IN THE NORTH GAUTENG HIGH COURT, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED. ✓

4/6/12
DATE SIGNATURE

(REPUBLIC OF SOUTH AFRICA)

CASE No. 60892/2011

4/6/2012

In the matters between:-

MALELANE GARAGE (PTY) LTD t/a MALELANE TOYOTA	First Applicant
M A S CORPORATION (PTY) LTD t/a MASCOR MALELANE	Second Applicant
DORCOM TRADING 199 (PTY) LTD t/a SASOL MALELANE	Third Applicant

and

ALZU PETROCHEMICALS 2 (PTY) LTD	First Respondent
TOPCOAT INVESTMENTS 15 (PTY) LTD	Second Respondent
TEDO BELEGGINGS 79 (PTY) LTD	Third Respondent
ME TSELISO MAQUBELA IN HIS CAPACITY AS CONTROLLER OF PETROLEUM PRODUCTS IN THE DEPARTMENT OF ENERGY	Fourth Respondent
MR VUSANANI DLAMINI IN HIS CAPACITY AS HEAD OF THE MPUMALANGA DEPARTMENT OF ECONOMIC DEVELOPMENT, ENVIRONMENT AND TOURISM	Fifth Respondent
TOTAL SOUTH AFRICA (PTY) LTD	Sixth Respondent

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

Van der Byl. AJ:-

.../...

[1] On 18 November 2011 I dismissed, with costs, including the costs of two counsel, an application by the Applicants for an interim order ordering the First, Second and Third Respondents to cease all retailing activities at both Nkomasi Toll Plaza filling stations, pending an application for review and setting aside of the site licences issued to the Second Respondent (**prayer 2.1.1**), an application to compel the Fourth Respondent to inform them of the status of the various applications made by the First Respondent (**prayer 2.1.2**) and, in the event of any licences having been granted to the Respondents, an appeal against each decision in terms of which any such licences were granted (**prayer 2.1.3**).

[2] In a Notice of Application for Leave to Appeal ("*the Notice*") filed on 9 December 2011 the Applicants seek leave to appeal against my judgment and order on 15 grounds specified in the Notice.

[2] On 21 May 2012, ie., two days before the hearing of this application, a notice entitled "*Additional Ground of Appeal*" was hand delivered at my chambers in which it is contended -

(a) that on 12 March 2012 the Fourth Respondent published a list of applications from which it appears that the Second Respondent on 17 August 2011 and 6 September 2011 applied for new site licences in respect of the filling stations in question, being a fact which was allegedly not disclosed to this Court by either the Second or Fourth Respondent and which was not known to the Applicants;

.../...

(b) that, therefore, the making and acceptance of these applications constitute admissions by the Second and Fourth Respondents that during August and September 2011 the Second Respondent was not in possession of valid site licences in respect of the two filling stations;

(c) that the Second Respondent was accordingly not entitled to have commenced with the construction of the filling stations in question and the First Respondent not entitled to have made application for or to have been granted a retail licence.

After counsel appearing on behalf of the Respondents noted their objection against the application to advance further evidence without having afforded the parties a proper and timeous opportunity to respond thereto, Ms. Janse van Nieuwenhuizen SC who appeared on behalf of the Applicants in this application withdrew the application and indicated that she would restrict the Applicants' application to the grounds set out in the Notice.

[4] To return to the Notice, the fact that the Notice was filed as far back as 9 December 2011 calls for an explanation why this application was enrolled for hearing only on 23 May 2012.

[5] At the time the Notice reached me, the judgment had not yet been transcribed. The transcribed version reached me on 17 April 2012. I was requested in an e-mail addressed to me by the Applicants' attorney of record on 16 February 2012 to hold over the allocation of a date for the hearing of the application as he was still communicating

with the Respondents' representatives whereafter they will ensure that I be provided with the court file timeously. On 11 May 2012 I received a letter from the Applicants' attorney of record requesting me to enrol the matter for 23 May 2012, being a date convenient to all the parties.

[6] Because of the delay of more than six months since I dismissed the Applicants' application, I asked counsel whether the Applicants have in the meantime lodged any review application as envisaged in **prayer 2.1.2** of the Notice of Motion or an appeal against any decision of the Fourth Respondent granting any licences applied for by the First Respondent as envisaged in **prayer 2.1.3** of the Notice of Motion.

