IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)

CASE NO. 1661/2021

In the matter between:

TOTAL BRITE STAR SERVICE STATION CC	**Applicant**
and	
ENSPA TRADING COMPANY (PTY) LIMITED	**First Respondent**
SPARGS SELLA YE MOTO (PTY) LIMITED	**Second Respondent**
THE CONTROLLER OF PETROLEUM PRODUCTS, EASTERN CAPE	**Third Respondent**
THE MINISTER OF THE DEPARTMENT OF MINERAL RESOURCES AND ENERGY	**Fourth Respondent**

JUDGMENT

LAING J

[1] This is an application for leave to appeal in relation to a matter that involves the development and operation of a filling station at Ngcobo in the Eastern Cape. The parties will be described as they were in the main application.

[2] Previously, the applicant applied for an order, *inter alia*, staying the first and second respondents' exercise of their rights in terms of the site and retail licences granted to them by the third respondent. The court granted an order declaring that the effect of the third respondent's decision to grant the above licences was suspended, pending the determination of the applicant's appeal to the fourth respondent. No order was made regarding costs.

[3] The first and second respondents have sought leave to appeal against only those portions of the judgment that found that the appeal to the fourth respondent had the effect of suspending the third respondent's decision. The grounds for the application can be summarised as follows: the court erred by failing to interpret the Petroleum Products Act 120 of 1977 ('PPA') purposefully and by finding that there was nothing to rebut the presumption that the common law rule of automatic suspension applied; the court erred in not evaluating and finding that the nature of the procedure under section 12A of the PPA was a wide appeal, akin to a review; the court failed to consider the effect of sections 2A(c) and (d),[1] and 2B(3), such that the third respondent's decision was not suspended; and the court erred in failing to find that the effect of lodging an appeal under section 12A did not have the effect of suspending the third respondent's decision to issue site and retail licences.

[4] The provisions of section 17(1)(a) of the Superior Courts Act 10 of 2013 govern the basis upon which the application must be decided. They provide that leave to appeal may only be given where, *inter alia*, the court is of the opinion that the appeal would have a reasonable prospect of success or where there is some other compelling reason why

[1] It is assumed that the first and second respondents intended to refer to section 2A(1)(c) and (d).

the appeal should be heard. Consequent to the repeal of the Supreme Court Act 59 of 1959, it is generally accepted that a stricter test applies.[2]

[5] In the present matter, the first and second respondents have argued that section 12A gives rise to a wide appeal, akin to a review. The term, 'appeal', is sometimes used to describe what is essentially a review.[3] Hoexter and Penfold comment as follows:

> 'In the leading case, *Tikly v Johannes NO*,[4] Trollip J distinguished between two types of appeal, as well as a third type in which "appeal" denotes review. The first type, appeal in the wide sense (or simply wide appeal), is a complete rehearing and redetermination on the merits of a case, with or without additional evidence or information. This means that the appellate body is not confined to the record of the body *a quo*. With the second type, ordinary or narrow appeal, the rehearing on the merits is limited to the evidence on which the decision was originally given, and is thus restricted to the record of the authority *a quo*.'[5]

[6] For the meaning of 'appeal' when used within the context of what is, in substance, a review, it is helpful to consider Trollip J's observations:

> 'The word "appeal" can have different connotations. In so far as is relevant to these proceedings it may mean:
>
> …a review, that is, a limited re-hearing with or without additional evidence or information to determine, not whether the decision under appeal was correct or not, but whether the arbiters had exercised their powers and discretion honestly and properly…'[6]

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[2] See *The Mont Chevaux Trust (IT 2012/28) v Tina Goosen* (unreported, LCC case no. LCC 14R/2014, 3 November 2014), cited with approval in *The Acting National Director of Public Prosecution v Democratic Alliance* (unreported, GP case no. 19577/09, 24 June 2016. Furthermore, see *Notshokovu v S* (unreported, SCA case no. 157/15, 7 September 2016).

[3] This was firmly recognized in *Tikly v Johannes NO* 1963 (2) SA 588 (T), at 590F-591A, as discussed further.

