 18 December 2009 he approached P Naidoo, the Manager of the second respondent in charge of the day to day management of the second

respondent. What transpired between him and Naidoo is a subject of a dispute between the parties. The applicant asserts that, whilst he was in Naidoo's office, there was a telephone conversation between Naidoo and Cedric Miya (Miya) of the office of the first respondent and Naidoo enquired from Miya as to what exactly was required of him (Naidoo) to do in the matter. Immediately after terminating the said telephone conversation with Miya, he (Naidoo) informed him that Miya had instructed him not to approve his application to the first respondent. These averments are denied by the first respondent. In the scheme of things, this dispute is not pertinent to the issues which require determination, and it is not necessary for me to express any definite view one way or the other. Importantly, on the same day the second respondent addressed a letter to the applicant advising him, inter alia, that in the light of his conviction of drunken driving on 25 July 2007, the provisions of regulation 117 of the National Regulations disqualified him from obtaining the PDP as all other applicants, who had been convicted of a similar offence, and concluded by advising him that his application was not recommended.

[9] On 12 January 2010 the applicant's attorney forwarded to second respondent his application in terms of regulation 125(1)(b) of the National Regulations which was accompanied by the second respondent's recommendation for the referral of the application for a PDP for a decision by the first respondent to determine whether or not a PDP may be issued to him. On 9 February 2010 the first respondent addressed a letter to the applicant's attorney which, inter alia, stated:

‘2. Cognisance has been taken of your representative and whilst this Department sympathise with your predicament, the Department has no legal basis upon which to grant you a Professional Driving Permit. In this respect, I refer you to Regulation 117 of the National Road Traffic Act, 1996 (Act No. 93 of 1996), which states that “A professional driving permit shall not be issued by a driving licence testing centre:

(a) …

(b) …

(c) If the applicant has, within a period of five years prior to the date of application, been convicted of or has paid an admission of guilt on -

(i) driving a motor vehicle while under the influence of intoxicating or a drug having a narcotic effect;

(ii) driving a motor vehicle while the concentration of alcohol in his or her blood or breath exceeded a statutory limitation.”

(3) In view of the above mentioned and the prescripts of the National Road Traffic Act 1996 (Act No 93 of 1996), I cannot accede to your application of granting Professional Driving Permit.

(4) Therefore in the exercising my discretion, your application is declined.’

[10] The applicant will again become eligible to re-apply for the renewal of a PDP on 25 July 2012 when the suspension period imposed on him by Regulation 117 of the National Regulations will expire.

Legislative Framework

[11] Section 91 of the Traffic Act provides:

'(1) The Minister may-

(a) delegate to any other person any power conferred upon him or her by this Act other than the power conferred by section 75; and

(b) authorise any other person to perform any duty assigned to the Minister by this Act,

and may effect such delegation or grant such authorisation subject to such conditions as he or she may deem fit.

(2) The MEC concerned may-

(a) delegate to any other person any power conferred upon him or her by or under this Act; and

(b) authorise any other person to perform any duty assigned to the MEC by or under this Act,

and may effect such delegation or grant such authorisation subject to such conditions as he or she may deem fit.

(3) Any delegation effected or authorisation granted under subsection (1) or (2) may at any time be withdrawn by the Minister or by the MEC concerned, as the case may be.'

[12] The third respondent has in terms of section 75 of the Act promulgated certain regulations to the Traffic Act. Regulation 125 provides:

'Referral of application to MEC

(1) If an applicant for a professional driving permit complies with all the requirements and conditions specified in the regulations but has-

(a) not been certified to be medically fit as referred to in regulation 117 (b); or

(b) within a period of five years prior to the date of the application, been convicted of an offence referred to in regulation 117 (c),

he or she may request the driving licence testing centre concerned to refer his

or her application to the MEC for a decision whether or not a professional driving permit may be issued.

(2) An application referred to the MEC for a decision shall be accompanied by the applicant's reasons why the application should be re-considered as well as a recommendation from the testing centre whether the application should be re-considered.

(3) If the MEC approves that a professional driving permit may be issued, he or she shall-

(a) ensure that such approval is recorded on the register of professional driving permits; and

(b) inform the driving licence testing centre concerned accordingly,

and the testing centre shall deal with the application in accordance with regulation 119.

