REPUBLIC OF SOUTH AFRICA

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

(1) REPORTABLE:: **YES**

(2) OF INTEREST TO OTHER JUDGES: **YES**

09/02/2016 EMKubushi
DATE SIGNATURE

9/2/2016

In the matter between:

72927/13

CASE NO: 62131/2013

WESTVAAL HOLDINGS (PTY) LTD	**FIRST APPLICANT**
BURDOLPH BELEGGINGS (PTY) LTD	**SECOND APPLICANT**
and	
THE MINISTER OF ENERGY	**FIRST RESPONDENT**
THE CONTROLLER OF PETROLEUM PRODUCTS	**SECOND RESPONDENT**

AND

CASE NUMBER: 72927/2013

ELDERBERRY INVESTMENTS (PTY) LTD	**FIRST APPLICANT**
QCK LEZMIN 4619 CC	**SECOND APPLICANT**
and	
THE MINISTER OF ENERGY	**FIRST RESPONDENT**
THE CONTROLLER OF PETROLEUM PRODUCTS	**SECOND RESPONDENT**

J U D G M E N T

KUBUSHI, J

INTRODUCTION

[1] The applicants before me seek leave, in terms of uniform rule 28 (4), to amend the notice of motion in a review application they have launched against the first and second respondents ("the notice of motion").

[2] At the end of argument, the applicants' counsel informed me that in a similar application between *Elderberry Investment (Pty) Ltd and another v The Minister of Energy and another*, case number 72927/2013, the same dispute that arises in the matter before me, arose. That application was postponed to be heard simultaneously with the current application. Counsel provided me with the file in the Elderberry matter and I have satisfied myself that the issues in both matters are *in pari materia* and that no further or differing considerations apply in the Elderberry matter. I was informed further that the respondents in the Elderberry matter have agreed to abide my decision in the present application. As such the parties in the Elderberry matter will be bound by the decision I make in the current application.

THE AMENDMENT

[3] The applicants had previously applied in terms of the Petroleum Products Act 120 of 1977 ("the Act") for two petroleum product licences, namely, a petroleum product site licence and a retail licence. The applications for the licences were turned down by the second respondent as the Controller of the Petroleum Products in terms of the Act ("the controller"). The applicants appealed the decision of the second respondent to the first respondent but the

appeal was unsuccessful as well. As a result, the applicants instituted review proceedings to review and set aside the decisions of the first and second respondents, respectively. The first and second respondents are opposing the review application but have not as yet filed their opposing papers.

[4] The review application having been launched, and on perusal of the record of the proceedings of the decisions filed in respect thereof, the applicants became aware that the record contained information which entitled them to relief on grounds other than those already prayed for in the review application. Consequently, the applicants served the first and second respondents with a notice of intention to amend the notice of motion.

[5] The applicants' notice of intention to amend proposed to insert the following three new prayers, namely prayers 4, 5 and 6, in the notice of motion:

> "4. That the provisions of Regulation 6 (2) *(a)* of the Regulations regarding Petroleum Products Site and Retail Licences promulgated in terms of the Petroleum Products Act 1977 (Act No. 120 of 1977) and published in Government Gazette No. 28665 on 27 March 2006 is declared *ultra vires* the said Act.
>
> 5. That the matter is referred back to the Second Respondent for reconsideration of the applications referred to in paragraphs 1 and 2 above.

6. That for purposes of the reconsideration of the applications referred to in paragraphs 1 and 2 above the Second Respondent shall not have regard to Regulation 6 (2) *(a)* referred to above."

[6] The first and second respondents in response to the proposed amendments filed a notice of objection. The respondents are not objecting to the insertion of the new prayer 5 in the notice of motion. They are, however, objecting to the insertion of the other two new prayers, namely, prayers 4 and 6, on the basis that the amendments as proposed by the applicants are bad in law. The respondents' submission that the amendments are bad in law is predicated on the grounds that:

6.1 as a matter of law the provisions of regulation 6 (2) *(a)* of the Regulations regarding Petroleum Products Site and Retail Licences promulgated in terms of the Petroleum Products Act 1977 (Act No. 120 of 1977) and published in Government Gazette No. 28665 on 27 March 2006 ("the Regulations") are not *ultra vires* the provisions of the Act because the Minister is, either expressly or at the very least by necessary implication, authorised and empowered by s 2 (1) *(b)* (ii) and/or s 12C (1) *(a)* (i) – (ii) of the Act to make regulation on the need for a new site retailing petroleum products; and