[7] It would appear that no review application had been lodged because, so it is contended on behalf of the Applicants, they are first required to exhaust their internal remedies as provided in section 7(2)(a) of the Promotion of Administrative Justice Act, 2000 (Act 3 of 2000).

[8] As far as the Applicants' envisaged appeal against any decision taken by the Fourth Respondent is concerned, Ms Janse van Nieuwenhuizen informed me from the bar that such an appeal had been lodged on 24 October 2011 and that the appeal is still pending.

[9] This information, however, gave rise to a heavy debate between the parties as to whether or not this information forms part of the papers or whether or not this information is or can be substantiated.

.../...

[10] What is apparent from the founding papers is that the Applicants, not having been able to obtain copies of any applications for retail licences or temporary licences, on 25 September 2011 lodged objections against the granting of any retail licences or temporary retail licences to the First Respondent.

[11] As appears from the Respondents' papers -

(a) site licences were issued to the Second Respondent on 3 August 2010 and 15 December 2010;

(b) pending a decision on applications for retail licences submitted by the First Respondent on 17 August 2011 and 1 December 2011, temporary licences were granted on 17 October 2011 and 24 October 2011 (of which the Applicants were informed on 24 October 2011, being the date on which this application was launched).

[12] No indication is contained in any of the further papers filed by the Applicants, particularly, the Applicants' replying affidavit filed on 10 November 2011, that an appeal has in terms of section 12A of the Petroleum Products Act, 1977 ("*the Act*"), been lodged on 24 October 2011 or on any date thereafter. Such an averment was in my view, particularly, if regard is had to **prayer 2.1.3** in terms of which temporary relief was sought pending an appeal in terms of that section, a necessary averment.

[13] In terms of the said section 12A an appeal must be lodged within 60 days after

.../...

the decision in question has been made known to the affected person and must be accompanied by -

(a) a written explanation setting out the nature of the appeal;

(b) any documentary evidence upon which the appeal is based.

[14] The significance of these considerations is that, in so far as no appeal has been lodged within the prescribed period or a review has not been launched with the period of 180 days prescribed by the Promotion of Administrative Justice Act, 2000, is that any appeal on the dismissal of the Applicants' application for interim relief pending any such appeal or review will have no practical effect.

[15] For this reason alone the application for leave to appeal cannot in my view succeed.

[16] In the course of argument it became apparent that this application was restricted to the grounds set out in paragraphs 3, 4, 5, 10, 11 and 12 of the Notice in that I erred -

(a) not finding that the Applicants have a *prima facie* right to the relief sought (**paragraph 3 of the Notice**);

(b) not finding that the balance of convenience favoured the relief sought (**paragraph 4 of the Notice**);

.../...

(c) not finding that the Applicants have a reasonable prospect of success in appealing the decision of the Fourth Respondent to grant temporary retail licences to the First Respondent in terms of section 2B(5) of the Petroleum Products Act, 1977, in respect of filling stations that had never been in operation (**paragraph 5 of the Notice**);

(d) not attaching sufficient weight to the unlawful construction of the filling stations (**paragraph 10 of the Notice**);

(e) attaching too much significance to the fact that the filling stations were already in operation (**paragraph 11 of the Notice**);

(f) taking into consideration the situation of the third parties who were not before Court (**paragraph 12 of the Notice**).

[17] As is apparent from the grounds set out above, no reasons appear from the Notice why it is contended that I erred in these respects which cast serious doubts on the validity of the Notice (see: ***Tzouras v SA Wimpy (Pty) Ltd 1978 (3) SA 204 (W) at 205E; S v Maliwa and Others 1986 (3) SA 721 (W) at 726E; Molebatsi v Federated Timbers (Pty) Ltd 1996 (3) SA 92 (B) at 94I; Songomo v Minister of Law and Order 1996 (4) SA 384 (E) at 385I***; ***Van der Walt v Abreu 1999(4) SA 85 (W) at 94E***). In the absence of any reasons why it is contended that I erred in the respects raised in the Notice, I was left completely in the dark to determine exactly the bases on which it is contended that I so erred. The majority of the grounds raised are in any event

.../...

misconceived.

