IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

24/11/16

CASE NO: 76409/14

DELETE WHICHEVER IS NOT APPLICABLE

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

22/11/16
DATE

SIGNATURE

In the matter between:

LEPELLE INDUSTRIAL AND MINING SUPPLIERS CC	Applicant
and	
STREAKS AHEAD INVESTMENT (PTY) LTD	First Respondent
BOROKA FILLING STATION CC	Second Respondent
THE MINISTER OF ENERGY NATIONAL GOVERNMENT	Third Respondent
THE CONTROLLER OF PETROLEUM PRODUCTS	Fourth Respondent
BA-PHALABORWA LOCAL MUNICIPALITY	Fifth Respondent
ERF 344 ONTWIKKELING (PTY) LTD	Sixth Respondent
THE MEC DEPARTMENT OF ECONOMIC DEVELOPMENT, ENVIRONMENT AND TOURISM	Seventh Respondent
THE MEC FOR LOCAL GOVERNMENT AND HOUSING, LIMPOPO PROVINCE	Eight Respondent
REGISTRAR OF DEEDS	Ninth Respondent

Held; the applicant had satisfied the requirements for the granting of an interim interdict which rendered the applicant entitled to the relief sought.

Annotations:

Unreported Cases

Helen Suzman Foundation and Another v Minister of Police and Others, case number: 23199/06 NGHC

Searle v Mossel Bay Municipality and Others (case number: 1237/09, 12 February 2009 CPD

Reported Cases

Setlogelo v Setlogelo 1914 (1) 221

Webster v Mitchell 1948 (1) SA 1186 (WLD)

L. F. Boshoff Investments (Pty) Ltd v Cape Town Municipality 1969 (2) SA 256 (C)

Da Silva v Coutinho 1971 (3) SA 123 (A) 140

Unity Longhauls (Edms) Bpk v Grindrod Transport (Pty) Ltd 1978 (2) SA 102 (T) 109

National Chemsearch (SA) (PTY) Ltd v Borrowman 1979 (3) SA 1992 (T)

Silver Crystal (Pty) Ltd v Namibia Diamond Corporation (Pty) Ltd 1983 (4) SA 884 (D) 888 – 889

Begeman v Cirota 1983 TP (1) 270

Masuku v Minister van Justice 1990 (1) SA 837 (A)

Knop v Johannesburg City Council 1995 (2) SA 1 (A)

Transnet Bpk h/a Coach Express en 'n Ander v Voorsitter, Nasionale Vervoerkomissie en Andere 1995 (3) SA 844 (T)

Radio Islam v Chairman, Counsel of the Independent Broadcasting Authority 1999 (3) SA 897 (w)

Olitzki Property Holdings v State Tender Board 2001 (8) BCLR 779 (SCA), 2001 (3) SA 1247 (SCA)

Ladychin Investments v South African National Road Agency 2001 (3) SA 344 (NPD)

Ouderkraal Estates (Pty) Ltd v City Of Cape Town and Others 2004 (6) SA 222

Thomson v Head of the Department of Agriculture, Conservation, Environment and Tourism, North West Province and Others 2008 (1) ALL SA 392 (T)

PS Booksellers (Pty) Ltd and Another v Harrison and Others 2008 (3) SA 633 (C) [2007] 3 All SA 552

Van der Westhuizen and others v Butler and Others 2009 (6) SA 174 CPD

Camps Bay Residents and Ratepayers Association and Others v Augoustides and Others 2009 (6) SA 190 (WCC)

Van der Westhuizen v Butler 2009 (6) SA 175 (C)

National Treasury and Others v Opposition to Urban Tolling Alliance and Others 2012 (6) SA 223 (CC)

Statutes

Petroleum Products Act 120 of 1977 ("*PPA*")

National building Regulations and Building Standards Act 103 of 1977

Environmental Conservation Act 73 of 1989 ("*ECA*")

National Environmental Management Act of 107 1998 ("*NEMA*")

Promotion of Administrative Justice Act 3 of 2000 ("*PAJA*")

Access to Information Act 2 of 2000 ("*PAIA*")

[1] This is an application in which the appellant seeks a temporary interdict against the first, second and sixth respondents in terms whereof the first, second and sixth respondents are prohibited from taking any further steps to continue with construction activities and/or trading or retail activities and/or selling of petroleum products, and/or conducting business of any nature whatsoever on Erf 3465 situated in the Township of Namakgale B, district of Namakgale held by the sixth respondent under the title deed TG 12564/2013 ("*Erf 3465*").

