**IN THE NORTH GAUTENG HIGH COURT, PRETORIA**

**(REPUBLIC OF SOUTH AFRICA)**

~~**Case No: 6307/11**~~

**Appeal Case No: A543/12**

30/4/2014

**DELETE WHICHEVER IS NOT APPLICABLE**

**(1) REPORTABLE: YES / ~~NO~~**

**(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO~~**

**(3) REVISED: ~~YES~~/NO**

30/04/14
**DATE** **SIGNATURE**

*In the matter between:*

| | |
|---|---|
| **NINE NINE NINETY NINE PROJECTS (PTY) LTD** | 1st Applicant |
| **GT ATLAS STATION CC** | 2nd Applicant |
| and | |
| **THE MINISTER: DEPARTMENT OF ENERGY** | |
| **NATIONAL GOVERNMENT** (formerly known as | 1st Respondent |
| **THE DEPARTMENT OF MINERALS AND ENERGY**) | |
| **THE CONTROLLER OF PETROLEUM PRODUCTS** | 2nd Respondent |
| **TARGA REEF INVESTMENTS 10 CC** | 3rd Respondent |

**JUDGMENT**

**MAKHUBELE AJ**

**INTRODUCTION**

[1] This is an appeal, with leave of the Supreme Court of Appeal[1], against the whole judgment and cost order of the court a quo made by Vorster AJ on 16 February 2012 in terms of which the application launched by the appellants to review and set aside the refusal and appeal thereof by the first and second respondents respectively of its application for a site and retail licence in terms of the Petroleum Products Act, Act 120 of 1977, as amended was dismissed and appellant was ordered *"to pay the costs of the First, Second and Third Respondents jointly and severally, taking into account that the employment of senior counsel was justified"*[2]

[2] The review application (as well as this appeal) was opposed by the third respondent ("Atlas Service Station"). It appears from the judgment of the court a quo that there was appearance for the first and second respondents (though they did not file papers) when the matter was argued. We do not have the benefit of the essence of their submissions on the merits of the review and costs, save what is stated in the judgment that they *"informed the Court that they abide by the decision of the Court, but nevertheless they insisted that their respective decisions were correct and that the Applicant should pay their costs of the hearing"*.

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[1] Case No: 310/12, per Lewis et Pillay JJA
[2] paragraph 11 of the judgment

**THE FACTUAL MATRIX**

**Application for site and retail licences**

[3] The facts that gave rise to the dispute are largely common cause and are summarized hereunder in chronological sequence.

[4] The first appellant applied for and was granted authorization and on 30 August 2007 in terms of the Environment Conservation Act, Act 73 of 1989 by the Department of Agriculture, Conservation and Environment to develop a filing station on remainder of erf 765 Bonaero Park, Kempton Park.

[5] On 23 October 2008, the first and second appellants simultaneously submitted their respective applications for a site and retail licence to the Controller.

The Controller on or about 20 October 2009 refused both applications.

[6] The reasons given for the refusal of the site licence application is that the application for the retail licence was declined.

This is apparently in accordance with the provisions of section 2B (3)(c) of the Act, which provides that a site licence remains valid for as long as there is, a corresponding retail licence.

[7] In a letter dated 20 October 2009, the Controller gave two (2) reasons for refusal of the retail licence application.

(a) It was established during a site visit conducted on 06/03/2009 that there is a filling station 100 metres apart from the proposed site. This, according to the Controller, would not "*promote efficient retailing, instead will take volumes from existing retailer*"

(b) An objection was received , assessed against the facts, the Act and Regulations and was found to be valid.

**Appeal to the Minister**

[8] In their undated notice, the appellants raised, amongst other grounds, a point in limine with regard to failure by the Controller to give them an opportunity to respond to the objection that was apparently lodged by the third respondent.

The objection had an impact on the decision reached, and as such, they argued, the rules of natural justice should have been applied by giving them an opportunity to be heard.

[9] The site licence application was rejected on a technical basis in that in terms of the Act there cannot be a valid site licence without a valid retail licence. The appellants' argument in this regard is that if the appeal on the refusal to grant the retail licence succeeds, then the site licence should be granted too.

[10] Other than the point in limine, **the grounds of appeal** with regard to the refusal to grant the retail licence are:

(a) There is no definition of the word ***"Efficient retailing"*** in the Act or its subsequent amendment. The appellants argued that in order to determine the true meaning of the word/phrase, one has to look at intention of the legislature by examining the objects of the Act, Parliamentary Discussions, White Papers and Industry Debates.

The documents referred to were not attached to the appeal documents or proceedings before the court a quo.

However, the appellants' argument (after referring to the White Paper on Energy Policy of the Republic of South Africa, Medium – term Policy Priority: Objective 3) is that:

(i) The development of a new filling station nearby an existing one cannot be a reason to deny the application unless there is proof of direct and substantial impact on the existing site.

(ii) There must be a balance between the needs of an existing site and a new one as well as those of the consumers. There are compelling interests of the appellants and the community that should be guarded by the department. The traffic volumes on Atlas Road, the extensive developments in the immediate vicinity of the proposed new site are indications that a new filling station is warranted.

