IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

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

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

(3) REVISED.

12/12/14
DATE SIGNATURE

CASE NUMBER: 33828/2013

In the matter between

CIANAM TRADING 104 CC	**APPLICANT**
And	
MS ELIZABETH DIPUO PETERS MP **In her capacity as MINISTER OF ENERGY**	**FIRST RESPONDENT**
MAGNACORP 659 CC	**SECOND RESPONDENT**
THE ELDORADO TRUST (IT 556/98)	**THIRD RESPONDENT**
ILIFU TRADING 12 CC	**FOURTH RESPONDENT**

JUDGMENT

LEPHOKO AJ

[1] The applicant seeks an order reviewing and setting aside a decision of the first respondent to dismiss an appeal noted against the decision of the Controller of

Petroleum Products (the Controller) to grant site and retail licenses to the second and third respondents to operate a fuel filling station.

BACKGROUND

[2] The applicant is a close corporation and trades as a service station in Waterfall, KwaZulu-Natal. The second and third respondents respectively applied to the Controller for the grant of retail and site licenses in terms of the Petroleum Products Act No 120 of 1977 (the PPA). Mrs S P Rosseau who is a member of the applicant close corporation, together with others, objected to the granting of the aforesaid licenses. The basis for the objection was that the area in which the licenses were to be granted was over traded and there was no need for another filling station. The Controller dismissed the objection and granted the licenses. Mrs Rosseau appealed the decision of the Controller to the first respondent. The first respondent dismissed the appeal and the dismissal of the appeal led to the present review. The applicant was not a party to the objection or the appeal.

[3] The applicant brought this review in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The review was brought on both procedural and substantive grounds. At the hearing of the application the applicant limited its argument to procedural grounds. The grounds for review are that the first respondent's decision to dismiss the appeals was taken in a manner that is unreasonable, procedurally unfair and in contravention of sections 3(1) and 3(2)(b) of PAJA. The alleged contravention is that the applicant was denied access to full copies of the application to which it had

objected and in respect of which the appeal was made and as a result the applicant was denied its right to a reasonable opportunity to make representation. The first, second and third respondents raised a point *in limine* that the applicant lacks standing to bring the application, albeit on different grounds.

STANDING

[4] In this application the applicant acts in its own interest. It has been held that "no man can sue in respect of a wrongful act unless it constitutes the breach of a duty owed to him by the wrongdoer or unless it causes him some damage in law... And the rule applied to wrongful acts which affect the public as well as to torts committed against private individuals"[1]. Standing is a factual question, and generally, the applicant must demonstrate that it has the necessary interest in an infringement or threatened infringement of a right[2]. For convenience I will first deal with the *point in limine* raised by the second and third respondents.

SECOND AND THIRD RESPONDENTS POINT *IN LIMINE*

[5] It was contended on behalf of the second and third respondents that the PPA does not entitle the applicant to trade free from competition. It was contended that in order to establish standing in the context of the present case the applicant has to demonstrate within the relevant statutory scheme that it has a right directly affected by the appeal decision.

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[1]Dalrymple v Colonial Treasurer 1910 TS 372 at 379.
[2]Jacobs v Waks 1992 (1) SA 521 (A) at 534-535, Independent Food Processors (Pty) Ltd v Minister of Agriculture 1993 (4) SA 294 (C) at 302D-303G.

[6] In *Rinaldo Investments (Pty) Ltd v Giant Concerts CC*[3] the Supreme Court of Appeal held that "The factual basis upon which a litigant claims standing is only part of the picture. In order to place those facts in their proper context, it is also necessary to consider the statutory scheme in issue, particularly its purpose. .....In other words, a litigant's interest must be assessed against all the factual and legal circumstances of the case".

[7] The applicant is the proprietor of a filling station known as the Waterfall Convenience Centre. The objection process and the appeal is governed by the PPA and the regulations promulgated in terms thereof (the regulations). Section 2B (2) of the PPA reads as follows:

> "2B (2)
>
> (1) The Controller of Petroleum Products must issue licenses in accordance with the provisions of this Act.
>
> (2) In considering the issuing of any licenses 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;

[3] ZASCA 34 (29 March 2012) at para 16

(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".

[8] In considering the issuing of any licenses, the Controller is required, *inter alia*, to give effect to the provisions of section 2C of the PPA. Section 2C deals with transformation of the South African Petroleum and Liquid Fuels Industry and giving effect to the Charter for that industry.

[9] Notice of application for a retail license is regulated by regulation 16. Regulation 16, *inter alia*, makes provision for inspection of the application by any member of the public who may object to the issuing of the license. Neither the PPA nor the regulations restrict the category of documents or nature of the information that must be made available for inspection.