[4] Ibid.

[5] Cora Hoexter and Glenn Penfold *Administrative Law in South Africa* (2022) 89.

[6] *Tikly v Johannes* (note 3 above).

[7] Returning to section 12A of the PPA, an appeal lodged in terms of sub-section (1) must be accompanied by: (a) a written explanation setting out the nature of the appeal; and (b) 'any documentary evidence upon which the appeal is based'. The contents of (b) indeed suggest that the provisions give rise to a wide appeal. However, it is not at all apparent that the provisions provide the fourth respondent with the functions and powers necessary to review the third respondent's decision. The text does not permit such a broad interpretation.

[8] The provisions of sections 2A(1)(c) and (d), and 2B(3), take the matter no further. They merely indicate, firstly, that the holding or development of a site and the retail of prescribed petroleum products are prohibited without a suitable licence. They indicate, secondly, that a licence issued by the third respondent remains valid provided that certain conditions, as stipulated, are met. There is nothing in the above provisions to rebut the presumption that the common law rule of automatic suspension applies when an appeal is lodged against an administrative decision.

[9] The court addressed the first and second respondents' arguments in paragraphs [48] to [59] of the judgment. It stands by its findings.

[10] The first and second respondents also contended, in argument, that the absence of any direct authority regarding the interpretation of section 12A meant that the matter warranted the attention of an appeal court. This constituted a compelling reason for why leave to appeal should be granted. The applicant, in contrast, pointed out that the first and second respondents did not rely on this as a ground for their application. In any event, it said, if the first and second respondents' contention was to be accepted then it would imply that leave would have to be given for a finding on any piece of legislation.

[11] Van Loggerenberg remarks that, as far as compelling reasons are concerned, the merits and the prospects of success remain vitally important and are often decisive.[7] A compelling reason includes the fact that the decision for which leave to appeal is sought involves an important question of law.[8]

[12] The relevant provisions of section 17(1)(a) of the Superior Courts Act 10 of 2013 should be understood as contemplating a situation where leave must be granted because the circumstances constrain or force or oblige the court to refer the matter to an appeal court for hearing. The reasons for the referral must be compelling. The threshold for an application of this nature is higher than before and a court cannot grant leave merely because it would be useful to ascertain, for example, whether an appeal court would find that a well-established principle of the common law finds application within the context of a certain piece of legislation, notwithstanding the findings already made by the court *a quo*.

[13] The present court is not persuaded that the first and second respondents have demonstrated that there are sufficient merits and prospects of success in the intended appeal proceedings. Based on the authorities considered in the judgment, a rebuttable presumption exists that the common law rule of automatic suspension applies when an appeal is lodged against an administrative decision, and the presumption can be rebutted to the extent that the empowering legislation indicates otherwise. The text of the PPA does not support the first and second respondents' argument that the effect of the third respondent's decision has not been suspended, pending the determination of the appeal to the fourth respondent.

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[7] DE van Loggerenberg *Erasmus: Superior Court Practice* (Jutastat e-publications, RS 18, 2022), A2-57. See, too, *Minister of Justice and Constitutional Development v Southern Africa Litigation Centre* 2016 (3) SA 317 (SCA), at 330C; and *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* 2020 (5) SA 35 (SCA), at paragraph [2].

[8] *Caratco* (note 7 above).

[14] The court made the above finding in its judgment. Such finding does not, in the circumstances, involve an important question of law that constrains, forces, or obliges the court to grant leave to the first and second respondents.

[15] Consequently, the following order is made:

(a) the application for leave to appeal is dismissed; and

(b) the first and second respondents are directed to pay the applicant's costs.

JGA LAING
JUDGE OF THE HIGH COURT

APPEARANCE

For the applicant:	Adv Venter,
Instructed by	IC Clark Inc,
	East London.
For the 1st and 2nd respondents:	Adv De La Harpe SC with Adv Watt,
Instructed by	Drake Flemmer & Orsmond Attorneys,
	East London.
Date of hearing:	03 May 2023.
Date of delivery of judgment:	06 June 2023.