(b) With regard to the ground of appeal based on the ***"Perceived hardship of the BP Bonaero Site"***, the appellants argued that:

(i) *"The BP entrance and exit directly off Atlas Road was closed off by the Department of Roads and Transport, when Atlas Road was upgraded as part of the Blue IQ Project.*
*We have been informed that the retailer received and possibly BP South Africa as well, extensive financial compensation for the actual and future loss of income due to the closure of their entrance/exit off Atlas Road"*

(ii) The appellants further argued that if the BP site has diminished sales, it is due to the closure of its access to Atlas road for which it has been compensated and not the new development (appellants').

(c) Appellants further argued that it followed proper EIA processes, and despite objections by the BP site, it was issued with authorization to develop the site by the Department of Agriculture, Conservation and Environment.

(d) The upgrade of Atlas Road as part of the external road infrastructure will increase traffic volumes and the proposed site is the only one with direct access to this road.

(e) Future residential and commercial expansions in the surrounding area were also mentioned as positive factors that would increase traffic volumes, hence a need for the proposed site.

(f) Other grounds of appeal flirtingly mentioned are: facilitating an environment conducive to efficient and commercially justifiable investment, creation of employment opportunities and development of small businesses in the petroleum sector, ensuring countrywide availability of petroleum products at competitive prices, promoting access to affordable petroleum products by low-income consumers for household use, promotion of ubuntu principles.

[11] The decision of the Minister was communicated to the appellants by letter dated 13 August 2010. The relevant parts read as follows:

*" After careful consideration of all the facts and arguments presented before me, including the arguments presented in the appeal, I hereby confirm the decision of the Controller of Petroleum Products to refuse your clients' aforementioned applications for a site and retail licence.*

*The reasons for my decisions are that the new proposed retailing business will not promote an efficient retailing petroleum industry and facilitate an environment conducive to efficient and commercially justifiable investment.*

*A site visit was conducted during which it was established that the proposed new site and retail activity is less than 800 metres from an existing service station and will take away substantial volumes from the existing service station and thus compromise the objectives set out in section 2B (a) and (b) of the Act. Notwithstanding evidence of growth patterns including he expansion of residential and commercial areas, the area in which the site is proposed is well serviced.*

*Section 2B(3)(c) of the Act provides that* ***" any licence issued by the Controller of Petroleum Products remains valid for as long as , in the case of a site, there is a corresponding valid retail licence.****". In view of the above, the decision of the Controller of Petroleum Products to refuse the application for the site licence is justified."*

[12] The reasons for the decision of the Controller are captured in an internal memo dated 26 April 2010 addressed to the Acting Director: Legal Services.

(a) The Controller stated, without substantiating, that the applicants did not satisfy the requirements (a-e) in section 2B.

(b) The close proximity (800 metres apart) between the proposed site and the existing station was given as the reason for the finding that the former will not promote an efficient retailing petroleum industry and facilitates an environment conducive to efficient and commercially justifiable investment . In this regard, the following factors were taken into account:

(i) The prices in petroleum industry are regulated; as such the proposed site will take sales volumes from the existing filling station because the latter has no access to Atlas road.

(ii) Both service stations will service the same market and because the proposed site is conveniently located at the

entrance /exit of Bonaero Park, the existing one will be rendered *"in-efficient"*.

(iii) The drop in sales will render the existing filling station not feasible and sustainable.

(iv) The Controller has a mandate to ensure a sustainable petroleum industry. Approval of the proposed site will render retailing in the area inefficient because the existing retailer *"will have to minimize his work force, people will lose jobs this will be contradiction with the aforementioned objective (c) of the Act"*.

(v) On why the objection was not made available to the appellants, the Controller indicated, amongst other things that :

> *"The Petroleum Controller's office is of the view that the appellant could not have proved that the new site will not take liters away or will not have a major impact on the existing site."*

(vi) The Controller indicated further that expansion of residential and commercial areas " *does not necessarily call for a new service station, it's not like they are not catered for. There are other service stations in the area, an Engen site about 4km up Atlas road from the proposed site and a Caltex site further up the Atlas road. Generally the area is well serviced.*

*(vii)* The Controller concluded by stating that *"There must be consistency in the Petroleum Controller's decision making, if the applicant's licence gets granted, the Petroleum Controller will be setting a precedent which will have to apply in all similar cases in future".*

[13] It appears from the submissions addressed to the Minister dated 06 August 2010 that the reasons provided by the Controller were used as a basis for the recommendation that the decision of the latter be confirmed. The reasons of the Controller were simply packaged into headings to suit the requirements of each subparagraph of section 2B of the Act.

[14] The inspection that was conducted and referred to in both the Controller and the Minister's decision was conducted on Friday 06 March 2009 by one **Ms Kholofelo Komane**. The appellants have challenged the factual findings thereof. I will revert to it later.