[2] A further order is sought declaring that the temporary interdict shall be valid and binding on all the parties to this application pending:

2.1 the finalisation of the applicant's review application against the decision of the third respondent on appeal to grant a site licence on Erf 3465 under licence application F2013/02/050001, in respect of the first respondent and a new retail licence under application F/2013/02/05/0002.

2.2 the applicant's internal appeal that has been lodged with the fourth respondent pertaining to the transfer of the site licence in respect of Erf 3465 Namakgale B Township, from first respondent to sixth respondent;

2.3 any review application that may follow from the decision of the fourth respondent pertaining to applicant's internal appeal filed as referred to in paragraph 2.2 above;

2.4 final relief in terms of Part B of this application.

2.5 Costs of Part A of this application.

Background

[3] The background to this matter is that the applicant is the owner of Impala service station situated at corner Main road and Gravelotte Highway (R71) Namakgale.

[4] The applicant's service station is located in close proximity to the main entrance and exit from Namakgale Township directly on the main route to Phalaborwa which is the nearest town.

[5] Due to its location, Namakgale Township constitutes the applicant's main customer base, the only other competitor being the old Sasol garage which operates at or near the secondary entrance to Namakgale Township.

[6] A significant portion of the applicant's customer base is the taxi operators by virtue of its business being located on the main taxi route.

[7] Within a radius of less than two kilometres from the applicant's business is a property known as Erf 3465 which is the subject of this application and which was previously owned by the Ba- Phalaborwa Municipality, the fifth respondent herein.

[8] Erf 3465 was transferred to the first respondent on 14 July 2008 by the Department of Housing Affairs Limpopo and the first respondent made an application for business rights for the development of a shopping centre in 2007 on the property in question.

[9] On 2 September 2012 the first and sixth respondents concluded a sale agreement for the purchase of Erf 3465 and subsequently a lease agreement was entered into between them on 25 November 2012 for the purposes of trading as a filling station.

[10] Despite the pending transfer of the property to the sixth respondent, the first and second respondents proceeded to lodge applications with the Controller of Petroleum Products (fourth respondent) for a site and retail licence for the establishment of a filling station on Erf 3465 on November 2012.

[11] The applicant is in possession of the applications made by the respondents having obtained them from the fourth respondent's office in terms of the Access to Information Act 2 of 2000 ("*PAIA*").

[12] From those applications it appears that the first and second respondents omitted to mention the pending transfer of Erf 3465 from the first respondent to the sixth respondent. Besides this omission the applicant submits that the application for business rights regarding Erf 3465 is plagued by procedural irregularities which render a number of the respondent's subsequent actions unlawful, for example:

12.1 The transfer took place on 21 February 2013 but the licences were only granted on 16 July 2013.

12.2 When the licences were granted, the third and fourth respondents were not informed thereof.

12.3 In light of the failure to disclose that the first respondent was no longer the owner of Erf 3465, persisting with the application was in contravention of the Petroleum Products Act 120 of 1977 in that it constituted a material misrepresentation of the true facts which would have resulted in the licence not being granted if it was disclosed. The applicant submits in this regard that the site licence was obtained through fraud which should render the granting of the said licence unlawful.

[13] The applicant saw an advertisement relating to the first respondent's site licence application in The Beeld newspaper on or about 09 April 2013 and lodged an objection to it with the Department of Energy on 7 May 2013.

[14] The applicant received no further correspondence from the fourth respondent until he learnt of his decision upon making enquiries on 15 August 2013. He learnt that the fourth respondent had granted the first and second respondent's licences on 10 July 2013.

