IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NUMBER 70529/14

In the matter between:

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

DATE 22/8/16
SIGNATURE

24/8/2016

MARIKANA MOTOR DIENSTE CC — Applicant

And

MS TINA JOEMAT-PETERSON MP NO — First Respondent

R T MAQUBELA NO — Second Respondent

ELDORA INVESTMENTS 5 CC — Third Respondent

MIBBALL BIZZ LIMPOPO CC — Fourth Respondent

JUDGMENT

TOKOTA AJ

[1] The third respondent is a close corporation registered as such in terms of the laws of this country. It is the owner of the property known as Portion 356 of the farm Rooikoppies 297 having bought the property from De Beer Transport CC. This property was previously used to conduct a business of, *inter alia*, a trucking transport, earthmoving and construction business known as De Beer Transport CC. De Beer Transport CC applied, and such application was approved on 4 November 2011, for the rezoning of the property from agriculture to a business. The land use was therefore altered to accommodate a petrol filling station and sold to the third respondent by De Beer Transport CC on 17 July 2012.

[2] The third respondent (hereinafter referred to as Eldora) having registered the property in its own name then applied for environmental authorisation for the establishment of a petrol filling station. The authorisation was granted by the Provincial Department of Economic Development, Environment, Conservation and Tourism (the department) on 16 February 2011. The site was then cleared in preparation for the commencement of business.

[3] Although this is not clearly set out in the papers it appears that subsequent to the granting of environmental authorisation Eldora applied

to the Department of Energy for a licence to undertake petroleum retailing activities.

[4] Pursuant to the application by Eldora an advertisement was published in two news papers calling upon all interested persons to lodge objections, if any, with the Department of Energy within twenty days of such publication. The advertisement was published on 12 July and 2 August 2013.

[5] The applicant had an interest in the application in that it is conducting a business of a filling station in the same area in Marikana trading as Marikana Motors. It lodged an objection to the granting of the licence to Eldora on the basis that there were already more than optimal number of filling stations in the area.

[6] The second respondent is the officer in the department appointed by the Minister in terms section 3(1)(a) of the Petroleum Products Act No. 120 of 1977 (the Act) as the Controller of Petroleum Products (the Controller). He denies that the objection was received by the department. He avers that the email address, used by the attorney acting on behalf of the applicant, was discontinued. Mr Erasmus, who is the attorney who lodged the objection on behalf of the applicant, and

who also appeared in court, stated that the email address used is reflected in the advertisement. Mr Erasmus also lodged an objection on behalf of the fourth respondent but used a different email address. This objection was received and considered by the second respondent. After the objections had been lodged nothing happened which was brought to the notice of Mr Erasmus who lodged the objections.

[7] Towards the end of May 2014 the applicant claims to have become aware of the granting of the licence by "happenstance". This was noticed when the third respondent was busy clearing the site preparing for the building of the petrol station. On the assumption that the licence was granted by the Controller, on 30 May 2014 the applicant filed an appeal to the Minister in terms of section 12A of the Act against the decision of the Controller granting the licence. The officials of the department decided not to submit the appeal to the Minister on the grounds thereof that it was a "preliminary appeal" and that they would wait for a "final appeal". Despite this decision they allowed Eldora to go ahead with the preparations for the filing station. This decision was never conveyed to the applicant nor was receipt of the appeal acknowledged.

[8] On 9 September 2014 Mr Erasmus addressed a letter to Mr B Martins, who was the then Minister and to Mr Sibiya, the then Controller of Petroleum Products, in which he pointed out that he has observed that work has commenced on the site which was an indication that the licence must have been granted to Eldora. He lamented about the failure to acknowledge the earlier objection and an appeal. He pointed out that on the assumption that the appeal and the objection were unsuccessful, he had instructions to bring an application for review of the decisions in Court. He demanded reasons for the approval and copies of applications, site visit reports and proof of submission of the appeal to the Minister. Furthermore he requested that Eldora be directed to cease the work pending the review application. A copy of this letter was sent to Eldora at the same time requesting Eldora to cease the activities.

[9] On 19 September 2014 the applicant brought an urgent application seeking, inter alia, an interim order interdicting and restraining Eldora from proceeding with the constructions pending the review application. It is not clear from the papers what happened in Court but I was informed from the bar that the matter was settled on the basis that Eldora would stop the construction work at the site pending the finalisation of the review application.

[10] It transpired during the urgent application that the appeal was never considered as it was never submitted to the Minister. This application therefore concerns a review of the decision to grant the licence and the decision not to submit the appeal to the Minister. It is opposed by the department and Eldora.

[11] The appearances for the parties were as follows; Mr Erasmus appeared for the applicant, Ms Kriel appeared for the department and Mr Rossouw SC appeared together with Mr Venter for Eldora. Mr Rossouw was not involved in the drawing of papers and heads of argument.

