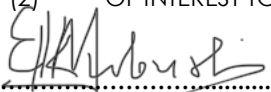




**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case Number: 71333/2018

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
	
.....	
E.M. KUBUSHI	DATE: 21 JULY 2022

In the matter between:

EMPIRE CROSSING DEVELOPMENT (PTY) LTD	First Applicant
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TEXICAM INVESTMENTS (PTY) LTD	Second Applicant
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and

THE MINISTER OF ENERGY	First Respondent
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THE CONTROLLER OF PETROLEUM PRODUCTS	Second Respondent
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TOM CAMPHER MOTORS	Third Respondent
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ENGEN EMPIRE CROSSING	Fourth Respondent
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JUDGMENT

KUBUSHI J

INTRODUCTION

[1] This application, launched by the first applicant, Empire Crossing Development (Pty) Ltd ("Empire Crossing") and the second applicant, Texicam Investments (Pty) Ltd ("Texicam") concerns the consideration, adjudication and granting of licences in relation to the retail of petroleum products, in accordance with the Petroleum Products Act ("the Act"),¹ read with the Petroleum Products Site and Retail Licence Regulations ("the Regulations").²

[2] The express purpose of the Act is, amongst others, to provide a licensing framework for the manufacture, wholesale, and retail of petroleum products, and, to structure through regulation, a system for the consideration, adjudication and grant of licences in relation to petroleum products.³ In order to establish or create an outlet for the sale of petroleum products a 'site licence' and the accompanying 'retail licence' are required. Therefore, a person who intends to retail petroleum products requires at least two licences, namely, a 'site licence' and a corresponding 'retail licence'.

[3] The functionary responsible for the administration and regulation of the licencing regime in terms of the Act, is the Controller of Petroleum Products ("the Controller"), the second respondent herein, who is appointed by the Minister of Energy, ("the Minister"), the first respondent herein, in line with the provisions of section 3(1)(a) of the Act.⁴ The Controller as a creature of statute is empowered by the provisions of the Act to accept and consider applications for site and retail licences according to the provisions of the Regulations.⁵

¹ Act 120 of 1977.

² Petroleum Products Site and Retail Licences Regulations published in GNR286 in Government Gazette 288665 of 27 March 2006 as amended by GNR 1061 in Government Gazette 35984 of 19 December 2012.

³ Overview (Preamble) of the Act.

⁴ See section 2B(1) of the Act.

⁵ Regulation 3(1)(b) provides that an applicant of a site licence must lodge the application with the Controller; and regulation 15(1)(b) provides that a retail licence application must be lodged with the Controller.

[4] The Act provides, in terms of section 12A thereof, for an internal appeal (“the appeal”) against the decision of the Controller. The Minister, in keeping with the provisions of section 12A of the Act, is empowered to consider the appeals lodged against the decisions of the Controller.⁶

[5] The application entails, in particular, the powers of the Controller to accept a new retail licence application replacing a retail licence application that was already considered and rejected by the Controller and the powers of the Minister to consider an internal appeal of a site licence application without a corresponding retail licence application. The Controller had refused to approve the site licence application that was on appeal before the Minister, as well as the corresponding retail licence application that had been lodged together, with that site licence application.

[6] Empire Crossing and Texicam, who are together referred to as the applicants herein, are in this application seeking an order to review and set aside the decisions of the Minister and the Controller, for refusing Empire Crossing's site licence application; and the decision of the Controller for refusing to accept Texicam's retail licence application.

[7] In terms of section 2E of the Act, the Minister is enjoined, by means of Regulations, to prescribe a system for the allocation of site and their corresponding retail licences. The applicants, as will more fully appear later in the judgment, are aggrieved by the system, contained in the Regulations, that the Minister and the Controller relied on when considering Empire Crossing's site licence application, in particular, regulation 6(2)(a) thereof. Consequently, the applicants are, further, seeking a declaratory relief that regulation (6)(2)(a) be declared *ultra vires* the provisions of section 2E of the Act.

⁶ **Section 12A. Appeal. –**

(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

[8] The application is opposed by the Minister, the Controller and the third respondent ("Tom Campher Motors") (collectively referred herein as the respondents). The fourth respondent, Engen Empire Crossing ("Engen Empire"), is not taking part in these proceedings.

FACTUAL BACKGROUND

[9] What actually happened in this matter is that in July 2013 Empire Crossing sought statutory authorisation from the Controller to construct and operate a filling station. Consequently, Empire Crossing lodged a site licence application with the Controller. The site licence application was lodged together with a corresponding retail licence application submitted by another entity in the name of Kodin Motors CC ("Kodin Motors"). As will become clear, hereunder, Kodin Motors is not involved in this matter.