6.2 as a matter of law and having regard thereto that the provisions of regulation 6 (2) *(a)* of the Regulations are *intra vires* the provisions of the Act, the controller is by virtue of s 2B (1) of the

> Act under a legal duty or obligation to have regard to those provisions of regulation 6 (2) *(a)* of the Regulations so that she or he cannot be prevented from considering whether there is a need for a site at the premises of the applicants when she or he considers the two matters (the application for a site licence and the application for a retail licence) presently under review.

[7] Initially, as *per* the respondents' answering affidavit and their heads of argument, the respondents had raised an additional objection that the proposed amendments were wrongly sought in terms of uniform rule 28 instead of uniform rule 53. This objection was, however, not pursued during argument before me and I shall not deal with it in this judgment.

[8] As a result of the first and second respondents' objection to the proposed amendments, the applicants approached court on application in terms of uniform rule 28 (4) for leave to amend the notice of motion as proposed in the notice of intention to amend, hence the application before me. The first and second respondents are, obviously, opposing this application and rely on the objections raised in their notice of objection to the proposed amendments.

ARE THE PROPOSED AMENDMENTS BAD IN LAW?

[9] After a lengthy argument by the parties' counsel it became apparent that the parties were common cause that the objection by the respondents raises a legal issue. The parties are also in agreement that the legal issue revolves

around the interpretation of s 2 (1) *(b)* (ii) and/or s 12C (1) *(a)* (i) and (ii) of the Act read with regulation 6 (2) *(a)* of the Regulations.

[10] The applicants' submission is that I should not at this stage of the proceedings deal with the legality or otherwise of the amendments. The contention being that such should be dealt with at a subsequent hearing in the event of granting the applicants leave to amend the notice of motion.

[11] The applicants' main complaint for such a submission is that it would be inappropriate for a court to proceed with the interpretation of the provisions of a statute at this stage of the proceedings since to do so would be to undermine the principles of interpretation enunciated in the judgment in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (1) SA 593 (SCA) para 18 to 19. The applicants in this submission also rely on the judgment in *Poswa v President of the Republic of South Africa and Others* 2015 (2) SA 127 (GJ) para 61 whereat the court stated

> '[61] It has been said that "context is everything" when it comes to the interpretation of statutes, contracts and documents. . .'

[12] The applicants in this instance, argue further that it would be untenable for this court to proceed to interpret the provisions of the Act which are at issue without the benefit of the entire review application, that is, all the papers in the review application, especially in light of the fact that the respondents have not yet filed opposing papers.

[13] In opposition to the applicants' submission the respondents' argument is that this court is entitled to proceed to interpret the provisions of the Act which are at issue before it even at this stage of the proceedings since a statute is not interpreted in the circumstances of each case but in the context of the Act. In this regard the respondents' counsel referred, in support of the respondents' submission, to the judgment in *Desert Palace Hotel Resort v Northern Cape Gambling Board* [2007] 3 All SA 573 (SCA) para 7. I agree.

[14] The principles relating to the amendment of pleadings are trite and I do not intend to repeat them in this judgment. It has become established law that save in exceptional cases, where the balance of convenience or some such reason might render another course desirable, an amendment ought not to be allowed where its introduction into the pleading would render such pleading excipiable.[1]

[15] It has also been held that while the practice is not entirely uniform on this point, the weight of authority seems to favour the view that if the pleading as sought to be amended would be excipiable, this affords a ground upon which the court may, in the exercise of its discretion, refuse the application for amendment.[2]

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[1] See Erasmus: Superior Court Practice Vol. 2 D1-338

[2] See Cross v Ferreira 1950 (3) SA 443 (C) at 449H

[16] In my view, the applicants' submission that the court cannot interpret the provisions of the statute at this stage of the proceedings misses the point all together. It is trite that the interpretation of a statute, contract or document is the function of a court. It is also trite law that when interpreting a statute, the factual circumstances of a case have no bearing on the analysis. In interpreting a statute the court does not require extrinsic evidence in order to do so.