[12] Mr Erasmus submitted that the matter started as a review of the decision of the Minister to dismiss the appeal. This has changed immediately it became clear that the appeal was never submitted to the Minister. He argued that the decision by the second respondent not to submit the appeal to the Minister ought to be reviewed and set aside and the matter be remitted to the Minister to consider the appeal. He further argued that the granting of the licence should be set aside and be replaced with the refusal thereof.

[13] Ms Kriel, conceded that there was a proper appeal in terms of the Petroleum Products Act. She contended that since the appeal has not

been considered the review application is premature and should be deferred until the internal remedies have been exhausted. On this ground therefore, so the argument ran, the application should be dismissed. Furthermore, she argued that the fact that the appeal was not submitted to the Minister was the result of the applicant's own doing in that the appeal was headed "preliminary". She contended that this Court should refuse to entertain the review application on the basis that the applicant should first exhaust internal remedies. In her view the fact that the appeal has been launched and not yet considered prevents the applicant from approaching this Court for review. She referred me to section 7(2)(c) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA); **Nichol v Registrar of Pension Funds 2008 (1) SA 383 (SCA); and Koyabe v Minister for Home Affairs (Lawyers for Human Rights as Amicus Curiae) 2010 (4) SA 327 (CC)**.

[14] Mr Rossouw on behalf of Eldora also advanced the same argument that the internal remedies have not been exhausted. The rhetorical question is whether the failure to exhaust the internal remedies can be said to be a fault which is attributable to the applicant. Every step that the applicant took was ignored. The department did not fulfil its constitutional obligation towards the applicant as envisaged in section

195 of the Constitution of the Republic of South Africa, Act 1996 (the Constitution).

[15] In terms of section 195 of the Constitution the State is expected to promote and maintain a high standard of professional ethics; the Constitution demands that public administration must be accountable; there must be transparency which must be fostered by providing the public with timely, accessible and accurate information. The department failed to fulfil this constitutional obligation.[1]

[16] Mr Rossouw, however, took the argument a step further and maintained that there was no objection lodged by the applicant in that it was filed late. Therefore, so the argument ran, there was nothing to appeal against. He contended that the appeal ought to be preceded by an objection.

[17] Mr Rossouw's argument appears to be attractive but the substance thereof will be examined later in this judgment.

Failure to exhaust internal remedies.

[1] See Khumalo v MEC for Education, KZN 2014 (5) SA 579 (CC) (49)

[18] In my view the question of failure to exhaust the internal remedies by the applicant should be viewed in the light of the second respondent having decided not to submit the appeal to the appropriate body entrusted with the duty to consider the appeal in terms of section 12A of the Act. When the second respondent decided that the appeal was not going to be submitted to the Minister he was not authorised by any legislation to do so. He does not have power to decide whether or not the appeal is proper. He had a duty to submit the appeal to the Minister. It is the latter who would decide whether or not the appeal was defective. There was therefore a dereliction of duty on the part of the second respondent. The argument now presented to me seeks to have the respondents benefit from their own misconduct. It is a well established principle that a party should not be allowed to benefit from his own wrong.[2]

[19] The second respondent did not even have a courtesy of acknowledging receipt of either the objection (at least in respect of the one allegedly received) and the applicant was not even notified that the appeal was not going to be submitted to the Minister for whatever reasons. If he decided not to process the appeal it would be expected of

[2] See Magistrate Pangarker v Botha and Another 2015 (1) SA 503 (SCA) para 34; NDPP v Phillips 2002 (4) SA 60 (W) para.43; Info D B Computers v Newby 1996 (1) SA 105 (W) at 108A

him to inform the applicant as that decision affected the rights of the applicant adversely.

[20] There is a duty founded, *inter alia*, in the emphasis of accountability and transparency in section 195(1)(f) and (g) and the requirement of a high standard of professional ethics in s 195(1)(a) of the Constitution. It has been said that public functionaries, as the arms of the state, are vested with the responsibility, in terms of s 7(2) of the Constitution, to 'respect, protect, promote and fulfil the rights in the Bill of Rights'. As bearers of this duty, and in performing their functions in the public interest, public functionaries must, where faced with an irregularity in the public administration, seek to redress it. This is the responsibility carried by those in the public sector as part of the privilege of serving the citizenry who invest their trust and taxes in the public administration.[3]
The simple thing that the Controller should have done, if he was of the opinion that the appeal was irregular, was to write a letter to the applicant advising it of his view of the appeal. The perception that it was merely a "preliminary" appeal would have been corrected.

[33] .See Khumalo v MEC for Education, KZN 2014 (5) SA 579 (CC) para.35

[21] Furthermore section 33 of the Constitution provides that everyone whose rights have been adversely affected by administrative action has a right to be given written reasons for the decision affecting his rights.