[10] In terms of regulation 15 (2) the second respondent is required when lodging a retail licence application to provide the result of the net present value (NPV) calculation and all data and assumptions used in the calculation of the NPV.

[11] Regulation 18 (2) requires the Controller when evaluating a retail license application to, *inter alia,* satisfy himself that the proposed retailing business is economically viable and that it will promote the licensing objectives stipulated in section 2B(2) of the PPA. Significantly, regulation 18 (3) stipulates that in determining the economic viability of the proposed retailing business the controller must be satisfied that the NPV has been correctly calculated and is positive. This means that the controller is, *inter alia,* required to interrogate all data and assumptions used in the calculation of the NPV. He cannot grant the license if the data and assumptions that underpin the NPV are dubious and the NPV is negative.

[12] It was conceded by the first respondent that the NPV is of importance in arriving at the decision to grant the license. The first respondent stated that the NPV provided by the second respondent was indeed considered and found to have been correctly calculated and was positive.

[13] It is common cause that the financial information relating to the NPV of the second respondent was not made available for inspection. It was contended by the first respondent that it regarded the financial information not to be part of the main application and that it was not made available to the public on that basis. It was contended that that information was regarded as financially privileged and forming part of protectable information. In so far as the PPA and the regulations are concerned there is only one form of an application for a retail license. It is not clear what application the first respondent refers to as not being the main application. What is clear though, is that

in terms of the PPA, the submission of the NPV is mandatory and is an essential and integral part of the application and the decision to grant or refuse a retail license.

[14] As the objector is objecting to the granting of the license, it should follow that in order to properly object, it must have full access to the information on which the granting of the license is based, including the calculation of the NPV. An objector must be given a fair chance to challenge the grounds advanced by the applicant for a retail license that the NPV is positive; that the proposed retailing business is economically viable and will promote the licensing objectives stipulated in section 2B (2) of the PPA and the aims of the Charter. Failure to grant full access to the application would reduce the objection process to a futile and meaningless formality. In my view, the selective provision of information that form the basis of an application for a license is contrary to the spirit of the PPA and undermines its manifest purpose.

[15] The requirement imposed by regulation 18 (3) clearly underscores the fact that the granting of a retail license is directly connected to the Controller's evaluation of the NPV. If the NPV is so important in the decision to grant the license, it should follow that it is equally important to an objector and should form part and parcel of the documents that are essential in enabling an objecting party to mount an informed objection. The right to object and the significance of the NPV in the granting of a retail license far outweighs any confidentiality argument or alleged prejudice that may attach to the NPV or data and assumptions used to calculate the NPV being made public.

[16] In my view the objection process provided for in the PPA is primarily for the benefit of the objector. It is designed to ensure that the granting of new licenses is not done outside the confines of the PPA and in a manner that, *inter alia*, undermines existing businesses by saturating the industry to the extent that efficient retailing in petroleum is put in jeopardy. As a proprietor of a filling station, the applicant has a right directly affected by the appeal decision within the meaning of the PPA. The applicant has sufficient interest to object to any application that is made or granted in contravention of the PPA. Similarly, the applicant has a right to appeal to the first respondent against the dismissal of any objection by the Controller. Accordingly the applicant has the necessary standing to take on review any decision of the first respondent dismissing the appeal. However, in the present case, the right to review is subject to the point *in limine* raised first respondent.

FIRST RESPONDENT'S POINT *IN LIMINE*

[17] The first respondent contended that the applicant did not have *locus standi* in that:

(i) The applicant was not a party or the appellant in the appeal against which this review application is brought, alternatively

(ii) In as far as the applicant wishes to rely on the right to review as contemplated in PAJA, the applicant has failed to exhaust its internal remedy provided in terms of the PPA and has failed to make out a case that there are exceptional circumstances as contemplated in section 7(2) of PAJA to approach this court directly.

[18] A court may allow a party to access the provisions of PAJA despite its failure to exhaust all internal remedies available to it. Under section 7(2) of PAJA, the requirement that an individual exhaust internal remedies is not absolute[4].

[19] It is clear from the objection and the subsequent appeal that the objector and the appellant is Mrs Rosseau and not the applicant close corporation. A close corporation is on registration a juristic person and continues, subject to the provisions of the Close Corporations Act, to exist as a juristic person until it is deregistered or dissolved and its members have limited liability in respect of its debts[5]. A close corporation as a juristic person has its own legal personality and exists separately from its members[6]. The significance of this distinction is evidenced by sections 63, 64 and 65 of the Close Corporations Act and cannot be overemphasized. These sections deal with circumstances under which members and others may be held liable for debts of the close corporation.