**THE LEGISLATIVE BACKGROUND**

[15] Section 2A(1) of the Petroleum Products Act, Act 120 of 1977[3] ("the Act") provides, amongst other things that:

> *A person may not—*
>
> *(a)* .....
>
> *(b)* .....
>
> *(c) hold or develop a site without there being a site licence for that site;*
>
> *(d) retail prescribed petroleum products without an applicable retail licence by the Controller of Petroleum Products.*

[16] Section 2B of the Act, titled ***"Licensing"*** provides, amongst other things that:

> *(1) The Controller of Petroleum Products must issue licences in accordance with the provisions of this Act.*
>
> *(2) In considering the issuing of any licences in terms of this Act, the Controller of Petroleum Products shall give effect to the provisions of section 2C and the*

[3] as amended by Act 58 0f 2003

*following objectives:*

*(a) Promoting an efficient manufacturing, wholesaling and retailing petroleum industry;*

*(b) facilitating an environment conducive to efficient and commercially justifiable investment;*

*(c) the creation of employment opportunities and the development of small businesses in the petroleum sector;*

*(d) ensuring countrywide availability of petroleum products at competitive prices: and*

*(e) promoting access to affordable petroleum products by low-income consumers for household use.*

*(3) Any licence issued by the Controller of Petroleum Products remains valid for as long as—*

*(a) .....*

*(b) .....*

*(c) in the case of a site, there is a corresponding valid retail licence.*

[17] Section 2C, titled ***"Transformation of South African petroleum and liquid fuels industry "*** provides that:

*(1) In considering licence applications in terms of this Act, the Controller of Petroleum Products shall—*

*(a) promote the advancement of historically disadvantaged South Africans; and*

*(b) give effect to the Charter.*

*(2) The Controller of Petroleum Products may require any category of licence holder to furnish information, as prescribed, in respect of the implementation of the Charter.*

[18] Section 3 of the Act, titled ***"Appointment and powers of controllers and inspectors" provides that:***

*(1) The Minister—*

*(a) shall, subject to the laws governing the public service, appoint any person in the public service as Controller of Petroleum Products and appoint persons in the public service as regional controllers of petroleum products or as inspectors for the Republic or any part thereof;*

*(b) may on such conditions and at such remuneration as he or she may in consultation with the Minister of Finance determine, appoint or authorise any other person or person belonging to any other category of persons to act as regional controller of petroleum products or as inspector for the Republic or any part thereof.*

*(2) Subject to the provisions of this Act, the Controller of Petroleum Products, a regional controller of petroleum products and an inspector-*

*(a) may assist the Minister in the exercise of his powers and the performance of his functions under this Act;*

*(b) may gather such information in connection with the operation or administration of this Act as the Minister may desire, and investigate any offence relating to this Act.*

*(3) The Minister shall, subject to the provisions of this Act, determine the powers, duties and functions of the Controller of Petroleum Products, a regional controller of petroleum products and an inspector, and different powers, duties and functions may thus be determined in respect of different persons or categories of persons appointed or authorised under subsection (1).*

[19] Section 12A deals with *Appeals* ***against decisions of the Controller*** *and reads as follows:*

*(1) Any person directly affected by a decision of the Controller of Petroleum Products may, notwithstanding any other rights that such a person may have, appeal to the Minister against such decision.*

*(2) An appeal in terms of paragraph (a) shall be lodged within 60 days after such decision has been made known to the affected person and shall be accompanied by—*

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

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

*(3) The Minister shall consider the appeal, and shall give his or her decision thereon, together with written reasons therefor, within the period specified in the regulations.*

[20] In terms of section 12C, the Minister may, in addition to any other regulatory powers make **Regulations regarding, amongst other things** the

form and manner in which an application for a licence or an amendment to an already issued licence shall be made and the procedures to be applied in the evaluation of an application for a licence, and the period within which it shall be considered;

[21] The procedure for application of site and retail licences is prescribed in the ***"REGULATIONS REGARDING PETROLEUM PRODUCTS SITE AND RETAIL LICENCES"*** in terms of the Petroleum Products Act, 1977 (Act No. 120 of 1977, Promulgated and published in Government Gazette R286 of 27 March 2006 ("the Regulations")

[22] Regulations 3 and 15 prescribe the manner, documents and information that must be provided to the Controller in respect of applications for site and retail licences respectively.

[23] In terms of Regulation 16(4), both site and retail licence applications must be submitted simultaneously.

[24] Regulations 6 reads as follows:

*"Evaluation of site licence application*

6. *(1) In evaluating an application for any site licence, the Controller must, subject to sub regulation (2), verify that-*

*(a) the information and the documents submitted with the application form are true and correct; and*

*(b) the notice contemplated in regulation 4(1) was published.*

*(2) In the case of an application for a site licence made by a person in respect of whom section 2D of the Act is not applicable, the Controller must be satisfied that-*

*(a) there is a need for a site; and*

*(b) the site will promote the licensing objectives stipulated in sections 2B(2)of the Act.*

[25] Regulation 18 reads as follows:

***"Evaluation of a retail licence application***

*18. (1) In evaluating an application for any retail licence, the Controller must, subject to sub regulation (2), verify that-*

*(a) the information and the documents submitted with the application form are true and correct; and*

*(b) the notice contemplated in regulation **16(1)**was published.*

*(2) In the case of an application for a retail licence made by a person in respect of whom section 2D of the Act is not applicable, the Controller must be satisfied that-*

*(a) the retailing business is economically viable; and*

*(b) the retailing business will promote licensing objectives stipulated in section **2B(2)** of the Act.*

*(3) In determining the economic viability contemplated in sub regulation **(2)(a)**, the Controller must be satisfied that the net present value has been correctly calculated and is positive.*

[26] Section 2D of the Act is a transitional provision that only applies to persons who at the time of commencement of the Petroleum Products Amendment Act 2003 held and were in the process of developing a site or manufactures or wholesales petroleum products, or retails prescribed petroleum products.