7.6 *Streaks Ahead Investments (Pty) Ltd have been advised that they must take the necessary steps to amend the site licence to show that Erf 344 Ontwikkeling (Pty) Ltd is currently the owner of the site.*

7.7 *We submit that the site licence should now be transferred from Streaks Ahead Investments (Pty) Ltd to Erf 344 Ontwikkeling (Ptd) Ltd. On a strict reading of regulation 12 of the Regulations, the transfer cannot be done in terms of this regulation as the licence was not issued to the owner of the site at the time of the licence and the 6 (six) month period referred to in the Regulation has in any event lapsed.*

7.8 *The alternative is for Erf 344Ontwikkeling (Pty) Ltd to apply for a new site licence. We submit that if this is indeed the preferred procedure and if the filling station is now to stop its retailing activity, it will most certainly result in a material interruption in the supply of petroleum products.*

7.9 *That will compound the situation further in that there are currently 32 (thirty two) employees in the service of Boroka Filling Station CC as the retailer on the site. If the retailer is prevented from pursuing this retailing activity, all these employees and their families will certainly suffer severe hardship.*

7.10 *In light of the unfortunate oversight referred to above, Streaks Ahead Investments (Pty) Ltd and Erf 344 Ontwikkeling (Pty) Ltd request Department of Energy's guidance on the way forward to rectify the position as far as the site licence is concerned.*

[18] The applicant launched an application for a temporary interdict in October 2014 and a review application against the Minister's dismissal of the appeals was filed on 04 February 2016. Besides raising the aforesaid contraventions of the PPA in the interdict application the applicant also makes reference to other non-compliance issues by the respondents. The applicant averred that the filling station business was established on a property which had not been zoned for such a business in terms of the town planning scheme of the fifth respondent. This is denied by the respondents who submit that the attack on the zoning is founded on an incorrect approach. The respondents submit that they were entitled to establish a filling in terms of an endorsement on the first respondent's deed of grant in terms of proclamation R293.

[19] The applicant further attacks the validity of the environmental authorisation issued in terms of the National Environmental Management Act of 1998 ("*NEMA*"). The applicant submits that the authorisation was issued regarding a property described as "*Portion 1 of Erf 3465*" which does not exist since it is common cause that Erf 3465 had never been subdivided. The respondents submit that the phrase "*Portion 1*" was merely used as a description to distinguish the filling station business area from the other portion on which a shopping mall is situated. They submit the phrase was not used in the sense it is usually used regarding a subdivided property.

[20] I have considered these matters and I am of the view that whilst they are relevant and pertinent to the contested issues in this application, they do not take the real issue any further in light of the admissions referred to above. The fact is, with these admissions on the table, no doubt can be thrown on the applicant's case, be it from a factual or a legal basis.

[21] The respondents admit that they acted contrary to the provision of the PPA and what needs to be considered and decided is what impact that has on the licences. Is the second respondent trading unlawfully or is the business "***prima facie** lawful*" as submitted by the respondents? I will return to this matter (**infra**).

[22] In her decision regarding the appeals, the Minister instructed the fourth respondent to take action in terms of regulation 35 read with regulation 29 (2) of the Act in order to address the contravention of Section 2 A (4) (b) of the Act. Another process pending is an appeal regarding the transfer of the site licence by the fourth respondent from the first respondent to the sixth respondent. There are therefore several procedures pending and it is in the light of those that the present interdictory relief is sought.

[23] Section 2A of the Act expressly provides for the prohibition of certain activities as follows:

"1) A person may not -

a) Manufacture petroleum products without a manufacturing licence;

b) Wholesale prescribed petroleum products without an applicable wholesale licence;

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, issued by the controller of petroleum products."

Evidently, the aforesaid prohibitions are peremptory as Section 2 B (1) stipulates that *"the controller of petroleum products must issue licences in accordance with the provisions of this Act."*

[24] Further, Regulation 5 provides that the Controller, before he accepts an application for a site licence must be satisfied that the applicant is the owner of the site or has the written permission of the owner where the site is "*publicly owned*".

[25] It is common cause that the first respondent was not the owner of the site when the licence was granted and that the granting of a licence to it was as a result of misrepresentations made to the fourth respondent.

[26] It is also pertinent to bear in mind that retailing activities of petroleum products have been and are still conducted on Erf 3465 without a site licence, since 2014.

[27] The applicant submits and I accept that competition is unlawful where a person trades in contravention of an express statutory prohibition.