[20] When a member of a close corporation acts in her personal capacity she is not acting on behalf of the close corporation even though such action may benefit the close corporation[7]. As a result, by lodging the objection and the appeal in her personal capacity, Mrs Rossoau was not acting on behalf of the applicant. There is no reason to

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[4] Koyabe v Minister for Home Affairs 2010 (4) SA 327 (CC) at para 38.
[5] Section 2(2) and 2(3) of the Close Corporations Act 69 of 1984.
[6] The principle of separate legal personality was stated in Salmon v Salomon & Co Ltd 1897 AC 22, see also Lategan v Boyes 1980 (4) SA 191 (T) at 200, Gumede v Bandhla Vukani Bakithi Ltd 1950 (4) SA 560 (N), Airport Cold Storage (Pty) Ltd v Ebrahim and Others 2008 (2) SA 303 at para 6.
[7] Salomon v Salomon & Co Ltd (supra)

departing from the well-established principle that a juristic person has its own legal personality and exists separately from its members[8]. Mrs Rossoau was in any event entitled to lodge the objection and the appeal in her personal capacity and could have brought the review in her own name as long as she could establish that she had sufficient interest in the appeal decision within the meaning of the PPA.

[21] The appeal was lodged by Mrs Rosseau and not the applicant. Ordinarily Mrs Rosseau would therefore be the person affected by the appeal decision and entitled to take it on review. Section 7(2)(a) requires an applicant for judicial review of administrative action in terms of PAJA to first exhaust any internal remedy provided for in any other law. In the applicant's case the PPA provides first for an objection process and a right of appeal to the first respondent. The applicant did not exhaust the internal remedy available to it in terms of the PPA and seeks to approach this court directly.

[22] Section 7(2)(a) states that a court or tribunal may excuse a failure to exhaust internal remedies provided for in any other law subject to section 7(2)(c). Section 7(2)(c) provides that a court or tribunal may, **in exceptional circumstances** and **on application** by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it **in the interest of justice.** (emphasis added).

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[8] See SH v GF and Others 2013 (6) SA 621 (SCA) at para 16 where the court referred to its earlier decision: "As explained in *Brisley v Drotsky* 2002 (4) SA 1 (SCA) (para 8), when this court has taken a policy decision, we cannot change it just because we would have decided the matter differently. We must live with that policy decision, bearing in mind that litigants and legal practitioners have arranged their affairs in accordance with that decision. Unless we are therefore satisfied that there are good reasons for change, we should confirm the status quo"

[23] In *Nichol and Another v The Registrar of Pension Funds and Others*[9] the Supreme Court of Appeal stated that "it is now compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies unless exempted from doing so by way of a successful application under s 7(2)(c). Moreover, the person seeking exemption must satisfy the court of two matters: first, that there are exceptional circumstances, and second, that it is in the interest of justice that the exemption be given."

[24] As the applicant has not exhausted the internal remedies provided for in the law applicable to its dispute, (i.e. the PPA) this court is not in a position to entertain the review application until the applicant has complied with the provisions of section 7(2)(c). The applicant must on application put such facts before the court as are necessary to establish the exceptional circumstances relied upon to justify the no-exhaustion of internal remedies and to enable the court to make a determination whether it would be in the interest of justice that the failure be excused.

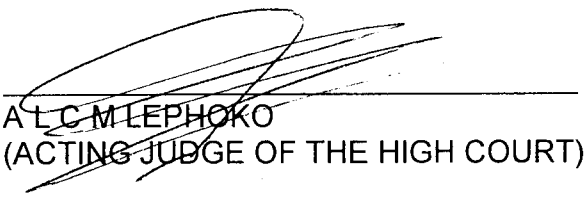
[25] The fact that the first respondent would raise a point of law that the applicant had not complied with the provisions of section 7(2)(c) was first raised on 28 November 2013 by way of a notice in terms of rule 6(5)(d)(iii) served on the applicant on 28 November 2013. The same point was again raised in the first respondent's replying affidavit delivered on or about the 26 November 2013. Despite being alerted of this pitfall the applicant chose not to bring the application envisaged in section 7(2)(c). The court has a discretion to condone a failure to exhaust internal remedies but it is not able to exercise that discretion in the absence of the application required in terms of section

[9] 2008 (1) SA 383 (SCA) at para 15

7(2)(c). Up and until the applicant has complied with the requirements of section 7(2)(c) its application for review cannot be entertained. In the circumstances the application must fail.

The following order is made

1. The application is dismissed.
2. The applicant is ordered to pay the costs of the application



A L C M LEPHOKO
(ACTING JUDGE OF THE HIGH COURT)

Heard on: 01 August 2014

Judgment delivered on: 12 December 2014

For the applicant: G Erasmus.
Instructed by: Erasmus Attorneys.

For first the respondent: G J Scheepers.
Instructed by: State Attorney, Pretoria.

For second and third respondents: A M Annandale SC.
Instructed by: Larson Falconer Hassan Parsee