[27] This section is not applicable to the appellants.

**PROCEEDINGS BEFORE THE COURT A QUO**

[28] Appellants launched motion proceedings to review and set aside the refusal of the applications and appeal thereof by the first and second respondents respectively of their applications for a site and retail licence in terms of the Petroleum Products Act, Act 120 of 1977, as amended.

They also sought an order that the licence applications be granted, alternatively that the appeal be referred back to the Minister for reconsideration.

**Grounds of review and judgment of the court a quo**

[29] The grounds of review are basically the same as those that were presented to the Minister in the appeal. I will not repeat them here.

[30] The third respondent is the existing site referred to in the decisions of both the Controller and the Minister.
It filed an opposing affidavit and mainly defended the decisions of the first and second respondents.

[31] In his judgment, Vorster AJ accepted that the decisions of the first and second respondents constitute administrative action and are thus subject to review in terms of the Promotion of Administrative Justice Act, (PAJA).

[32] The court a quo considered the merits of the attack on the decisions on procedural grounds, that is, failure by the Controller and the Minister to afford the appellants a hearing with regard to the objection.

This ground of attack was rejected on the basis that the appeal before the Minister was a hearing de novo, and as such, the appellants were afforded an opportunity to deal with and they did address the objection.

[33] Vorster J also dismissed the contention that the first respondent misdirected itself on the issue of the impact of the proposed new site on the existing filling station. The fact that third respondent lost access and was compensated for it is of no consequence according to the court a quo.

It went on to state that *"It is purely a question of fact what the impact of the proposed filling station of the Applicants adjacent to Atlas Road would have on the facility of the Third Respondent in its present location. The applicants themselves say that the impact is some 50 000 liters of fuel per month, which might well be material to a person in the position of the Third Respondent.*[4]

[34] It appears from the judgment that appellants requested the court a quo to make a finding that the first respondent failed to consider all relevant facts properly or sufficiently, in particular certain developments that were specifically mentioned by the appellants.

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[4] paragraph 9, from line 22.

The court a quo refused to make such a finding and stated the following:

> *"In its reasons for decision the First Respondent does not say whether it did or did not consider the abovementioned aspects alleged by the Applicants. In the absence of any evidence in that regard, what remains to be considered is the inference that the First Respondent did not consider those aspects. Such inference is not justified on the facts of this case and I cannot make such a finding"*[5]

**THE APPEAL TO THIS COURT**

[35] The court a quo dismissed the appellants' application for leave to appeal on 30 March 2012. Leave to appeal was subsequently granted by the Supreme Court of Appeal on 03 July 2012.

[36] It is clear from a reading of the decision of the Minister that the retail licence application was refused on two grounds, namely that *the new proposed retailing business will not promote an efficient retailing petroleum industry and facilitate an environment conducive to efficient and commercially justifiable investment.*

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[5] Paragraph 10 of the judgment

[37] Reference to section 2B (a) and (b) of the Act in the decision of the Minister should actually be section **2B(2)(a) and (b)** which reads as follows:

> "2B*(2) In considering the issuing of any licences in terms of this Act, the Controller of Petroleum Products shall give effect to the provisions of section 2C and the following objectives:*
>
> *(a) Promoting an efficient manufacturing, wholesaling and retailing petroleum industry;*
>
> *(b) facilitating an environment conducive to efficient and commercially justifiable investment;*

[38] Therefore, the Minister and the Controller relied on the distance between the proposed site and the existing filling station as well as the alleged taking of sales volumes as factors to be taken into account in assessing whether the new proposed retailing business will promote an efficient retailing petroleum industry and facilitate an environment conducive to efficient and commercially justifiable investment.

[39] The appellants' view, from a reading of their papers and argument is that there are other factors and these were not properly or sufficiently

considered by the court a quo that would have proved that its proposed facility does comply with the requirements of section 2B.

These are[6]:

(a) The proposed facility will be the only facility within an 8 Kilometre stretch along Atlas Road;

(b) The impact on third respondent is a decrease of turnover of approximately 18% or not more than 50,000 liters per month.

(c) The evidence presented by the Traffic Engineer on behalf of the Appellant, Mr Schreus that the facility had excellent potential and shall constitute a sustainable development.

(d) The contents of the Site Motivation Report,

(e) High volumes of traffic travelling on Atlas Road,

(f) Market study undertaken by the petroleum group, Engen which found the site to be very favorably situated and that as a

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[6] Notice of appeal

result of substantial residential developments along Atlas Road to have tremendous potential,

(g) New developments in the immediate area creating a further need for petroleum products,

(h) It was mere speculation that the facility of the third respondent would be left uneconomical or unsustainable by the approval of the appellants' retail licence application.

(i) The objection filed by the third respondent was similar to the one it filed with the Department of Agriculture, Conservation and Environment and that it was dismissed.

(j) In terms of the Environmental Management Act, 107 of 1998, economic sustainability of the proposed facility as well as the existing facility had to be considered by environmental authorities before granting the Environmental Authorization.

(k) The Environmental Authority of Gauteng did make a finding that both facilities would be sustainable even if the appellants' were approved.

(l) Sustainability does not outlaw competition and that there is no guarantee of monopoly by one owner.

