REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: 7591/2017

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

DATE 17/04/18 SIGNATURE:

In the matter between:

MARAILE MASHABELA **APPLICANT**

AND

EXECUTIVE COMMITTEE OF BURGERSFORT

LOCAL AND LONG DISTANCE ASSOCIATION

AND 3 OTHERS **RESPONDENTS**

JUDGMENT

KGANYAGO J

[1] The applicant has brought this application on urgent basis. Part A of the application was struck off the roll on the 19th December 2017 due to lack of urgency. The applicant is now proceeding with Part B of his application. In Part B the applicant is seeking an order that the respondents' decision of the 29th October 2017 to suspend him indefinitely from operating his taxis with registration number CFJ 706 L and CGH 528 L on the routes allocated to the Burgersfort Local and Long Distance Taxi Association (BLLDTA) be reviewed and set aside. The Respondents are opposing the applicant's application.

[2] On the 8th March 2018, the applicant filed an application seeking leave to supplement his founding affidavit. The application for leave to file his supplementary affidavit was to be heard on the same date set down for the main application. However, on the date of the hearing, the applicant abandoned his application for leave to file his supplementary affidavit.

[3] The facts of the case are briefly as follows: The applicant is a member of BLLDTA. The applicant was subjected to a disciplinary hearing by the respondents. He was orally informed of the outcome of the hearing on the 29th October 2017. According to the applicant the

sanction imposed on him was indefinite suspension from operating his taxis on the routes allocated to BLLDTA.

[4] The applicant has attached a document to his founding affidavit which he alleges that it is the constitution of BLLDTA. According to the applicant, the respondents did not follow the procedures provided for in that constitution in disciplining him. He is therefore of the view that the disciplinary hearing held against him by the respondents was unfair and grossly irregular towards him as he was not given adequate notice for the hearing, he was not given a reasonable opportunity to make representations and that the complainant laid against him was not clear.

[5] The respondents does not dispute that the applicant is member of BLLDTA, and that he was subjected to a disciplinary hearing of which the sanction was that of a suspension. The respondent however dispute that the suspension was for an indefinite period of time. According to the respondents, the applicant was suspended for a period of 5 months with the option to pay a fine of R55 000-00. The respondents' alleges that the applicant was charged for inciting the members of BLLDTA to revolt against the executive committee, and

call for an early election. The respondents' alleges further that the applicant has collected R50-00 from each member of BLLDTA without authority or delegated powers from the executive committee.

[6] The respondents disputes that the document which the applicant has attached to his founding affidavit is their constitution. They have attached another document to their answering affidavit which they claim to be a constitution of BLLDTA. The respondents contends that the disciplinary hearing against the applicant was fair and further that if he was dissatisfied with the outcome of the hearing, he should have lodged an appeal as per their constitution.

[7] The respondents are raising an argument that the applicant has failed to lodge an appeal before he resorted on approaching the Court for the relief he is seeking. Basically what the respondents are stating is that the applicant has failed to exhaust the internal remedies before he embarked on his Court application. Both constitutions which have been submitted by the parties provide for an appeal process in case the aggrieved party is not satisfied with the outcome of the disciplinary hearing.

[8] Generally, the duty to exhaust internal remedies is not of itself absolute nor is it automatic. It is trite that a Court will condone a failure to exhaust internal remedies where available remedy is illusory or inadequate, or where it is tainted by the alleged illegality. Under common law, the two paramount considerations are whether the domestic remedies are capable of providing effective redress and whether the alleged unlawfulness undermines the internal remedies themselves.

[9] In **Koyabe v Minister of Home Affairs 2010 (4) SA 327 (CC)** at 343 A-B Mokgoro J said :

> *"The duty to exhaust internal remedies is therefore a valuable and necessary requirement in our law. However, the requirement should not be rigidly imposed. Nor should it be used by administrators to frustrate the efforts of an aggrieved person or to shield the administrative process from judicial scrutiny."*

[10] Even though the duty to exhaust internal remedies is not absolute, the aggrieved party is still bound to exhaust internal remedies prior to embarking on judicial review, unless the

aggrieved party can show exceptional circumstances to exempt him from this requirement. (See **Koyabe v Minister of Home Affairs and *supra* and Nichol and another v Registrar of Pension Funds and others 2008(1) SA 383 (SCA)).**