(4) If the MEC refuses the application, the testing centre concerned and the applicant shall be informed accordingly.'

Locus Standi of minor children

[13] This application is also brought by the applicant in his capacity as the natural father and guardian of his two minor children. Mr Haasbroek, for the applicant, contends that the decision taken by the first respondent directly impacts on the care and well being of his two minor children. He continued to contend that the first respondent was obliged to take into consideration the provisions of section *9* of the Children's Act 38 of 2005. This section provides that '[i]n all matters concerning the care, protection and well being of a child the standard that the child's best interest is paramount importance must be applied.' As I understood Mr Haasbroek's argument, he sought to rely on the

phrase ‘concerning…a child’ and advocated for the interpretation that the first respondent ought to have considered the provisions of this section.

[14] Mr Moodley SC, for the respondents, disagreed. He contends that the phrase ‘concerning…a child’ must be given its ordinary literal meaning in accordance with the rules of interpretation and must therefore be read as meaning about a child or children or about the care, protection and well being of that child or those children. He argued that an application for a renewal of PDP is not an application that concerns a child nor is such application about the care, protection or well being of a child.

[15] Section 28(2) of the Constitution Act of the Republic of South Africa, Act 108 of 1996 provides that a child’s best interests are of paramount importance in every matter concerning a child and the similar provision is to be found in section 2(b)(iv) of the Children’s Act. The Children’s Act does not define the word ‘concerning’ when used in relation to the child. The shorter Oxford Dictionary on Historical principles defines the word ‘concerning’ as: ‘regarding, touching, in reference or relation to, about.’ Having carefully considered the matter, I incline to agree with Mr Moodley on this issue. I am mindful of the fact that the refusal of such a permit may adversely affect the interests of the applicant’s children. In my view, however, the children in their capacity do not have a right nor are they eligible to acquire a PDP. I would observe further that the applicant’s minor children do not have a vested legal interest in the relief being sought by him and therefore lack the necessary *locus standi* to institute these proceedings.

The Issues

[16] The first issue which requires determination is whether in the exercise of his discretion, the first respondent based his decision entirely on a wrong premise that he was not empowered to grant the application by virtue of the provisions of Regulations 117 of the National Regulations. The applicant contends that it is so and it is evident from the reasons he furnished for his decision and which are contained in annexure V to his founding affidavit. The applicant's approach which is in line with this contention is to be found on paragraphs 41 and 42 of his founding affidavit wherein he states:

'41 It would appear from the underlined words "… *the Department has no legal bases upon which to grant you a Professional Driving Permit*…" that the First Respondent approached the matter on the basis that he was constrained, in law, by virtue of the provisions of Regulation 117, either from considering my application or from deciding that a professional license be issued to me. In other words, because I was precluded from being issued with a permit by virtue of the provisions of Regulation 117, the First Respondent appeared to have dealt with the matter on the premise that he was not in law entitled to reconsider or "overturn" that position.

42. I have been advised that the approach followed by the First Respondent is wrong in law. I have been advised that, Regulation 125 (1) (b) provides that the matter be referred to the First Respondent for a "*decision whether or not a professional driving permit may be issued*." This process requires the exercise of a discretion after having considered all the relevant evidence. The First Respondent clearly has not exercised his discretion accordingly in reaching a conclusion.'

[17] The first respondent denied this approach and provided the following

answer to the aforementioned paragraphs:

‘46.1 I deny that I approached the application on the basis that I was constrained in law and specifically by the provisions of Regulation 117 to refuse the application.

46.2 I record that I am fully aware of the powers that I have to reconsider an application for a PrDP which has been previously refused and that I further have the discretion to overturn such decision upon good cause being demonstrated to me.

46.3 I record that I did indeed exercise such discretion in this matter but that in weighing up the information submitted by the Applicant including his personal factors and the interests of the public, the Department’s policy considerations, statistical information concerning intoxication as a cause of accidents, death and mayhem on our roads which information I am privy to in my capacity as MEC, the prescripts of the National Road Traffic Act and all other relevant information including the Affidavit deposed to by Schnell in the previous application as was before me, I exercised my discretion against the Applicant’s renewal of his PrDP. I should mention that I also took into account the applicant’s non disclosure of his previous convictions in annexure “TWM2” and the fact that he had a previous conviction for reckless and negligent driving.