(m) The decision was influenced by wrong facts, such as that there are several other competing facilities that can render the same service to the traffic on Atlas Road.

[40] During oral argument, this court made it clear from the outset that the appeal before it is about the misdirections, if any, of the court a quo. This is so because there is a distinction between an appeal and a review and this court is neither a court of first instance nor the decision-maker. The court did not have the benefit of a transcript of record of proceedings, as such we do not know what was placed before the court a quo.

Submissions were also made on behalf of the first and second respondents, but we do not know what those are and there was no appearance.

The judgment of the court a quo dealt with two issues only, namely,

(a) The attack on the decisions of the Controller and the Minister based on alleged procedural irregularity due to their failure to afford the appellants an opportunity to comment on the objection by the third respondent;

(b) The impact that the proposed facility would have on the third respondent's existing filling station. The enquiry here was limited to the closure of the access road and the loss of sales volume.

[41] This court would have benefited from the submissions of the first and second respondents' counsel, but as it turned out there was no appearance.

**Submissions on behalf of the appellants**

[42] Mr Erasmus, on behalf of the appellants was invited by the court to go through the Layout Plan of the proposed access to the filling station. It is common cause that the third respondent has no direct access to Atlas road, this having been closed due to upgrades some years earlier. There are various other entry/ exit points to and from other filling stations in and around the area in question.

[43] The appellants commissioned a study by an engineer, **Harms Schreus** of WSP Civil and Structural Engineers ("Schreus") to *"investigate in more detail the possible impact the new site will have on the exiting site"*

[43.1] Schreus conducted a number plate survey with a view to determine what percentage of the vehicles visiting the BP site also passes the proposed site.

He concluded that 17,5% of the traffic visiting the BP site past the proposed site, and that 18,2% of the passing traffic for the proposed site on Atlas Road also passes the Caltex, which is situated some 6 kilometers from the proposed site. He also made a finding that based on the information that the BP is selling 4000,000 liters of fuel in a month, the impact would be a maximum 70 000 liters a month (17.5%).

Schreus argued that the BP site would remain feasible at 350 000 liters of fuel a month.

[44] According to the affidavit of Schreus, this evidence was obtained *"after the initial site and retail license applications for Bonaero Park were rejected"*[7]. This, it seems, formed part of the appeal record to the Minister.

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[7] paragraph 2 of Schreus affidavit dated

It is an indication that indeed the appeal before the Minister was a hearing de novo. Whether or not it was treated as such by the Minister is another matter.

[45] Mr Erasmus went on to submit that the inspection report of 06 March 2009 was flawed because it contains several material defects.
The decision of the Controller and ultimately the Minister was based on the findings of the inspection report; as such it had a direct negative effect. These are the defects identified:

(a) It is not correct that the appellant's proposed site will only have access from Templehof Road and not Atlas Road. In fact, the proposed site main road is from Atlas road.

(b) The 100-meter distance between the proposed site and the BP site is not correct. This distance may be "as the crow flies", but in reality, by road, it is 500 metres.

(c) The Caltex garage referred to in the inspection report closed down more than 5 years before the upgrade of the Atlas Road.

Therefore, this is an irrelevant consideration that was taken into account.

(d) It is not correct that there is not much development going on that would create a need for fuel. There are several residential, commercial developments and this information was addressed in the motivation.

[46] It was submitted on behalf of the appellant that they only had sight of the third respondent's objection on receipt of the review record of proceedings. Before this, they only guessed what the nature of the objection is because the third respondent had earlier filed an objection with the Environmental Authority, and this was dismissed.

The appellants filed a supplementary affidavit and addressed the issues raised in the objection directly for the first time. As it turned out, the objection was based on the same facts as the objection and subsequent appeal at the Gauteng Department of Agriculture , Conservation and Environment ("GDACE") that was dismissed.

[47] The objection is based on a submission that there are four (4) filling stations within a 3 (three) kilometre radius from the appellants' proposed site.

[48] According to appellants, it is not correct that there are four (4) filling stations within a radius of 3 (three) kilometers of appellants' proposed new site.

(a) The Caltex filling station had been in disuse due to lack of business for five (5) years and is situated on the opposite side of atlas road. It was not considered by GDACE.

(b) The Sasol Parkhaven that according to third respondent is situated about 1.2 kilometers further on the opposite side.

According to Appellants, there is no such filling station and it did not exist at the time the relevant decisions were made. Documents were attached to prove that there is no pending or approved filling station by this name.

(c) The existing Engen filling station is , on third respondent's own admission in the objection summary, situated about four (4) kilometers away. There is no reason why it should be included in the 3 (three) kilometer radius too.

(d) According to the appellants, the only competitor is the BP outlet.

[e] It is also not correct, as the Controller has stated in his reasons, that there are other filling stations in the area, referring to the Engen (4 km) and the closed Caltex.

[49] It was also submitted on behalf of the appellants that the third respondent appears to accept Schreus's evidence and that its 2-year projected expenditure and expense over a two-year period is similar to that of Scheurs. The third respondent has however failed to give actual figures to support its sales and the impact the proposed site would have.

[50] In conclusion, Mr Erasmus submitted that reliance by the third respondent on the case of ***Fuel Retailers Association of Southern Africa v***

***Director-General, Environment Management, DACE, Mpumalanga Province and 11 Others*** [8] was misplaced.

This case does not say that there must not be competition. The case was decided in the context of applications for environmental authorizations. The approach of environmental authorities was that they did not have to consider socio-economic issues. The judgment of Ngcobo J (majority) is to the effect that economic considerations are relevant.