[22] The decision by the second respondent was not authorised by legislation, it was therefore procedurally unfair. I am therefore not persuaded that failure to exhaust internal remedies in this matter can be a ground for refusing to entertain the matter. The applicant did what it had to do to exhaust the internal remedies but this was frustrated by the departmental officials. In any event it has applied for exemption which, in the circumstances, establish exceptional circumstances why the matter should be entertained.

Was there an objection against the granting of the licence.

[23] The first advertisement was published on 12 July 2013. The objection by the applicant was sent on 1 August 2013. This objection was emailed to the address appearing in the advertisement. This is the email which was alleged to have been discontinued and therefore, so it was alleged, the objection was not received. The objection by the fourth respondent is dated 18 October 2013 and it was received and

considered by the department. This is the objection which, it is contended, was out of time.

[24] Let me now examine the argument of Mr Rossouw. First, the objection which was lodged on 1 August 2013 was within the twenty day period. The argument is that since it was never received it was never lodged. Mr Erasmus argued that the email, which he used, was in the advertisement and therefore it does not lie in the mouth of the second respondent to deny that he received it. Mr Rossouw argued that the address to which the objection should have been lodged is a physical address of the department and not the email address. Therefore the applicant did not comply with the directive of the advertisement. The email address is made available for contact purposes.

[25] It is perhaps expedient at this point to quote the relevant portions of the advertisement.

"The purpose of the application is for the applicant to be granted a licence to undertake petroleum retailing activities as detailed in the application. Arrangements for viewing the application documentation can be made by contacting the Controller of Petroleum Products by:
.Telephone: (012) 444-4444 or
.Fax (012) 341 4228; or

.E-mail: petroleum.controller @energy.gov.za

Any objection to the issuing of a licence in respect of this application, which ***must clearly quote the application number*** *above, must be lodged with the Controller of Petroleum Products within a period of twenty days (20) working days from the date of publication of this notice. Such objection must be lodged at the following physical address:*

Physical address: *Postal address*

The Controller of Petroleum Products
Department of Energy
70 Meintjies Street
Sunnyside
Pretoria
0002".

The Controller of Petroleum Products
Department of Energy
Private Bag X 19
Arcadia
0007

[26] In my view this argument that the use of email address renders the objection invalid is to place form over substance. First, the email address can serve the purpose if the objection reaches the Controller. He cannot simply ignore the objection because it came to him by an email.

[27] Second, the objection which was sent in October 2013 using another email address was considered in the decision making process.

[28] Mr Rossouw argued further that the appeal can only be made by an affected person who has lodged an objection. In his argument a person who has not lodged an objection cannot lodge an appeal because he is not the person contemplated in section 12A of the Act. Section 12 A reads:"

"*(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."

[29] I must therefore decide, first, whether there was any objection lodged, if so, whether such objection was lodged out of time. Second, if it was lodged out of time whether there can be any condonation for the late filing thereof. Third, if I find that there was no objection, whether there can be any appeal against the decision of the second respondent in the absence of such objection. Fourth, if I find that there was no objection in the sense that it was filed out of time and there is no room for condonation whether the section precludes any appeal by any affected person other than the one who has lodged an objection.

Was there any objection lodged.

[30] The process of arriving at the decision will involve an interpretation of section 12A of the Act. I could not find any provision relating to the lodging of objections in the Act itself. This is however provided for in the regulations.

Regulation 4 provides:

"*4 Notice of application for site licence*
(1) When an application for a site licence contemplated in regulation 3 is accepted, an applicant in respect of whom section 2D of the Act is not applicable, must have a notice of the application published in a prominent manner, in at least two of the most popular newspapers circulating in the area of the proposed activity in two official languages, one of which must be English.
(2) The notice contemplated in subregulation (1) must state-

- *(a) the name of the applicant;*
- *(b) the application number issued by the Controller upon acceptance of the application;*
- *(c) the purpose of the application;*
- *(d) the place where the application will be available for inspection by any member of the public;*
- *(e) the period within which any objection to the issuing of the licence may be lodged with the Controller; and*
- *(f) the address of the Controller where objections may be lodged.*

(3) The place contemplated in subregulation (2)(d) must be the physical address of the Controller's office where the application was lodged.
(4) The period contemplated in subregulation (2)(e) must be at least 20 working days from the date of publication of the notice.
(5) Proof of the publication of the notice of application contemplated in subregulation (1) must be submitted to the Controller."

[31] To the extent that the argument maintains that once the twenty day period expires after the publication without any objection having been

lodged the objector has no remedy, I cannot agree. Mr Rossouw's argument seems to me to be founded on the premise that the twenty day period is the maximum period required and there is no provision for condonation in the Act.