46.4 The Department of Transport has embarked on a concerted programme spanning some two decades to curb the offence of drunken driving and related offences and their undisputed devastating consequences on the lives of the individuals involved, the community at large and its negative impact on the economy. Research indicates that an estimated 50% of people who die on South African Roads have a blood alcohol concentration level above the maximum permissible blood alcohol limit of 0, 05g per 100 millilitre. The Department, as part of its ongoing drive to curb offences lodged an Alcohol Evidential Testing Centre (AEC) in Pietermaritzburg on the 21st October 2009. I annex hereto a speech delivered by myself at the opening of the centre marked **TWM 4,** which sets out in greater detail the reasons and statistics that

prompted the establishment of that centre.

46.5 I further annex hereto the KZN Road Traffic Inspectorate's monthly crime statistics for the period 1st December 2009 to 31st December 2009 and for the period 1st January 2010 to 31st January 2010, marked **TWM 5** and **TWM 6**, respectively. The Court will note that for the first mentioned period reflected in Annexure TWM 5, the Inspectorate made 731 arrests for drunken driving and 395 arrests for the latter period as reflected in Annexure TWM 6. It must be emphasised that these are monthly figures and computes on average for a period of one year into approximately 5000 arrests for drunken driving alone.

46.6 It is also evident from these statistics that the prevalence of drunken driving offences escalates towards the end of the year and in particular over the festive period. It is not insignificant that the applicant's offence was committed on the 18th November 2006.

46.7 The Departments campaign against the commission of this offence has yielded progressive and significant results year on year and this is evident from comparative statistics taken over the same period of time. In this regard, I by way of illustration annex hereto a document which reflects comparative drunken driving arrests for various regions in KwaZulu-Natal for the Easter Vacation Period for the 2009 and 2010 year; marked Annexure **TWM 7**. It will be noted that the overall decrease in the number of arrests for drunken driving is more than fifty percent. In the circumstances I verily believe that the "Arrive Alive Campaign"; the "Zero Tolerance Campaign" and the soon to be introduced Points Merit System are all initiatives that are gradually managing to stem the tide against driving offences and in particular against drunk driving offences.

46.8 Moreover, I have recently commissioned an investigation into the feasibility of suspending or cancelling a driver's licence automatically upon that driver's conviction for drunken driving. Such an outcome necessitates legislative changes to Section 35 (3) of the Road Traffic Act in terms of which it is envisaged that it will become compulsory for the court to suspend or cancel such drivers licence upon conviction. I annex hereto a discussion document compiled at my request by the Manager of the Road Traffic Inspectorate, KZN

which deals with the issues involved in greater detail, marked Annexure **TWM 8**.'

[18] The record filed by the first respondent in terms of Rule 53(1)(b) of the rules of this Court reveals that before the first respondent made his decision on the matter he sought and was given a legal opinion on 3 February 2010 by the Manager: Legal Services. Paragraph 3 thereof sets out the factors which the first respondent was required to consider in the exercise of his discretion, and reads as follows:

'3. Facts to consider

3.1 The powers of upholding or dismissing the appeal vest with the MEC in terms of the NRTA;

3.2 Each case should then be decided according to its own merits, taking into account the attitude of drivers in the position of Mr. Sookraj (too quick to plead that they are the sole bread winners and that the decision not to grant PRDP is, in his view unethical and unconstitutional);

3.3 The number of road fatalities in the attributed to drunken driving or excessive alcohol levels in the blood is too high (Too many breadwinners are killed by the inconsiderate driving of one drunken driver);

3.4 The social standing of the Applicant; and

3.5 The Verulam Testing Ground's report (on whose jurisdiction Mr. Sookraj resides)'

In paragraph 4 thereof, the Manager: Legal Services concluded:

'4. Conclusion

4.1 It is recommended that the MEC consider the facts mentioned hereinabove in considering this Appeal in line with the provisions of Regulation 125 of the Act;

4.2 Consider the rights of Mr Sookraj in contrast those law abiding citizen killed on public roads by ill considerate drunken drivers; and

5. By virtue of the powers vested on the Honorable MEC, we are of the view that the MEC will be in the position to make an informed decision in this matter.'