[50.1] In response to a question from the court as to what the powers of the inspector were, Mr Erasmus indicated that the Minister is enjoined, in terms of Section 2E of the Act to prescribe the system. This has not been done yet.

It was further submitted in this regard that the inspector should have asked for more information to verify the allegations of the objector. The same objection was considered by GDACE four months before it was lodged with the Controller. GDACE adjudicated the objection in terms of prescribed guidelines and dismissed it. The decision was upheld on appeal.

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[8] Case no. CCT.67/2006 dated 07/06/2007

[50.2] Mr Erasmus accepted that if there are no Regulations or guidelines one has to look at the material placed before the decision –maker and how it was adjudicated.

He submitted further that the approach of the court a quo in holding that appellants have not shown how the Minister misdirected herself was a narrow one. The fact that only one of the requirements was considered makes the decision unfair.

**Submissions on behalf of the third respondent**

[51] Mr Davis, on behalf of the third respondent started off by inviting the court to look at the facts /documents before the Controller and the Minister.

He referred to the letter / objection dated 26 November 2008, and in particular a submission on behalf of third respondent in paragraph 6.2.5 that it would suffer an 80% *"drop in our client's business, purely from an ease of access and convenience perspective. The entrance and exits of the Applicant's site is far more accessible than our client's site, as per the annexed sketch hereto, drawn to scale, marked as Annexure "E""*

[52] He also referred to the inspection report on the inspection conducted on 05 August 2008 where the inspector indicated that

*"There is a direct competition a BP service station situated only a 100 metres away from the proposed site and another Engen service station about 5 kilometers up Atlas road and the Caltex service station that closed down on Atlas road, I believe its because of the lack of business'.*
Reference to a distance of 100 metres in the inspection report is a mistake according to Mr. Davis and it was not carried over to the submissions made to the Minister. It is correct that the Minister was advised that the distance is 800 metres, but there is no evidence as to how this correction came about. The distance being 100 or 800 metres does not take the issues any further.

[53] I have already referred to the objection lodged by the third respondent and the appellants' submissions in response thereto.

[54] The third respondent's concern is the negative effect that the appellant's proposed new site would have on its business and employees. There are sufficient other filling stations in the area to service the existing clientele.

[55] Accordingly, these are relevant considerations that the Minister was obliged to take into account.

[56] Mr Davis went on to refer to a map[9] depicting all filling stations in the area. He submitted that this information was before the Controller and the Minister.

[57] He went on to refer to the reasons provided by the Controller for the decision and submitted that it is clear that the emphasis was on economic growth

[58] The reliance on the Fuel Retailers case was intended to demonstrate that the impact on the third respondent's site would not be negligible.

[59] In conclusion, Mr Davis submitted that if the court finds that the decision should be reviewed, it should be referred back to the Minister because the issues involved are of a technical nature.

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[9] p121, part of the Engen Feasibility study undertaken to predict the average monthly fuel sales in 3 years time and to estimate the impact on the surrounding sites by the proposed site.

**DID THE CONTROLLER AND THE MINISTER EVALUATE THE APPLICATIONS PROPERLY?**

[60] This question, proper, belongs to an enquiry that should have been undertaken by the court a quo to determine whether the Minister took into account (all) relevant considerations and whether there has been misdirection.

I have quoted the relevant parts of the Regulations with regard to how applications for site and retail licences are to be evaluated and factors to be taken into account.

[61] The problem, as the appellants have submitted, is that there is no definition of the words /phrases used in section 2B, such as "efficient retailing" or at least an indication of what kind of evidence would support such a requirement.

**DID THE COURT A QUO MISDIRECT ITSELF?**

[62] In the matter of **MEC For Environmental Affairs and Development Planning v Clairison's CC**[10], Nugent JA and Swain AJA[11] reiterated the distinction between a review and an appeal.

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[10] (408/2012) [2013] ZASCA 82 (31 May 2013)
[11] Ponnan and Tshiqi JJA and Willis AJA concurring

*"It bears repeating that a review is not concerned with the correctness of a decision made by a functionary, but with whether he performed the function with which he was entrusted. When the law entrusts a functionary with a discretion it means just that: the law gives recognition to the evaluation made by the functionary to whom the discretion is entrusted, and it is not open to a court to second-guess his evaluation. The role of a court is no more than to ensure that the decision-maker has performed the function with which he was entrusted."*

[63] The court went on to say that:

*"[19] The power of review is sourced today in the Constitution, and not the common law, but sound principles are not detracted from because they were expressed in an earlier era. As was said in Pharmaceutical Manufacturers of South Africa: In re Ex parte President of the Republic of South Africa*[12]

> *'That is not to say that the principles of common law have ceased to be material to the development of public law. These well-established principles will continue to inform the content of administrative law and other aspects of public law, and will contribute to their future development'.*

[12] Pharmaceutical Manufacturers of South Africa: in re Ex parte President of the Republic of South Africa 2000 (2) SA 674 (CC) para 45

*[20] It has always been the law, and we see no reason to think that PAJA has altered the position that the weight or lack of it to be attached to the various considerations that go to making up a decision, is that of the decision-maker. As it was stated by Baxter:2*[13]