[10] The applications were considered by the Controller and both were not granted. Pursuant to such refusal of the applications, Empire Crossing followed the prescribed internal appeal process provided in terms of section 12A of the Act, by submitting a notice of appeal. However, Kodin Motors failed to appeal the Controller's decision disapproving the retail licence application. Tom Campher Motors and Engen Empire (the third and fourth respondents) jointly counter appealed the decision of the Controller. In the counter appeal, one of the issues raised as a ground for dismissing Empire Crossing's appeal was the absence of a corresponding retail licence application because Kodin Motors, had not appealed the decision of the Controller. On receipt of the counter application, the Minister informed Empire Crossing that Kodin Motors did not appeal the Controller's refusal of its retail licence.

[11] It is alleged that consequent to such notification, a number of attempts were made by both Irma Muller Town Planners (who had been appointed to compile a new retail licence application by Texicam) as well as Texicam's attorney, to submit a new retail licence application to the Controller. These attempts are said to have included attendances at the Department of Energy's

helpdesk (where these applications are usually submitted), telephone calls, e-mails and even a consultation which was arranged by Texicam's attorney and attended by officials from the Department. All attempts were, apparently, without success. The office of the Controller refused to accept the retail licence application on the basis that it did not have a corresponding site licence application.

[12] On the face of such refusal, Texicam, on 8 February 2018, through its attorney of record, lodged an internal appeal against the Controller's refusal to accept its application for a retail licence, which appeal the Minister, apparently, refused to entertain.

[13] On 30 March 2018, the Minister confirmed the decision by the Controller not to approve Empire Crossing's site licence application. One of the reasons recorded in the written reasons provided by the Minister, for dismissing Empire Crossing's appeal, is that an appeal in respect of the corresponding retail licence application was not submitted.

[14] Not satisfied by the Minister's decision confirming the Controller's decision and the failure of the Minister to entertain Texicam's internal appeal, Empire Crossing and Texicam have now approached this court seeking an order, amongst others, to review and set aside

14.1 the decision of the Controller not to accept Texicam's application for a retail licence regarding Erf 54 and the Remaining Extent of Erf 22, Braamfontein Werf; and

14.2 the failure of the Minister to take a decision regarding Texicam's internal appeal against the decision of the Controller as stated in 14.1 above, and that the Controller be ordered to accept and consider Texicam's application for a retail licence.

ISSUES FOR DETERMINATION

[15] The parties agree that the relief sought by the applicants in prayer 2 of the notice of motion ought to be determined first, as it may be dispositive of the review relief sought by the applicants, leaving only the question of the validity of regulation 6(2)(a) for determination by the court. The contention is that, if the court finds that the refusal by the Controller to accept Texicam's retail licence application was correct, then by implication there was no retail licence application before the Minister, and without the retail licence application a site licence application could not be considered on appeal.

[16] It appears, therefore, that there are two issues to be determined in this matter. The first issue pertains to Prayer 2 of the notice of motion and the second issue is that of the validity of regulation 6(2)(a).

[17] As regards Prayer 2 of the notice of motion the crisp issue is whether the Controller was correct in refusing to accept Texicam's retail licence application. Underlying that issue is whether Empire Crossing's site licence application that was on appeal before the Minister could serve as a corresponding application to Texicam's retail licence application.

[18] The issue in regard to the validity of regulation 6(2)(a) is whether the said regulation is *ultra vires* the Act.

[19] I deal hereunder with the two issues in turn.

Whether the Controller was correct in refusing to accept Texicam's retail licence application

[20] The relief sought by the applicants in prayer 2 is that the decision by the Controller not to accept the application for a retail licence by Texicam should be reviewed and set aside.

[21] It is common cause that after the Minister informed Empire Crossing that Kodin Motors did not lodge an appeal against the decision of the Controller not to approve Kodin Motors' retail licence application, Texicam attempted to lodge

a retail licence application. The Controller refused to accept Texicam's retail licence application on the ground that it was not lodged together with a site licence application as is required in terms of regulation 15(4). However, the applicants want to argue that Texicam's retail licence application should have been accepted by the Controller because Empire Crossing's site licence application that was pending on appeal before the Minister served as a corresponding application to it. Equally, Texicam's retail licence application, if it was accepted, would then serve as a corresponding application to Empire Crossing's site licence application, when the Minister considered the appeal.

[22] In essence the question would, therefore, be whether Empire Crossing's site licence application could serve as a corresponding application to the retail licence application which Texicam wanted to lodge with the Controller, as required in terms of regulation 15(4). Likewise, the question would be whether Texicam's retail licence application, if it was accepted, would serve as a corresponding application to Empire Crossing's site licence application, when the Minister considered the appeal.