[19] In my view, it is clear from the evidence presented by the first respondent that he did not adopt a one dimensional approach in the exercise of his discretion in the matter. I am therefore satisfied that the first respondent weighed up the information submitted by the applicant against the interests of the public, and correctly took into account the policy considerations of his Department, statistical information concerning intoxication as a cause of accidents, death on the roads, the prescripts of the Traffic Act and all other relevant information pertaining to his department on the matter.

[20] The second issue which requires determination relates to the report of the convictions in terms of Regulation 118(4) of the National Regulations which provides that If the driving licence testing centre is satisfied that the application is in order, it shall request the officer in charge of the nearest South African Police Station for a report of the convictions identified in Regulation 117(c) if any, recorded against the applicant and for the purpose of such report, any member of the South African Police Service may take the finger and palm prints of the applicant.

[21] The form on which the enquiry is recorded by the South African Police Service in terms of this regulation is called SAPS 91 (a). It is common cause that the applicant completed the SAPS 91 (a) which is annexure TWM2 to the first respondent's answering affidavit. Amongst the questions which the applicant was required to answer is the following: 'Have you ever been convicted of any offence? If so, state case, date and sentence.' The question appears immediately below the applicant's personal details, and he responded as follows, 'No'. The answer which was given by the applicant to the question was specifically endorsed by him in that he appended his signature alongside it confirming the correctness thereof.

[23] The answer was given against the backdrop of a computer printout from the Criminal Record Centre of the South African Police Service, demonstrating that on 29 December 1994 he was convicted of the contravention of section 120(1) of the Road Traffic Act 29 of 1989, and that on 25 July 2007 he was convicted of the contravention of section 65(2)(a) of the Traffic Act which conviction is the focus of this application. The applicant did not disclose the conviction of 25 July 2007 even though he completed annexure "TWM2" on 3 November 2008. The first respondent contends that from the applicant's answer an irresistible inference could be drawn that the applicant intended to conceal his previous convictions in the hope that they would have gone undetected by his Department. In the exercise of his discretion in terms of regulation 125 (2) this is one of the factors that he had to consider. In paragraphs 19.4 and 19.5 of his answering affidavit, he

expressed himself in this regard as follows:

'19.4 In the premises it would appear that the Applicant has not been honest in the completion of annexure "TWM2", alternatively in failing to correct the response referred to, by disclosing his previous criminal convictions. I can only presume that such non disclosure was motivated by the erroneous belief that annexure "TWM2" would not be forwarded to the respondents.

19.5 I should indicate that such an apparent demonstration of dishonesty was sufficient reason in itself for me to decline the Applicant's referral to me in terms of Regulation 125 for the renewal of his PrDP, but I did not do so on this ground alone and considered all the other relevant facts alluded to hereunder.'

[24] Pausing here further for a moment, I observe that the applicant did not deal with the circumstances under which he answered the question aforesaid as he did in his founding affidavit. It would seem, from the perusal and consideration of the papers, that the only time the applicant sought to provide an explanation on the issue is in paragraphs 36 and 37 of his reply affidavit where he states:

' 36.

I have no recollection that I was asked whether I had been convicted of any offense. If I had been asked that question I have no doubt that I would have answered in the affirmative. I recall that I was asked to sign at various places on the form which I did. I deny that anything was written in the space under hearing *"Have you ever been convicted of any offence etc.*" when I signed it. It was abundantly clear to me that my fingerprints would be taken for the purpose of conduction a criminal record search. To that end it would be ludicrous to declare that I have not been convicted when I knew full well that the search would reflect that I had been convicted.

37.

In any event, I respectfully submit that at the time when the First Respondent made the decision not to renew my permit it clearly did not take this evidence into

consideration at all for it simply decided the matter on the basis that it "… *has no legal basis upon which to grant …(me*) …a *Professional Driving Permit* …" as it stated in **annexure "V"** to my Founding Affidavit. I respectfully submit that, in annexure "V", the First Respondent clearly set out the reasons for its decision. The First Respondent clearly decided the matter on the basis that it was not "entitled in law" to even consider approving my application. The First Respondent is now simply purporting to create the impression that it had considered this "evidence" when it clearly had not.

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I further respectfully submit that the First Respondent should have given me an opportunity to respond to the "evidence" and had failed to do so.'