See **Silver Crystal (Pty) Ltd v Namibia Diamond Corporation (Pty) Ltd** 1983 (4) SA 884 (D) 888-889; **Unity Longhauls (Edms) Bpk v Grindrod Transport (Pty) Ltd** 1978 (2) SA 102 (T) 109.

[28] Everyone, including a rival trader, is entitled to protect him or herself by approaching a court of law to prohibit loss which is caused by performance of an unlawful act of another.

See **Begeman v Cirota** 1923 TP (1) 270, **Da Silva v Coutinho** 1971 (3) SA 123 (A) 140; **Knop v Johannesburg City Council** 1995 (2) SA 1 (A); **Olitzki Property Holdings v State Tender Board** 2001 (8) BCLR 779 (SCA), 2001 (3) SA 1247 (SCA).

Temporary Interdict Requirements

[29] It is trite that an applicant for a temporary interdict has to satisfy the following requirements:

29.1 a **prima facie** right;

29.2 a well-grounded apprehension of irreparable harm, if the interim relief is not granted and the ultimate relief is eventually granted;

29.3 that the balance of convenience favours the granting of an interim interdict;

29.4 that the appellants have no other satisfactory remedy available to them.

See **Setlogelo v Setlogelo** 1914 (1) 221 at 227; **L. F. Boshoff Investments (Pty) Ltd v Cape Town Municipality** 1969 (2) SA 256 (C) at 267; **Masuku v Minister Van Justice** 1990 (1) SA 837 (A); **National Treasury and Others v Opposition to Urban Tolling Alliance and Others** 2012 (6) SA 223 (CC).

[30] It is equally trite that due to the discretionary nature in granting an interim interdict, the requisites enumerated (**supra**) are not to be weighed in isolation but due weight must be given to their inter-relatedness.

[31] A brief discussion of the interim interdict requisites is apposite. The primary requisite is a **prima facie** right, namely, **prima facie** proof of facts that establish the existence of a right in terms of substantive law. The degree of proof has been formulated as follows: the right can be **prima facie** established even if open to some doubt.

Unlawful Competition

The basis of the applicant's claim is that his right to trade lawfully is subjected to unlawful competition by the respondents in that the second respondent obtained a retail licence without being the owner of that site as provided in the Petroleum Products Act 120 of 1977. "*Competition in conflict with a statutory provision is considered to be unlawful in principle because it disturbs the so-called equality principle of the law of competition: the par concurrentium.*"
See van Heerden-Neethling, *Unlawful Competition*, second edition p253. The **locus classicus** for the recognition that competition in conflict with a statutory prohibition is a form of unlawful competition is **Patz v Greene & Co** 1907 TS 427. In that case the applicant (appellant), who traded in the vicinity of a mining compound, applied for an interdict against the respondents who carried on a similar business on claim land at the entrance of the compound. The applicant based his application **inter alia** on the fact that trading on claim land was prohibited by statute. The application was dismissed in the court **a quo**, but the applicant appealed with a measure of success. Solomon J formulated the following rules:

"Everyone has a right .... to protect himself by appeal to a court of law against loss caused to him by the doing of an act by another, which is expressly prohibited by law. Where the act is expressly prohibited in the interests of a particular person, the court will presume that he is damnified, but where the prohibition is in the public interest, then any member of the public who can prove that he has sustained damage is entitled to his remedy."

The proper approach is to consider the facts as set out by the applicants together with any facts set out by the respondents, which the applicants cannot dispute and to decide with regard to the probabilities and the ultimate onus whether the applicants should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondents should then be considered, and if they throw serious doubts on the applicant's case, the applicants cannot succeed.
See *The Law of South Africa*, volume, II 2nd Ed, p 420, para 404.