[17] The applicants' contention that before I can interpret the provisions of the Act before me I require inside into the evidence of the matter, that is, the evidence contained in the papers exchanged and/or to be exchanged by the parties in the review application, is faulty. In my opinion, the applicants do not understand the content of the judgments they have referred me to. It is indeed so that 'context is everything' when it comes to the interpretation of a statute. However, 'context' does not mean evidence and/or the circumstances of a particular case. The 'context' to which the applicants rely on, has been succinctly defined in the judgments the applicants are referring me to.

[18] For instance, in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) the court states as follows:

> '[18] . . . The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole

and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective and not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.

[19] All this is consistent with the 'emerging trend in statutory construction'. It clearly adopts as the proper approach to the interpretation of documents the second of the two possible approaches mentioned by Schreiner JA in *Jaga v Donges NO* and another [1950 (4) SA 653 (A) at 662G – 663A], namely that from the outset one considers the context and the language together, with neither predominating over the other. This is the approach that courts in South Africa should now follow, without the need to cite authorities from an earlier era that are not necessarily consistent and frequently reflect an approach to interpretation that is no longer appropriate.' (my emphasis)

[19] And, in *Desert Palace Hotel Resort (Pty) Ltd v Northern Cape Gambling Board* [2007] 3 All SA 573 (SCA), the following is stated:

'[8] The proper approach when interpreting a statutory provision was formulated in *Stellenbosch Farmer's Winery Ltd v Distillers Corporation (SA) Ltd and Another* [1962 (1) SA 458 (A) at 476E – G] as follows:

> 'In my opinion it is the duty of the court to read the section of the Act which requires interpretation sensibly, i.e. with due regard, on the one hand, to the meaning or meanings which permitted grammatical usage assigns to the words used in the section in question and, on the other hand, to the contextual sense, which involves consideration of the language of the rest of the statute, as well as the "matter of the statute, its apparent scope and purpose, and within limits, its background". In the ultimate result the court strikes a proper balance between these various considerations and thereby ascertains the will of the Legislature and states its legal effect with reference to the facts of the particular case which is before it.' (my emphasis)

[20] It is clear from the above quoted passages that context entails

"reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence"

and

"having regard to the purpose of the provision and the background to the preparation and production of the document"

and

"consideration of the language of the rest of the statute, as well as the matter of the statute, its apparent scope and purpose, and within limits, its background".

It does not entail consideration of the evidence and/or circumstances of a particular case as the applicants seek to suggest in their submission.

[21] As it is succinctly stated in *Krischke v Road Accident Fund* 2004 (4) SA 358 (W) para 9: a pleading which is bad in law lacks averments, which are necessary to sustain an action. It follows that an amendment should be refused on the ground of excipiability.

[22] Similarly, as in the *Krischke*-judgment, the objection raised by the respondents in this instance goes to the root of the applicants' case. The amendments are, thus, dependent upon the applicants proving that the proposed amendments are not bad in law. Once it is established that the applicants' amendments are bad in law, then, *a fortiori*, the application should inevitably fail. The applicants' submission that I should determine the amendments without proffering a determination of whether the amendments are bad in law or not is, consequently, flawed. And, in a matter such as the current, where there is a point of law to be decided, which might dispose of the case, then that point of law should be determined.[3]

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[3] See Krischke v Road Accident Fund above para 10.

[23] In the circumstances I opt therefore to deal with the issue as to whether I should grant the proposed amendments or not. Put differently, the issue is whether or not the proposed amendments are bad in law and should therefore not be allowed.

Is the issue triable?

[24] Before I deal with the interpretation of the relevant provisions of the Act, I pause to deal first with another point raised by the applicants.

[25] Despite my above findings, the applicants still persist with the contention that they be granted leave to amend the notice of motion by virtue of the fact that the issue proposed to be introduced by the amendments is a triable issue. According to the applicants the issue in this instance is eminently triable because the applicants contend for one interpretation of the statute, and the respondents contend for a different interpretation thereof. The triable issue thus relates directly to the interpretation of the relevant statutory provisions, which is a matter for the court.

[26] It is true that in law an amendment is normally granted when the issue proposed to be introduced by the amendment is a triable issue.[4] A triable issue is said to be one that, (a) if it can be proved by the evidence foreshadowed in the application for amendment, will be viable or relevant; or

[4] See Caxton Ltd v Reeva Foreman (Pty) Ltd 1990 (3) SA 547 (A) at 565H – J.