[25] In my view, the applicant's explanation aforesaid is drivel. The other factors which, in my view, militate against this explanation and drove me to agree with the submission by Mr Moodley that the applicant is not entirely honest can be gleaned from his affidavit in support of his request for a recommendation for him to be issued with PDP where, in his affidavit, he described himself as a sole breadwinner, contrary to the averments contained in his founding affidavit in these proceedings in which he records that his wife is also employed and earns a salary of R 2400 per month. This is further perpetuated by the applicant's attorneys during the address in mitigation of the sentence before the Magistrate in which he (the attorney) informed the Court on behalf of the applicant that he earned R 2000 per month as a driver, which was not correct.

[26] It is to be observed that, Regulation 117 of the National Regulations prescribes more onerous minimum requirements for an applicant for a PDP as opposed to an applicant for an ordinary driver's licence in view of the very real

risk that such driver would otherwise pose to innocent members of the public, be they motorists, passengers or pedestrians. This is evident in Regulation 117(aA) which prescribes the minimum age at which a person could be issued with PDP for categories 'P' and 'D' to be 21 and 25 years respectively. A category 'P' authorises the driving of a motor vehicle as referred to in regulation 115 (1) (a), (b), (c), (d), (e) and (g) of the National Regulation. In terms of regulation 117 (b) of the National Regulation such driver is required to be medically fit and in possession of a certificate by a health practitioner testifying to that fact, whilst Regulation 117 (c) (iii) and (iv) of the National Regulation will bar a driver from being issued with a PDP if he or she has been convicted of reckless driving or an offence involving violence.

To my mind, by enacting regulation 117 of the National Regulations, the legislature's intention was to protect members of the public from the risk and harm inherent in the conduct of those drivers who engage themselves in driving a vehicle whilst their blood alcohol content exceeds the legal limit. Clearly, the possession of PDP confers a privilege on the holder which requires of him to be more circumspect in ensuring that he does not engage in any conduct that would jeopardise such possession. It is apparent from the provisions of regulation 117 of the National Regulations that whether an applicant for a PDP has been convicted of an offence specified under Regulation 117(c) (i); (ii); (iii) or (iv), such conviction results in the same penalty or sanction in that such an applicant will not be issued with a PDP.

[27] In paragraphs 39 to 46 of his replying affidavit, the applicant deals with

his previous conviction of 29 December 1994 contending that was not a previous conviction because there is no such offence as reckless and negligent driving and that it could only have been reckless driving or negligent driving. Section 120(1) of the Road Traffic Act which was contravened by the applicant resulting in such previous conviction provides that no person shall drive a vehicle on a public road recklessly or negligently. I have considered this submission and in my view, the fact that the word 'and' instead of 'or' was used in the SAP 91 does not mean that the applicant did not commit the offence of either reckless or negligent driving. Interestingly, the applicant recalls the incident and sought to contend that it was a minor, that a summons was issued in relation thereto and delivered to his place of employment in his absence, that his employer decided to pay the admission of guilt fine of R 200 for and on his behalf whilst he was away but without his permission. He was not aware that the incident was recorded as a criminal record against him. Strangely, this explanation was raised for the first time in his replying affidavit. It is trite that the applicant must make his case in the founding affidavit and that, save in exceptional circumstances, he will not be allowed to make or supplement his case in his replying affidavit (see *Ponntas' Trustee v Cananas* 1924 WLD 6 at 68). This argument is untenable.

[28] The third issue which requires determination is whether the second respondent was obliged to indicate in his recommendation the factors that were taken into consideration in deciding not to recommend that the applicant's application for a renewal of his PDP be reconsidered. The decision of the second respondent constituted an administrative action as defined in

section 1 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and it was incumbent upon the applicant to request reasons in terms of section 5 of PAJA if he required same. Having carefully considered the matter, I incline to find that, there is no obligation on the first respondent to require a more detailed motivation for the recommendation made by Naidoo. It is clear to me that, it was the first respondent who was required to bring his mind to bear on the facts and information before him and to make an informed decision thereon.