The Legislative Authority

[23] Currently, the licencing dispensation for the retail of petroleum products is governed by the Regulations.⁷ The Regulations are divided into three chapters and provide for Site Licences (Chapter 1), Retail Licences (Chapter 2) and General Provisions (Chapter 3). For purposes of this judgment, only the provisions relating to the Site Licences and Retail Licences shall be referred to.

[24] Chapter 1 of the Regulations prescribes the procedure to be followed when applying for a site licence. Regulation 3(2), thereof, requires that the application for a site licence must be lodged together with an application for a corresponding retail licence.⁸ Furthermore, regulation 5(1)(a) enjoins the

⁷ The Petroleum Products Site and Retail Regulations (n2) above.

⁸ **3 Lodging of site licence application**

(1) An applicant for a site licence must –

Controller, before accepting a site licence application, to be satisfied that a corresponding valid retail licence application has been lodged for that site.⁹

[25] Chapter 2 of the Regulations contains the prescriptive requirements for lodging a valid retail licence application. The process of lodging retail licence applications, is provided for in regulation 15 thereof. In terms of sub-regulation (4), the application for a retail licence must be lodged together with an application for a corresponding site licence: Provided that in the case of a licensed site, a valid site licence, or a certified copy thereof, must accompany the application.¹⁰ Regulation 17(a) prescribes further that, in accepting a retail licence application, the Controller must be satisfied that a corresponding site licence application has been lodged or a valid site licence exists.¹¹

Discussion

[26] A number of points have been raised by the parties in argument for and against the dismissal of the relief sought by the applicants in Prayer 2 of the notice of motion. None of the points raised by the applicants could be substantiated. To the contrary, on all the points raised by the respondents, it is this court's view that the review relief sought by the applicants ought to be dismissed. I deal with the said points hereunder.

(b) lodge the application with the Controller . . .

(2) The application contemplated in subregulation (1) must be lodged together with an application for a corresponding retail licence.

⁹ **5 Acceptance of site licence application**

(1) Before accepting a site licence application, the Controller must be satisfied that-

(a) a corresponding valid retail licence application has been lodged for that site;

¹⁰ **15 Lodging of retail licence application**

(1) An applicant for a retail licence, must-

(b) lodge that application with the Controller, . . .

(4) The application contemplated in subregulation (1) must be lodged together with an application for a corresponding site licence: Provided that in the case of a licensed site, a valid site licence, or a certified copy thereof, must accompany the application.

¹¹ **17 Acceptance of retail licence application**

In accepting a retail licence application, the Controller must be satisfied that-

(a) a corresponding site licence application has been lodged or a valid site licence exists;

The refusal by the Controller to accept Texicam's retail licence application is correct

[27] It is a jurisdictional requirement of regulation 15(4) that a retail licence application must be lodged together with a corresponding site licence application.

[28] The requirement for lodging the retail licence application is stated explicitly in the regulation; it is self-explanatory and requires no interpretation. The application must be lodged together with a corresponding site licence application. The prescript is further fortified by the provisions of regulation 17(a) that require that before the retail licence application can be accepted, the Controller must be satisfied that the corresponding valid site licence application has been lodged.

[29] The language used in regulations 15(4) is, also, predominantly prescriptive. The use of the word 'must' denotes that the provisions are imperative and provides the Controller or anyone in the office of the Controller expected to accept the application with no discretion to exercise. In addition, the English Oxford dictionary defines the phrase 'together with' as meaning 'as well as,' and 'along with'. Accordingly, the Controller is constrained to follow these express provisions to the letter. It follows, therefore, that it is an express requirement that a retail licence application cannot be lodged or be accepted by the Controller or the Office of the Controller without a corresponding site licence application being lodged.

[30] A debate, in oral argument, ensued about whether the Regulations require a simultaneous lodging of the retail licence application and the corresponding site licence application. The applicants, in this regard, referred to the unreported judgment in *Streaks Ahead Investments (Pty) Limited and Others v Lepelle Industrial and Mining Supplies CC and Others*,¹² for support

¹² *Streaks Ahead Investments (Pty) Limited and Others v Lepelle Industrial and Mining Supplies CC and Others* (case number A243/2017) [1019] ZAGPPHC 514.

of their submission that the Act and Regulations do not require simultaneous lodgement of the applications. However, in this court's view, and as argued correctly so on behalf of the respondents, *Streaks Ahead* finds no application in the circumstances of the matter before this court. That judgment dealt with licences that had already been issued whereas, in this matter, the licences have not been issued.