[32] The second requisite is a reasonable apprehension that the continuance of the alleged wrong will cause irreparable harm to the applicants. The test is objective and the question is whether a reasonable man confronted by the facts, would apprehend the probability of harm on a balance of probabilities. Actual harm need not be subjective.
See *The Law of South Africa*, volume II, 2nd Ed, p421, para 405

[33] In the present case applicant has presented evidence that his sales of petroleum products have deteriorated ever since the second respondent commenced its business operations. According to the evidence tendered by the applicant, the impact on its filling station in economic terms was devastating. In January of 2014 the applicant would sell about 449 223 litres of fuel per month – until the second respondent started trading on 22 May 2014. The impact on the applicant's business can be seen in the monthly deterioration of sales that occurred thereafter with the result that by September of that year the applicant could only sell 225 631 litres of fuel. According to the applicant petrol filling stations are expected by the supplier (Total) to maintain a threshold of about 350 000 litres per month and in so doing they can benefit through renovations to the business operations by the supplier. Without maintenance of the threshold the business operation is put in jeopardy. The applicant is currently suffering serious damages which threaten the continued existence of his business. Irreparable harm is therefore not just reasonably apprehended but current and actual.

[34] The third requisite is that the balance of convenience must favour the granting of the order. The court ought to weigh the prejudice which the appellants will suffer if an interim interdict is not granted against the prejudice which the respondents will suffer if it is. The exercise of a court's discretion usually resolves itself into a consideration of the prospects of success and the balance of convenience. The stronger the prospects of success, the less the need for such a balance to favour the applicants. The weaker the prospects of success, the greater the need for it to favour the applicants. **In casu**, the second

respondent states that it has about 32 employees whose families would suffer were they to lose employment. The applicant avers on the other hand that its business operations might have to close down due to the activities of the respondents. Whilst the parties might appear to be on par in this regard, the applicant submits that a critical consideration is that the respondent's business is operating unlawfully in that the second respondent ought never to have been granted a licence to trade if the correct procedures were followed and the correct disclosures made when it presented its application for a licence.

[35] The fourth and final requisite is that there must be an absence of another adequate remedy. In this regard, the remedy must be available must comply with the following requirements:

35.1 Firstly, the remedy that is available must be adequate in the circumstances. **National Chemsearch (SA) (PTY) Ltd v Borrowman** 1979 (3) SA 1992 (T).

35.2 The remedy must be ordinary and reasonable.

35.3 It must be a legal remedy.

35.4 The remedy must grant similar protection.

See *The Law of South Africa*, volume, II 2nd Ed, p 423, para 407.

I have duly considered the factual matrix of this case and it does not appear that the applicant has available to it any other remedy than the present application.

[36] As stated (**supra**) the applicant has made a reference to a number of procedural irregularities in the process of granting a site licence to the first and second respondents. Whilst the respondents have filed an opposing affidavit they have formally admitted in detail the veracity of the PPA irregularities referred to by the applicant.

[37] In **Ladychin Investments v South African National Road Agency** 2001 (3) SA 344 (NPD), the applicant applied for interim relief pending an application to review a decision to allow the construction of a toll plaza in the intended position in circumstances where the appellant alleged **inter alia** that there had not been compliance with the requirements of the relevant legislation when they considered the applicant's objections, and that there had been no proper consideration given to the applicant's rights when the decision was made. After consideration of the applicant's case, and particularly the statutory principles of the Environmental Conservation Act 73 of 1989, which had not been complied with, as well as the National Environmental Management Act 107 of 1998, the court came to the conclusion that the applicant had established a clear right of review, alternatively a right open to some doubt, and that the balance of convenience favoured the applicant. Interim relief was granted by way of a temporary interdict prohibiting the construction of a toll gate.

[38] Another decision in which issues similar to the present case were discussed is that of **Thomson v Head of the Department of Agriculture, Conservation, Environment and Tourism, North West Province and Others** 2008 (1) ALL SA 392 (T), the court was faced with two applications. In the first application the applicant sought an interdict preventing the third and fourth respondents from continuing with the construction of a petrol filling station on a certain site. In the second application, the applicant sought to prevent the same respondents from conducting business in all petroleum products pending the outcome of an application for a licence and from competing unfairly with the applicant. The court found on the evidence before it that the relevant respondents were proceeding with the construction of the filling station, in conflict with the

conditions imposed thereon. That rendered the applicant entitled to the relief sought in the first application. In the second application, the applicant had to prove his entitlement to a permanent interdict, setting out the well-established requirements for final interdicts. The court found the applicant to have established those requirements and the applicant succeeded.