[29] The fourth issue which requires the determination is whether there exists a conflict between section 34 of the Traffic Act and regulation 117 of the National Regulation. Mr Haasbroek argued that there is such a conflict, and submitted that the same presents itself in that the Magistrate who convicted and sentenced him considered all the facts pertaining to the matter (conviction of 25 July 2007) and found that it was not necessary to suspend or cancel his licence and permit. He thereafter proceeded to operate as a professional driver only to be arbitrarily disqualified from renewing his permit some sixteen months later by virtue of the provisions of regulation 117 (c) (i). It is to be observed that provisions of section 34 of the Traffic Act are of general application and it empowers a Magistrate, after holding an enquiry, to exercise his discretion to suspend or cancel a licence or permit. On the other hand, Regulation 117 of the National Regulations peremptorily directs a driver's licence testing centre not to issue an applicant with a PDP if he has been convicted or has paid an admission of guilt fine on any one of the offences referred to in Regulation 117 (c) of the Nation Regulations. Regulation 117 (c)

of the National Regulations specifies particular kinds of offences which disqualify an applicant from obtaining a PDP. In other words an applicant with a conviction for an offence specified in Regulation 117 (c) of the National Regulations is ineligible to be issued with a PDP unless a period of five years has lapsed from the date of his conviction. Mr Moodley is, in my view, correct when he stated that the regulation is aimed at ensuring that an applicant with a conviction is not automatically entitled to obtain a PDP from an administrative body such as a driving licence testing centre, unless the MEC approves of his application notwithstanding such applicant's previous conviction. The applicant's argument on this issue is unsustainable. To my mind this argument contains a subtle of confusion of thoughts because, Regulation 117 of the National Regulations serves to protect the public interest at the time that an application is made to an administrative body such as a driving license testing centre in the sense that it is barred from issuing a PDP to a driver who has been convicted of any of the offences specified in that Regulation whereas s 34 of the Act confers upon the Magistrate a judicial discretion to suspend or cancel a licence or permit, on conviction.

[30] The applicant's counsel in his argument referred me to certain provisions of section 6 of PAJA on which he contends further that the decision of the applicant is reviewable. I deal hereunder, in *seratiam*, with the provisions he referred me to.

<u>The action was materially influenced by an error of law Section 6(2)(d) of PAJA</u>

[31] I have pertinently dealt with this contention in paragraphs 16 to 19 of this judgment. In my view, to repeat the same will serve no purpose but only to instil boredom.

Lack of procedural fairness (Section 6(2)(c)) of PAJA

[32] The attack under this head is predicated on that the first respondent took into account a substantial amount of facts none of which were communicated to the applicant beforehand so as to enable the applicant to respond thereto. It was argued, on behalf of the applicant, that the facts taken into account constitute, in essence, all the negative facts based on which the application was refused. I have considered this submission. It seems to me that the regulation does not contemplate the situation where the first respondent, before exercising his discretion, would give notice to the applicant of what factors he intend taking into account in weighing up the information submitted to him by the applicant. It ought to be born in mind that the first respondent's portfolio dictates that he must have knowledge of public interests and policy considerations which he ought to take into account in the exercise of his discretion. In my view, that is the underlying reason why he is the ultimate arbiter on the matter.

That the action was taken because irrelevant considerations were taken into account or relevant considerations were not considered – Section 6(2)(e) (iii)

[33] The applicant's attack under this head is centred on the answer furnished by the applicant on annexure TWM 2 when he was asked 'Have you ever been convicted of an offence?' calling for the conclusion that the applicant had attempted to conceal his previous convictions, that this was a demonstration of dishonesty. Under paragraphs 20 to 27 of this judgment I have cogently demonstrated how the applicant's contention is unsustainable. Accordingly, no more need be said in this regard.

The decision was taken arbitrarily or capriciously – Section 6(2)(e(vii)

[34] The applicant's attack under this head is predicated on that, considering the overwhelming evidence placed by the applicant before the first respondent, he (first respondent) ought to have found that the applicant was a fit and proper person to be issued with a PDP and therefore ought to have exercised his discretion and issue a PDP to him. Mr Haasbroek submitted that the applicant poses no threat to the public and that the inference is inescapable that the decision was made arbitrarily or capriciously. Not so, argued Mr Moodley. He submitted that the first respondent exercised his discretion in the context of taking into account and weighing up of all the information submitted to him by the applicant, which included his personal factors, the interest of the public, the policies of the Department of Transport, statistical information concerning intoxication as a cause of accident, statistics of death toll on the country's roads, the prescripts of the National Road Traffic Act and all other relevant information in particular the evidence of Schnell in the previous application relating to this matter. In my view, if the argument of

the applicant was to be accepted, the entire process would amount to administrative incantation the mere stating thereof would satisfy the requirements and compel the first respondent to issue PDP.