(b) which, as a matter of probability, will be proved by the evidence so foreshadowed.[5]

[27] In my view the insertion of the two prayers into the notice of motion does not introduce a triable issue. The issue as it has been found revolves around the interpretation of a statute. I have already mentioned in para [16] of this judgment that a court in interpreting a statute does not require the evidence foreshadowed in the application.

The interpretation

[28] One of the objects of the Act is to provide for measures in the saving of petroleum products and an economy in the cost distribution thereof. The Act envisages the issuance of licences as a mechanism to achieve this objective.[6]

[29] A person who intends to retail petroleum products requires at least two licences, namely, a 'site licence' [7]and a 'retail licence'. A 'site licence' and the accompanying 'retail licence' are aimed at the establishment or creation of an outlet[8] for the sale of petroleum products. The controller is empowered in terms of the Act to issue a licence applied for in accordance with the provisions of the Act.[9]

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[5] See Erasmus: Superior Court Practice Vol 2 D1-338
[6] See the Preamble to the Act
[7] The Act does not define 'site licence' but the definition is provided for in the Regulations. 'Site licence' means a licence issued for a person who holds land or has permission from the owner of the land to develop a site for the purpose of retailing petroleum products. See regulation 1 *(b)* of the Regulations.
[8] 'Outlet' in relation to petroleum products, means any place where petroleum product is sold or is offered for sale to customers – s 1 of the Act
[9] See s 2B (1) of the Act.

[30] Any person who has to apply for a 'site licence' must have a site where she or he intends to retail petroleum products. She or he must be the owner of that land or have a written permission from the owner of the land.[10]

[31] It follows, therefore, that there must be two approvals for the same site. Firstly, a competent authority, for example a Local Authority or a Municipality, must zone and approve the site for retailing of prescribed petroleum products. Secondly, before the person can proceed with the retail of such products, the controller must approve a licence, that is, a 'site licence', for that site. Section 2A (1) *(c)* of the Act prohibits a person to hold[11] or develop a site without there being a 'site licence' for that site.

[32] The first respondent is empowered in terms of the Act, firstly, to regulate in such manner as she or he deem fit or prohibit, the establishment or creation of an outlet for the sale of any petroleum product for the purposes of ensuring an economy in the cost of distribution of petroleum products or the rendering of service of a particular kind or of services of a particular standard.

[33] Secondly, without derogating from her or his general regulatory powers, the Minister is empowered to regulate manufacturing, wholesale, site or retail licences in general, including but not limited to the form and manner in which an application for a licence shall be made as well as the procedures to be

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[10] See s 2A (4) *(b)* of the Act.

[11] 'hold' when used in relation to land, means the owning of land for the purpose of establishing a site – s 1 of the Act

applied in the evaluation of an application for a licence.[12] The regulatory framework for the evaluation of licences, in particular 'site licences', is set out in regulation 6 of the Regulations. Sub-regulation (2) *(a)* thereof, provides that in case of an application for a 'site licence' made by a person in respect of whom s 2D of the Act[13] is not applicable, the controller must be satisfied that 'there is a need for a site'.

[34] The Act also empowers the Minister to prescribe a system to be used by the controller for the allocation of site and their corresponding retail licences. The controller is bound by this system.[14] A system contemplated herein must, amongst others, promote efficient investment in the retail sector and the productive use of retail facilities and may in that regard – (i) limit the total number of site and corresponding retail licences in any period; (ii) link the total number of site and corresponding retail licences in any period to the total mass or volume of prescribed petroleum products sold by licensed retailers.[15] The system may also link the issuing of a new site licence and the corresponding retail licences to the termination or transfer of ownership of one or more existing site licences and the corresponding retail licences.[16]

[35] The applicants' contend that by requiring in terms of regulation 6 (2) *(a)* of the Regulations that the second respondent be satisfied that 'there is a need' for a site, the first respondent has placed an additional duty on the applicants for a site licence that is not envisaged in the Act. In so doing, so it is argued, the

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[12] See s 12C (1) *(a)* (ii) of the Act.
[13] S 2D of the Act deals with transitional licensing provisions which are not applicable in this instance
[14] See s 2E (1) of the Act.
[15] See s 2E (3) *(d)* of the Act.
[16] See s 2E (3) *(g)* of the Act.

first respondent has exceeded her or his powers and has, therefore, acted *ultra vires* the Act. I, however, do not think so.