[39] **In casu** I have considered the evidence tendered by the parties and submissions by counsel. I have considered also the facts alleged by the applicant and admitted by the respondents. The admissions contained in paragraph 7 of the respondent's answering affidavit support the conclusion that the applicant has established a clear right of review. In the circumstances the applicant is more likely to suffer prejudice than the respondents and I find that the balance of convenience favours the applicant.

[40] I have listened to a rather interesting application of the law to the facts by respondent's counsel Wagener S.C. who has strenuously argued against the granting of an interim interdict whilst conceding that the respondents had indeed acted in contravention of the PPA. He submits that the respondents cannot be said to be acting unlawfully in continuing to conduct their business of a petrol filling station in competition with the applicant.

[41] His contention is that the second and sixth respondents had been granted retail and site licences by the relevant authorities even if they could be categorised as "*wounded*" or "***prima facie***" licences. On the other hand, counsel for the applicant Du Plessis S.C. contends that the said licences were unlawfully issued having been invalid **ab initio**. He submitted they were invalid due to the fact they were granted when the site or property in question had already been transferred to the sixth respondent creating a situation where the licences were granted "***in vacuo***" hence the invalidity.

[42] In supporting the argument for **prima facie** validity respondents' counsel relies on the well-known decision of **Oudekraal Estates (Pty) Ltd v City of Cape Town and Others** 2004 (6) SA 222 (at para 27) in which the validity of administrative actions were declared to have legally valid consequences until set aside by a court by way of a review application.

[43] As Howie P et Nugent JA stated the principle:

"[27] The apparent anomaly (that an unlawful act can produce legally effective consequences) is sometimes attributed to the effect of a presumption that administrative acts are valid, which is explained as follows by Lawrence Baxter: Administrative Law at 355:

"there exists an evidential presumption of validity expressed by the maxim omnia praesumumtur rite esse acta; and until the act in question is found to be unlawful by a court, there is no certainty that it is. Hence it is sometimes argued that unlawful administrative acts are "voidable" because they have to be annulled.""

[44] The applicant's counsel has sought to distinguish the Oudekraal decision from the present set off facts in that the applicant herein does not seek to set aside the administrative decision by the Controller and the Minister but to suspend it pending an internal appeal and/or a review and that this distinction was recognised and applied by the courts in the following cases: **Van der Westhuizen and Others v Butler and Others** 2009 (6) SA 174 CPD, **Camps Bay Residents and Ratepayers Association and Others v Augoustides and Others** 2009 (6) SA 190 (WCC), **Ladychin Investments v South African National Road Agency** 2001 (3) SA 344 (NPD), **Transnet Bpk h/a Coach Express en 'n Ander v Voorsitter, Nasionale Vervoerkomissie en Andere** 1995 (3) SA 844 (T).

[45] In the Camps Bay matter, the applicants sought to interdict the further construction on a building which was 95% complete due to alleged non-compliance with the relevant zoning scheme regulations. The court per Dlodlo J at P196 J – 197 G:

"INTERIM RELIEF FOR CESSATION OF BUILDING WORKS PENDING REVIEW PROCEEDINGS

[10] I am guided by a series of decision of this division as to the manner in which applications for the interim cessation of building works pending review proceedings are to be addressed. The manner in which the courts in this division have addressed applications for the interim cessation of building works pending review proceedings is well established. It has been laid down in a long series of decisions. Convenient examples include ***Beck and Others v Premier of the Western Cape*** *(CPD case 12596/06, 11 October 1996, unreported, per Conradie J);* ***Camps Bay Residents and Ratepayers Association and Another v Avadon 23 (Pty) Ltd and Another*** *(CPD case No 17364/05, 18 March 2005, unreported, per Foxcroft J);* ***PS Booksellers (Pty) Ltd and Another v Harrison and Others*** *2008 (3) SA 633 (C) ([2007] 3 All SA 552);* ***Van der Westhuizen v Butler*** *2009 (6) SA 175 (C); and* ***Searle v Mossel Bay Municipality and Others*** *(CPD case No 1237/09, 12 February 2009, unreported, per Binns-Ward AJ).*

What appears from this line of decisions is the following:

1. *The prospects of success in the contemplated review proceedings represent the measure of the strength or otherwise of the alleged right that the applicant must establish prima facie in order to obtain interim relief. See:* ***Searle*** *supra in para 6;* ***Lady Chin Investments (Pty) Ltd v South African National Roads Agency Ltd and Others*** *2001 (3) SA 344 (N);* ***Transnet Bpk h/a Coach Express en 'n Ander v Voorsitter, Nasionale Vervoerkommissie, en Andere*** *1995 (3) SA 844 (T).*

2. *The stronger the prospects of success in the review proceedings (ie the prima facie right) the greater the subordination of prejudice occasioned by a cessation of the building work. Otherwise stated, the principle of legality tends to operate decisively in this context.*

3. *As Conradie J noted in Beck's case supra, if applicants are likely to be proved right in the review proceedings, 'it is desirable that the building operations should be stopped now, that is to say, sooner rather than later'.*

4. *Important purposes and functions of granting interim relief in this context are that a respondent 'does not build himself into an impregnable position by the time the review comes to be heard' and, secondly, to prevent the bias exercised by a completed (but unlawful) structure towards the favourable determination of a regularisation application so as to 'permit a result that would not have been permitted if the factor of a fait accompli had not been present'. See:* ***Searle's*** *case supra para [11].*"

[46] Given the admitted irregularities which were committed by the respondents which were put forth as the basis for the applicant's case I am satisfied that the prospects of success in the contemplated review proceedings do represent the measure of strength of the right that the applicant had to establish **prima facie**. I am also satisfied that the principles set out in the Camps Bay decision are applicable in the present application.

[47] The Camps Bay case and the other cases referred to (**supra**) can accordingly be distinguished from the principles established in the Oudekraal decision regarding administrative decisions.

The Doctrine of Separation of Powers

[48] The respondent's counsel submits that this court ought not to grant the interim interdict as granting it would contravene the doctrine of separation of powers.

[49] In support of that submission he made reference to the following cases:

Helen Suzman Foundation and Another v Minister of Police and Others, case number 23199/06 NGHC (an unreported decision para 12-13), **National Treasury and Others v Opposition Tolling Alliance and Four Others** [2012] (6) SA 223 (CC) para 43-44.

[50] In the National Treasury matter Moseneke DCJ expressed the law in this regard as follows:

"[43] A little less than 40 years before the advent of our constitution, in Gool, a full bench of the Cape Provincial Division was called upon to grant an interdict restraining the Minister pendente lite from exercising certain powers vested in him by a statute. Ogilvie Thomson J, writing for a unanimous Court, considered the requirements for an interim restraining order announced in Setlogelo and said the following:

"The present is however not an ordinary application for an interdict. In the first place, we are in the present case concerned with an application for an interdict restraining the exercise of statutory powers. In the absence of any allegation of mala fides, the court does not readily grant such an interdict."

And later the learned Judge observed:

"The various considerations which I have mentioned lead, in my opinion, irresistibly to the conclusion that the court should only grant in interdict such as that sought by the applicant in the present instance upon a strong case being

made out of that relief. I have already held that the court has jurisdiction to entertain an application such as the present, but in my judgment that jurisdiction will, for the reasons I have indicated, only be exercised in exceptional circumstances and when a strong case is made out for the relief."

[44] The common law annotation to the Setlogelo test is that courts grant temporary restraining orders against the exercise of statutory power only in exceptional cases and when a strong case for that relief has been made out. Beyond the common law, separation of powers is an even more vital tenet of our constitutional democracy. This means that the Constitution requires courts to ensure that all branches of government act within the law. However, courts in turn must refrain from entering the exclusive terrain of the executive and the legislative branches of government unless the intrusion is mandated by the Constitution itself."

[51] It is trite law that the requirements for the granting of an interim interdict which were formulated in **Setlogelo v Setlogelo** 1914 AD 221 and refined in **Webster v Mitchell** 1948 (1) SA 1186 (WLD) were designed for and ideally suited for interdicts between private parties.

[52] It is common cause that the present application is essentially between private parties, namely the applicant, the first, second and sixth respondents. The applicant cannot therefore be said to seek to trespass in the exclusive domain of the Executive or the Legislature. On this basis therefore, the submission by counsel for the respondents is not sustainable.