[18] In the event of I am being wrong in this regard, I will now turn to the grounds raised in support of the application.

[19] **Firstly**, I find it convenient to first deal with the contention that I erred in holding that the balance of convenience favoured the Respondents. In this regard I held, as is apparent from my judgment, considering the dire consequences various entities who are not parties to these proceedings (such as, Steers and Mugg & Bean, conducting business on the premises, the approximately 130 employees appointed by Alzu to serve at the filling stations and the other facilities conducted by it on the premises) and the First, Second and Sixth Respondents will suffer if an interim order is granted, the interests of the Respondents and the other persons concerned by far outweigh the interests of the Applicants.

Ms. Janse van Nieuwenhuizen submitted that the arrangements which were made and which had given rise to the consequences which weigh heavily against the interests of the Applicants were made before the temporary retail licences were issued and that, therefore, the Respondents were the authors of their own situation..

This is in my view an unrealistic submission.

As appears from the provisions of the Act a retail licence or temporary retail licence is not issued together with the issue of a site licence. The holder of a retail licence must

obviously make, in preparation of its envisaged business, various investments most of which resulted in the respects on which the balance of convenience was determined. In any event many of the persons who will be affected by the interim order the Applicants sought were not parties to the application to whom the submission made in this regard cannot apply.

I accordingly fail to see how another Court may on this finding come to a different conclusion.

[20] **Secondly**, the submissions made in relation to my finding on the Applicants' *prima facie* case.

Relying on the unreported judgment of Botha J delivered in this Court in the case of ***Up & Under Motors and Another v The Controller of Petroleum Products and Another*** under Case No. 9365/07 on 30 March 2007 and on the decisions in ***Apleni v Minister of Law and Order and Others 1989(1) SA 195 (A) at 200I-201D*** and ***Zulu v Minister of Defence and Others 2005(6) SA 446 (T)***, Ms. Janse van Nieuwenhuizen submitted that a Court considering an application for interim relief does not have to make a final determination on a legal issue in dispute. The question in this matter is accordingly, so it was submitted, whether I should have held that, on an interpretation of the provisions of section 2B(5) of the Act, the issue of the temporary retail licences in this matter were on a *prima facie* basis unlawfully issued.

In my judgment I refrained from taking any decision on the precise interpretation to be

assigned to that section because, so I held, it would anticipate any decision to be taken on the envisaged appeal in terms of section 12A of the Act. In having held that I should not pronounce upon the interpretation of that section it was my perception that the section is not capable of having a *prima facie* interpretation. The contentions now raised had not been raised and argued in the proceedings *a quo*. Now that it has been raised in these proceedings I am bound to consider whether I should have approached the Applicants' alleged *prima facie* right on that basis.

I have read the judgments in the cases of ***Apleni, supra,*** and ***Zulu, supra***, but was unable to find any support for this submission in those decisions as the legal issues involved did not relate to a dispute on the interpretation of any statutory provision. In the ***Up & Under Motors case*** the question with which Botha J was concerned was whether in the application of certain facts to the provisions of section 12B of the Act a certain contractual practice are unfair or unreasonable.

I accordingly find no support in these cases for the submission made.

[21] This is accordingly in my view a case, as I have held in my judgment, where the balance of convenience by far overshadows the interests of the Applicants who merely wish to bring a multimillion rand business to a standstill with dire consequences to all persons and instances involved whilst challenging (in terms of an appeal that had not yet been lodged) on appeal the validity of licences issued more than six months ago in order merely to protect their own businesses in Malelane from competition situated 11 kilometres from the filling stations.

.../...

[22] For these reasons I am unpersuaded that this is a case where another Court may come to a different conclusion.

In the result the application is dismissed with costs, including any costs, if any, that may have been incurred in respect of the application to submit further evidence and, where applicable, the costs of two counsel.

.....
P C VAN DER BYL
ACTING JUDGE OF THE HIGH COURT

ON BEHALF OF APPLICANTS **ADV. N JANSE VAN NIEUWENHUIZEN SC**

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.../...

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DATE OF HEARING	23 May 2012
JUDGMENT DELIVERED	4 June 2012