[11] Factors taken into consideration in determining whether exceptional circumstances exist are whether the internal remedy is effective, available and adequate. An internal remedy is effective if it offers a prospect of success and can be objectively implemented, taking into account relevant principles and values of administrative justice present in the constitution and our law; and available if it can be pursued without any obstruction, whether systematic or arising from unwarranted administrative conduct. An internal remedy is adequate if it is capable of redressing the complaint. (**See Basson v Hugo and others [2017] ZASCA 192 (01 January 2018))**

[12] The applicant alleges that the respondents in disciplining him have failed to comply with clause 13 and 14 of their constitution. However, in the very same clause 13 of the document that the applicant has attached to his founding affidavit, it provides for an appeal procedure for a member who has been warned, fined,

suspended or expelled, an opportunity to have his case reheard if he believes that fairness was not achieved during the original inquiry.

[13] The constitutions submitted by both parties have an appeal procedure. Even though there is a dispute as to which of the two is the legitimate constitution of the association, what is certain is that both constitutions provide for an appeal procedure. The dispute in relation to which is the legitimate constitution, in my view does not create a real and genuine dispute of fact since at this stage the Court must first determine whether the applicant's dispute is premature or not. Or it put it the other way round, was the applicant duty bound to exhaust internal remedies before he could initiate his review application. I have already pointed out that both constitutions provides for an appeal procedure and the dispute of fact of which is the legitimate constitution is therefore immaterial at this stage. In my view, it was incumbent upon the applicant to show that exceptional circumstances existed justifying him to approach the Court before exhausting internal remedies.

[14] In his replying affidavit the applicant is simply pointing out the differences that appears in both constitutions without stating

exceptional circumstances justifying his failure to invoke the appeal procedure. In his replying affidavit the applicant is further alleging that the constitution attached to the respondents' answering affidavit has an appeal procedure which is so vague and unenforceable to the extent that it is *void ab initio* through lack of certainty. However, he is not stating that he did not lodge the appeal procedure as the process provided in that constitution is vague, unenforceable and uncertain. The other problem which the applicant will encounter is that he is trying built his case in his replying affidavit. It is settled law that one is not permitted to build his case in the replying affidavit. His case should be set out clearly with sufficient particulars in his founding affidavit in order to enable the respondents to answer to the said allegations.

[15] Approaching a Court before a higher administrative body is given the opportunity to exhaust its own existing mechanisms undermines the autonomy of the administrative process. It renders the judicial process premature, effectively usurping the executive role and function of the higher administrative body. (See **Koyabe v Minister for Home Affairs** para 36).

[16] The applicant's review application has been brought in terms of Promotion of Administrative Justice Act 3 of 2000 (PAJA). In terms of section 7(2) (a) of PAJA, no Court or tribunal shall review an administrative action in terms of the Act unless any internal remedy provided for in any other law has first been exhausted. Section 7(2)(c) provides that the aggrieved party may be exempted in exceptional circumstances and on application from the obligation to exhaust any internal remedy if the Court or tribunal deems it in the interest of justice.

[17] PAJA compels the aggrieved party to exhaust internal remedies unless exceptional circumstances exists. In this case the applicant has failed to show any exceptional circumstances that exist to justify his failure to exhaust internal remedies. The applicant has also failed to apply and set out facts which should be considered as exceptional circumstances justifying an exemption from exhausting internal remedies. Therefore, in my view the applicant's application is premature, and it will not be in the interest justice to exempt him from exhausting internal remedies. In my view, on that point alone, the applicant's application stands to fail.

[18] In the result I make the following order:

18.1 The applicant's application is dismissed with costs.

MF KGANYAGO

JUDGE OF THE HIGH COURT OF

SOUTH AFRICA, LIMPOPO DIVISION

POLOKWANE

APPERANCES

1. For the Applicant	**:Adv B.Macdonald**
2. Instructed by	**:Pratt Luyt & De Lange Attorneys**
3. For the Respondent	**:Adv**
4. Instructed by	**:FM Maluleke Incorporated**
5. Date of Argument	**:14 March 2018**
6. Date of Judgment	: 18/04/18