Delay in Launching the Application

[53] The applicant's counsel addressed this court at length regarding the timeline regarding steps taken by the applicant from the time it became aware of the respondent's application for a retail and site licence. Briefly stated, it is the applicant's case that it was not in possession of the relevant information with regards to the applications, their compliance with the zoning requirements of the Town Planning Scheme and the National Environmental Management Act (NEMA) (**supra**). The applicant had to collect and collate the said information in order to bring the present application to court.

[54] The respondent's counsel submits that the application was not brought with reasonable expedition and that the review application was brought outside the 180 days period which is disputed by the applicant.

[55] In the Van der Westhuizen case (**supra**) the applicants launched an application for the review of the local authority's decision to approve the respondent's building plans in terms of Section 7 of the National building Regulations and Building Standards Act 103 of 1977 (the Building Act). Pending determination of the review proceedings and determination of a possible future application for the demolition of the building on the respondent's property, the applicants brought an urgent application to interdict the respondents from proceeding with any further construction and from selling or alienating the property. The respondents resisted the application on the basis of urgency and that the applicants had no **prima facie** right since they would not succeed in the review application due to failure to bring it within 180 days in terms of Section 7(1) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

[56] The court held per Davis J with regard to urgency, that the 180 days limitation under PAJA was not directly applicable to the question of urgency in respect of an application for interim relief. The applicants had furthermore explained their delay in launching the application, which explanation was plausible.

[57] Even in the present case, the applicant has put sufficient facts before the court to indicate that any delay was not unreasonable in the circumstances especially considering the fact that the facts were fairly complex and the applicant had to do research into the many issues of fact and law in regard thereto. There was also the need to employ other experts in the field such as town planners and to retain the services of experienced and able counsel who are without doubt extremely busy.

See **Radio Islam v Chairperson, Council of the Independent Broadcasting Authority** 1999 (3) SA 897 (w) at p 908 and p 910.

[58] Further, I find that it cannot be disputed that the applicant is currently being prejudiced by the respondent's trading activities. I further accept that the first, second and sixth respondents have brought about their current situation by committing acts which they knew or ought to have known are unlawful.

[59] I also find that the requirements for the granting of an interim interdict have been satisfied and that there are good prospects of success in the review application.

[60] In the result the draft order handed in is made an order of court as follows:

ORDER:

Having heard counsel for both parties, the following order is granted in terms of Part A of the Notice of Motion

60.1 That a temporary interdict be granted in favour of the applicant against the first, second and sixth respondents in the following terms:

60.1.1 The first, second and sixth respondents are prohibited from taking any further steps regarding the construction of a filling station on Erf 3465, extent 3.742ha situated in Township Namakgale B, district of Namakgale held by the sixth respondent under TG12564/2013; and

60.1.2 The first, second and sixth respondents are prohibited from any trading activities and/or retail activities of petroleum products of any nature whatsoever on Erf 3465, extent 3.3742ha situated in Township Namakgale B district of Namakgale, held by the sixth respondent under TG12564.2013.

60.2 The abovementioned temporary interdict shall be valid and binding on all parties to this application pending:

60.2.1 the applicant's review application against the decision of the third respondent on appeal to grant a site licence on Erf 3465 Namakgale B Township under licence application F/2013/02/05/0001, in respect of first respondent and a new retail licence under application F/2013/02/05/0002;

60.2.2 the applicant's internal appeal that has been lodged with the fourth respondent pertaining to the transfer of the site licence in respect of Erf 3465 Namakgale B Township, from the first respondent to the sixth respondent;

60.2.3 any review application that may follow from the decision of the fourth respondent pertaining to the applicant's internal appeal filed as referred to in paragraph 60.2.2 above;

60.2.4 final relief in terms of Part B of this application.

60.3 Costs of Part A of this application, including the costs of three counsels.

S. A. M. BAQWA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Heard on:	31 October 2016 – 02 November 2016
Delivered on:	24 November 2016
For the Applicant:	Advocate R. Du Plessis S.C.
Instructed by:	A. Kock & Associates Inc.
For the 1st, 2nd and 6th Respondents:	Advocate S. Wagener S.C.
Instructed by:	Gerhard Wagenaar Attorneys