> *'The court will merely require the decision-maker to take the relevant considerations into account; it will not prescribe the weight that must be accorded to each consideration, for to do so could constitute a usurpation of the decision-maker's discretion.'*

*[21] That was expressed by this court as follows in Durban Rent Board and Another v Edgemount Investments Ltd,*[14] *in relation to the discretion of a rent board to determine a reasonable rent:*

> *'In determining what is a reasonable rent it is entitled and ought to take into consideration all matters which a reasonable man would take into consideration in order to arrive at a fair and just decision in all the circumstances of the case.... How much weight a rent board will attach to particular factors or how far it will allow any particular factor to affect its eventual determination of a reasonable rent is a matter for it to decide in the exercise of the discretion entrusted to it and, so long as it acts bona fide, a Court of law cannot interfere'.*

*[22] What was said in Durban Rent Board is consistent with present constitutional principles and we find no need to re-formulate what was said pertinently on the issue that arises in this case. The law remains, as we see it, that when a functionary*

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[13] Lawrence Baxter Administrative Law 1ed (1984) at 505

[14] Durban Rent Board and Another v Edgemount Investments Ltd 1946 AD 962 at 974, adopted in Johannesburg City Council v Administrator, Transvaal and Mayofis 1971 (1) SA 87 (AD)

*is entrusted with a discretion, the weight to be attached to particular factors, or how far a particular factor affects the eventual determination of the issue, is a matter for the functionary to decide, and as he acts in good faith (and reasonably and rationally) a court of law cannot interfere. That seems to us to be but one manifestation of the broader principles explained – in a context that does not arise in this case*[15] *– in Bel Porto School Governing Body v Premier, Western Cape*[16] *and Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs.*[17]

[64] In the matter before us, and in order to determine whether the court a quo misdirected itself or not, we have to take into account firstly, the legislative considerations and secondly the facts that were placed before the functionaries (the Controller and the Minister) and against that background assess whether they performed their respective functions reasonably and rationally.

[65] It may be so that the functionary has discretion to decide which factors to consider as well as the weight to attach. However, in this case, the Act and Regulations prescribe the requirements / factors to be taken into account in order to be issued with a site and retail licence. The Regulations also prescribe how applications are to be evaluated.[18]

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[15] Bel Porto was concerned with rationality, and Bato Star with the reasonableness of executive decisions.
[16] 2002 (3) SA 265 (CC) para 45
[17] 2004 (SA) 490 (CC) esp. paras 44 and 45.
[18] ***"Evaluation of a retail licence application***

[66] The difficulty in this matter for the functionaries is that certain word/phrases are used in the Act without at least an explanation or guidelines in the Regulations on how applicants would achieve the threshold. This is the reason why the appellant went to great length to bring in factors that in its opinion would meet the requirement of "*efficient retailing*".

[67] The role of the inspector is also critical because he/she has a mandate to gather information and bring it to the Controller and the Inspector. Objections aside, one would have expected the inspector to investigate the allegations made by appellants in their application, more especially those that relate to compliance with section 2B.

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18. (1) In evaluating an application for any retail licence, the Controller must, subject to sub regulation (2), verify that-
    (a) the information and the documents submitted with the application form are true and correct; and
    (b) the notice contemplated in regulation **16(1)**was published.
(2) In the case of an application for a retail licence made by a person in respect of whom section 2D of the Act is not applicable, the Controller must be satisfied that-
    (a) the retailing business is economically viable; and (b) the retailing business will promote licensing objectives stipulated in section **2B(2)** of the Act.
(3) In determining the economic viability contemplated in sub regulation **(2)(a)**, the Controller must be satisfied that the net present value has been correctly calculated and is positive.

[67.1] To simply pick up the issue of proximity between the two filling stations and the hardship one would suffer can hardly be regarded as the type of investigation that would enable the Controller to discharge his duties.

[68] Therefore, in my view, the question of what material was before the Controller and the Minister only becomes relevant after the investigations by the inspector. The inspector became aware that the facilities were in close proximity. This could never be the end of the enquiry because the Act and Regulations list many requirements for purposes of complying with section 2B. Close proximity and hardship could be one of many factors. There is no indication that the others were investigated, save for being mentioned by the appellants.

[69] The court a quo was enjoined to consider whether the decision is reviewable on any of the grounds of review in terms of PAJA.

[70] This has nothing to do with and is not a blurring of the distinction between review and appeal. If anything, the essence of the judgment of the court a quo is that it became concerned with the correctness of the decision of the Minister in as far as the impact of the proposed retail

facility on the third respondent is concerned.

[71] The court a quo correctly stated in paragraph 22 of the judgment that

> *"It is purely a question of fact what the impact of the proposed filling station of the applicants adjacent to Atlas Road would have on the facility of the Third Respondent in its present location.*

It however went on to state that:

> *" I cannot find that the First respondent misdirected itself to take into account the impact of the Applicants' facility on the existing facility of the Third Respondent"*

[72] The court a quo was enjoined to take into account whether the functionary (Minister) had relevant material before him to make a finding one way or the other with regard to the alleged impact. Instead it shied away from this responsibility and chose the easy way out; not making a finding.

This, in my view is a misdirection.