[32] When interpreting any legislation section 39(2) of the Constitution enjoins courts, to developing the common law, to promote the spirit, purport and objects of the Bill of Rights.[4] That requires courts, when interpreting a statute, to avoid an interpretation that would render the statute unconstitutional and to adopt an interpretation that would better promote the spirit, purport and objects of the Bill of Rights.

[33] An interpretation that absolutely closes the door for an objection by virtue of the expired time limit would, in my view, not be in line with the provisions of section 39(2) of the Constitution.[5] To interpret regulation 4 so as to close the door for any objection would infringe upon the rights of the applicant to a procedurally fair administrative action as well as the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate,

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[4] See Tshwane City v Link Africa and Others 2015 (6) SA 440 (CC) para.123; Veldman v DPP, WLD 2007 (3) SA 210 (CC); Msunduzi Muni v MEC for Housing, KZN 2004 (6) SA 1 (SCA) para.23

[5] See Mohlomi v Minister of Defence 1997 (1) SA 124 (CC); Moise v Greater Germiston TLC: Minister of Justice & Constitutional Dev Intervening (Women's Legal Centre as Amicus Curiae) 2001 (4) SA 491 (CC);

another independent and impartial tribunal or forum. Furthermore, the use of the phrase "at least twenty days" in sub-regulation 3 presupposes that twenty days is the lowest number of days not the maximum number of days. In my view therefore the objection can be lodged even on a period longer than twenty days.

[34] The spirit, purport and objects of the Bill of Rights is to be gleaned from the rights guaranteed in the Bill of Rights which is the cornerstone of our constitutional democracy. I conclude therefore that the lodgement of the objections was not late.

[35] A further argument is that in the absence of an objection there can be no appeal. This argument is also not convincing. Nothing in the section suggests such an interpretation. Besides, to interpret section 12A in that manner would offend against the provisions of section 39 of the Constitution. In any event having found that the lodgement of the objection could be filed even beyond the twenty day period it is, strictly speaking, no longer necessary to decide this issue.

[36] Similarly, the question whether the only person who can appeal is the one who lodged an objection need not be decided. But I have reservations in the correctness of such argument. The section refers to

"*any person directly affected by a decision*" and not to a person who has lodged an objection.

[37] In the light of what I have discussed above the decision by the second respondent was unlawful and falls to be set aside. It must follow therefore that the decision approving a licence cannot stand as the process must take its course after the Minister has taken a final decision on appeal.

[38] There is however one last aspect which I wish to highlight in this matter. The papers were voluminous and plagued with unnecessary annexures causing a bulky record. It is needless to restate the well established principle that a party is not entitled to simply annex papers to the affidavit without identifying what portions it relies on for its cause of action or defence.[6]

[39] Parties should endeavour as far as it is humanly possible to assist the Court and not make it difficult for the Court to identify the issues in dispute. The applicant is expected to set out its case in chronological and understandable manner. The factual background must be limited to

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[6] Swissborough Diamond Mines (Pty) Ltd v Govt of the RSA 1999 (2) SA 279 (T); National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) para 47: Helen Suzman Foundation v President of the RSA 2015 (2) SA 1 (CC) para.35

the facts which are relevant for the determination of the issues. The cause of action must be clearly identifiable and not be left to Court to fumble in the forest of assorted trees.

[40] The same principle applies to the respondent. The respondent must set out succinctly what its basis of defence is even before responding the applicant's founding affidavit. It is unhelpful and time consuming when the respondent simply responds to the paragraphs of the founding affidavit. In that event the Court has to trawl through all the paragraphs trying to find out what the respondent's case is.

[41] In the interest of brevity and without prejudicing the issues, the replying affidavit must, as far as this possible, be confined new issues that arose in the answering affidavit and should not be prolix and repetitive.

[42] In this particular case I struggled to find out the chronological events that led to the granting of the licence to third respondent. None of the parties were helpful in this regard. It is very important that judgments must be based on true disputes that had to be resolved. Affidavits must therefore serve their purpose of defining issues. Nothing would be more painful to the parties than to base any judgment on a wrong perception

of the real issues between the parties. Judges are human beings and can easily make mistaken formulation of the parties' case.

[31] Having said all of the above I make the following order:

1. The decision of the second respond not to submit the appeal to the first respondent is reviewed and set aside;
2. The granting of the licence to the third respondent is reviewed and set aside;
3. The matter is remitted to the Department of Energy and the second respondent is directed to submit the applicant's appeal to the Minister for her decision.
4. The respondents are ordered to pay costs of the application.

DATE OF HEARING: 27 JULY 2016.

DATE JUDGMENT DELIVERED: 24 AUGUST 2016.

Counsel for the applicant: Mr G Erasmus (Attorney)

Instructed by Erasmus Attorneys

For the first and second respondents Adv C A Kriel

Instructed by the State Attorney Pretoria

Third respondent's Adv D P J Rossouw SC

P A Venter

Instructed by De Beer and Slabbert Attorneys