That the action is not rationally connected to the information before the administrator - Section 6(2)(f)(ii)(cc) of PAJA

[35] The applicant contends that the facts put up by him, that show that he is not a danger to the public clearly outweigh those facts that show otherwise. It seems to me that this argument overlooks the fact that the overriding intention of the Legislature is to protect members of the public from those drivers who are prepared to drive a vehicle whilst the blood alcohol content exceeds the legal limit and from the risk and harm inherent in such conduct.

The first respondent's decision was so unreasonable that no reasonable person could have come to the same decision – Section 6(2)(h) of PAJA

[36] The applicant contends that the evidence put up by the applicant clearly shows that his conviction was a once off incident and that there is no possibility that he would either transgress in the same was or that he poses a threat to the public. Upon considering all the evidence, it was submitted, the conclusion was inevitable that the first respondent's decision falls under the abovementioned category of unreasonableness. I do not share the same sentiments as those expressed by Mr Haasbroek on this issue. The evidence of the first respondent is that his discretion is not exercised in *vacuo*. He took into account and weighing up the information submitted to him by the

Applicant he reached the decision that he arrived at. I am unable to fault him in this regard. In my view, the first respondent did take into account all the factors and struck a reasonable equilibrium between them before arriving at the decision. I am satisfied that the decision of the first respondent is a decision which any reasonable decision maker could have reached. I therefore cannot find any substance in the applicant's contention on this ground.

That the decision violates the applicant's right in terms of Section 22 of the Constitution – read with Section 33 (Disporportionality)

[37] Section 22 of the Constitution provides that every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law. The decision to refuse the applicant's application for a PDP infringes on his right to practice his occupation of a professional driver. The applicant found comfort for this contention in section 22 of the Constitution Act. This section provides that every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law. The limitation of rights is dealt with in section 36 of the Constitution. It is evident from the proper reading of section 22 read with section 36 of the Constitution that the right to choose a trade, occupation or profession cannot be limited but the practice thereof may be regulated by law. As Chaskalson P (in *S v Lawrence, S v Negal, S v Solberg* SA 1997 (4) SA 1176 para 33) said in similar circumstances (albeit in the form of section 26 of the interim

Constitution):-

'certain occupations call for particular qualifications prescribed by law and one of the constraints of the economic sphere is that persons who lack such qualifications may not engage in such occupations. For instance, nobody is entitled to practice as a doctor or as a lawyer unless he or she holds a prescribed qualifications, and the right to engage 'freely' in economic activity should not be construed as conferring such a right on unqualified persons; nor should it be construed as entitling persons to ignore legislation regulating the manner in which particular activities have to be conducted, provided always that such regulations are not arbitrary…'

The principle enunciated in this decision has been consistency followed by our Courts (see *Prince v President, Cape of Law Society and others* 2002 (2) SA 794 (CC) and *Food Corp (Pty) Ltd v Deputy Director – General, Department of Environmental Affairs and Tourism, Branch Marine and Coastal Management* 2004 (5) SA 91 (C)).

[38] It must be accepted that the Constitution does not mean whatever we wish to mean and, furthermore, that cases fall to be decided on a principled basis. Having carefully considered the applicant's contention on the issue, I incline to find that the relevant regulations do not infringe the rights in section 22 of the Constitution.

[39] Lastly, the applicant had in his papers initially sought the urgent relief in this matter but this point was wisely not persisted on before me.

<u>Costs</u>

[40] Having regard to the history of this matter, I am of the view that it is not necessary to depart from the general principle that the costs should follow the results. I do so mindful of the decision in *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC).

In the result the following order shall issue,

The application is dismissed with costs, such costs to include costs consequent upon the respondents' employment of two counsel.

Date of Hearing : 17 October 2011

Date of Judgment : 22 March 2012

Counsel for the Applicant : Adv. P. Haasbroek

Instructed by	:	Rajesh Hiralall Attorneys
Counsel for the Respondent	:	Adv. Y. N. Moodley SC
Assisted by	:	Adv. A Pillay
Instructed by	:	Cajee Setsubi, Chetty Inc.