[73] It is not even a question of material error of fact.[19] This can only arise if facts have been brought before the functionary. In this case, as I have already stated, it is not only the responsibility of the appellant to bring relevant facts, but the inspector too has a duty to verify and investigate those facts.

**SUBSTITUTION OF THE DECISION**

[74] In his heads of argument, counsel for the appellants referred to the unreasonable delays in processing the applications that have already taken place as well as the financial hardship that the appellants have already suffered.

He submitted that referring the matter back would cause further prejudice to the appellants. Under the circumstances, he submitted that the court is in the same position as the functionary to make the decision itself.

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[19] I am mindful of what has been stated in the matter of **Collen Mzingisi Dumani v Desmond Nair & another (144/2012) [2012] ZASCA** 196 (30 November 2012) that *misdirection with regard to evaluation of material fact does not render the decision* reviewable. However, what has been said in the matter of **Pepcor Retirement Fund v Financial Services Board 2003 (6) SA 38 (SCA)** referred to in paragraph 29 is applicable in this matter because the Controller and the Minister were empowered by legislation to consider the applications . There should be material facts before them. How they evaluate those facts should not render the decision reviewable. The point here is that the facts brought by the appellants were not investigated or verified by the inspector against any other facts brought by other interested parties, such as the third respondent.

[75] During oral argument, and after the court engaged both counsel on the issues highlighted in this judgment, notably, the deficiencies in the Act and Regulations as to exactly how the requirements in section 2B are to be met, they both conceded that the court would not be in a position to make a decision.

[76] Mr Davis correctly submitted that the issues in this matter are of a technical nature and require relevant expertise.
I may add that as I have stated above, there is a need for proper assessment of the various reports submitted for purposes of assessing exactly the issues referred to in section 2B and Regulation 16.

[77] It is common cause that the Minister has not yet prescribed a "*system*" in terms of Section 2E of the Act. However, the reasons given for the decision (hardship or impact on third respondent) seems to be a backdoor implementation of the system that does not exist because it seeks to limit the number of filling stations in a certain radius. The appellants have raised issues such as section 22 of the Constitution of the Republic of South Africa that guarantees each person a right to choose his/her trade. They also raised issues of lawful competition amongst retailers.

[78] The Minister is entitled to take as long as he/she wants or never, to prescribe "a system", however, in the interim, there are sufficient safeguards in the Act and the Regulations. All that is required is implementation of the relevant provisions by advising applicants how to achieve the objectives of the Act, which, in all fairness are policy statements that are capable of several meanings.

[79] The appellants have referred to the Guidelines in terms of the requirements for environmental authorizations that are implemented by GDACE, for example.

These guidelines prescribe things like distances between outlets, etc. An applicant can argue the rationale behind the prescription, but at least it is entitled to know what to comply with. There is a need for uniformity and consistency.

[80] I am inclined to refer the matter back to the Minister for reconsideration. However, I am also going to give directives with regard to the issues I have raised above, namely, the role of the inspector in the whole equation.

[81] I make the following order:

[81.1] The appeal is upheld with costs.

[81.2] The judgment and order of the court a quo is set aside and substituted with the following:

"1. *The refusal of the site licence application of the first applicant, and the dismissal of the appeal in respect thereof in terms of the Petroleum Products Act, 120 of 1977, as amended, by the first and second respondents, is hereby reviewed and set aside.*

2. *The refusal of the retail licence application of the second applicant, and the appeal in respect thereof, by the first and second respondents is hereby reviewed and set aside.*

3. *The decision of the first respondent not to uphold the appeals filed by the first and second applicants in respect of their site and retail licence applications, are referred back to the first respondent for reconsideration.*

*4. The following directives are hereby issued to assist the first respondent to formulate guidelines that should be issued to the applicants for purposes of compliance with the provisions of section 2B of the Act, read with Regulation 16.*

*4.1 The Minister should issue guidelines on factors that will be taken into account in order to comply with each and every objective in terms of section 2B of the Act.*

*4.2 The inspector is directed to within 30 days of this order:*

*(a) compile a copy with all information in the applications, together with any expert report and provide a copy thereof to the third respondent and or any interested person and give them a reasonable opportunity to respond and submit any contrary evidence.*

*(b) investigate, or cause to be investigated by relevant persons with relevant expertise any issues arising from the application and the responses of the applicant and any interested person.,*

*(c) Provide a copy of the findings of the investigations to the parties and solicit their response.*

*(d) Submit the application, with comments, findings and any other report to the Minister for consideration.*

*4.3 The Minister must consider the applications within a period of 30 days after receipt of the documents referred to in paragraph 4.2*

*5. The parties are afforded an opportunity to approach the court within 05 (five) days of this order should they wish to make any submissions on the directives in 4 above, whereafter, the court may, on its own discretion amend, vary or add any directive therein."*

**MAKHUBELE AJ**

Acting Judge of the High Court

I agree

**RAULINGA J**

Judge of the High Court

I agree

**THULARE AJ**

Acting Judge of the High Court

**APPEARANCES:**

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|---|---|
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| | |
|---|---|
| **FIRST AND SECOND RESPONDENT:** | **NO APPEARANCE** |
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| | Tel: (012) 309 1500 |
| | Ref: Mr Nkuna /NL/0606/2011/Z80 |

| | |
|---|---|
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