[36] It is not correct, as submitted by the applicants, that the Minister has acted *ultra vires* the Act in promulgating regulation 6 (2) *(a)* of the Regulations.

[37] It is clear from the provisions of ss 2 (1) *(b)* (ii) and 12C (1) *(a)* (ii) of the Act that the first respondent is authorised and empowered to regulate the establishment or creation of an outlet for the sale of petroleum products, and to amongst others, make regulations regarding site licences, including procedure to be applied in the evaluation of such a licence. Regulation (6) (2) *(a)* has thus been promulgated in pursuance of the obligations placed upon the first respondent in accordance with the Act. In this regard, the first respondent is entrusted with very wide and sweeping powers to regulate as she or he deem fit.

[38] The applicants may be correct to argue that regulation 6 (2) *(a)* of the Regulations places a more onerous duty upon the applicants. But, in my opinion, the applicants are wrong to say that such duty is not envisaged in the Act.

[39] Firstly, I am of the opinion that the requirement that the controller must be satisfied that there is a need for a site falls within the ministerial powers set out in s 2 (1) *(b)* (ii) of the Act and serves the purpose of ensuring an economy in the cost of distribution of petroleum products. It should be kept in

mind that the first respondent is not only empowered to regulate but also to prohibit the establishment or creation of an outlet. I am therefore of the opinion that in order for the controller to decide whether or not to prohibit the establishment or creation of a site she or he should be satisfied that there is no need for such a site.

[40] I am further of the view that in the process of evaluating an application for a 'site licence', the controller is bound by the system prescribed by the Minister in terms of s 2E (1) of the Act. In applying this system, the controller is called upon to promote efficient investment in the retail sector and the productive use of retail facilities. It is envisaged that in promoting efficient investment and productive use of retail facilities the controller may limit the total number of site and corresponding retail licences in any period or link the total number of site and their corresponding retail licences in any period to the total mass or volume of prescribed petroleum products sold by the licenced retailers. The controller may also link the issuing of a new site licence and the corresponding retail licence to the termination or transfer of ownership of one or more existing site licences and the corresponding retail licences. To maintain this equilibrium, the controller must be satisfied that 'there is a need for a site'. This the controller must do even though a local authority might have already satisfied itself of the need for a site for the retailing of prescribed petroleum products. The approval of a site by a Local Authority or a Municipality to retail petroleum products does not automatically entitles the owner of the site to sell petroleum products on that site without the issuance

of a 'site licence' by the controller. This is as explained in para [31] of this judgment.

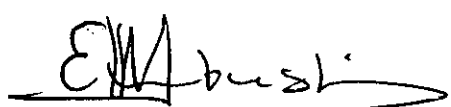
[41] It is thus evident from the aforesaid that it is necessary for the controller when assessing an application for a site licence to be satisfied that 'there is a need for a site'. I have to conclude that the first respondent acted *intra vires* when prescribing in regulation 6 (2) *(a)* of the Regulations that, for the type of licence in question, that is, a 'site licence', the controller must be satisfied that there is a need for a site.

[42] In the circumstances I have to hold that the substance of the applicants' amendments is bad in law and the amendments should therefore not be allowed.

ORDER

[43] I make the following order:

1. Leave to insert prayer 5 in the notice of motion is granted.
2. Leave to insert prayers 4 and 6 in the notice of motion is refused.
3. The applicants are ordered to pay the costs of the application jointly and severally.



E.M. KUBUSHI
JUDGE OF THE HIGH COURT

APPEARANCES

HEARD ON THE	: 24 NOVEMBER 2015
DATE OF JUDGMENT	: 09 FEBRUARY 2016
PLAINTIFF'S COUNSEL	: Adv S. S. WAGENER (SC)
PLAINTIFF'S ATTORNEY	: GERHARD WAGENER ATTORNEYS
DEFENDANT'S COUNSEL	: Adv M. M. OOSTHUIZEN (SC)
DEFENDANT'S ATTORNEY	: STATE ATTORNEY