[31] The applicants endeavoured, without success, to convince this court that there was no requirement in the Act or the Regulations for the simultaneous lodging of the retail licence application and the site licence application. They, in that regard, submitted that the applications for the respective licences can be lodged separately, each with its own set of requirements and criteria and that the valuation of the one would not necessarily depend on the content of the other nor does the Act or the Regulations require that the two applications be considered by the same official. They may be correct in that respect, however, where they lose the argument is in their proposition that the valuation of one application is not dependent on the existence of the other.

[32] The regulations 3(2) and 15(4) are very explicit. Regulation 3(2) provides that a site licence application must be lodged together with a corresponding retail licence application. Regulation 15(4), also, prescribes that a retail licence application must be lodged together with a corresponding site licence application. It means that when a site licence application is lodged, if there is no corresponding retail licence application, the person expected to accept the application to be lodged is bound by the provisions of the Regulations and cannot accept that site licence application. The same will apply in the case of a retail licence application without a corresponding site licence application.

[33] The applicants also lose sight of the fact that the purpose of the requirements of regulations 3(2) and 15(4) that site and retail licences must be lodged together, ensures compliance with the provisions of the Act, which

stipulate, imperatively so, that in order to retail petroleum products from a site there must be a valid site and retail licence.¹³

[34] Based on the aforesaid provisions of regulations 15(4) and 17(a), it is patently clear that a retail licence application should be accompanied by a corresponding site licence application, alternatively a valid existing site licence and the attempted submission by Texicam of the retail licence application, was clearly contrary to the abovementioned provisions.

[35] Even if it was to be accepted that by requiring the corresponding applications 'to be lodged together' does not mean that they should be lodged on the same date, as the applicants want to argue, however, the time lapse between the lodging of Texicam's retail licence application and the lodging of Empire Crossing's site licence application, is enormous. Texicam's retail licence application was lodged in 2017, that is, more than three years after Empire Crossing's site licence application was lodged, in 2013. It is unfathomable how it could be said that Empire Crossing's site licence application, that was lodged so long ago and had already been evaluated and refused by the Controller and was at that time in the process of an internal appeal, could be a corresponding application to Texicam's retail licence application.

[36] Therefore, without this court having to decide the question of whether the refusal of the Office of the Controller to accept Texicam's retail licence application is a decision taken by the Controller or not, or whether the Controller had taken a decision or not; the submission by the Minister and the Controller's counsel that the refusal by the Office of the Controller not to accept the retail licence application of Texicam, was in compliance with the provisions of the Regulations and in as much as it was a decision, it was the correct decision, is in this court's view sustainable.

¹³ *Snyders NO v Louistef (Pty) Ltd and Another* 2017 (6) SA 646 (CC).

The Appeal does not revive the Site Licence Application

[37] The applicants submit that Texicam would have complied with the requirements of regulation 15(4) if the Controller had accepted the retail licence application it wanted to lodge, because a corresponding site licence application in respect thereof existed. According to the applicants, Empire Crossing's site licence application which was pending before the Minister on appeal, would serve as a corresponding application for Texicam's retail licence application.

[38] The applicants submit in argument that the rejection of the site licence application was suspended by the internal appeal lodged by Empire Crossing. They submit further that, from a procedural point of view, although there was the rejection, the rejection was suspended; the rejection had no legal effect until the internal appeal was disposed of. Accordingly, so it is argued, at the time Texicam wanted to lodge a retail licence application, Empire Crossing's site license application was pending in front of the Minister, or it was before the Minister, and if the Controller had accepted Texicam's retail licence application, that site licence application would have served as a corresponding application to Texicam's retail licence application.

[39] In contradistinction, the Minister and the Controller submit that the appeal does not revive the site licence application but only stops the operation of the Controller's decision. It was argued, emphatically on behalf of the respondents that the fact that there was an appeal pending does not really mean that Empire Crossing's site licence application was turned back to the table of the Controller, as the appeal can never revive that site licence application. The, further, submission is that the only effect of the common law principle, is that the order of a functionary against whose decision is appealed, is that, it is not executed. In principle the order or the decision is not executed pending the appeal. The decision of the Controller was, therefore, suspended pending the appeal. The appeal did not revive that application. Empire Crossing's site licence application was already adjudicated upon by the

Controller and was refused. It could, therefore, not be returned to the desk of the Controller for reconsideration, so it is argued.

[40] During oral argument, counsel for the Minister and the Controller undertook to provide authority for his proposition that the appeal did not revive the site licence application but only suspends the operation of the Controller's decision. Counsel, instead, provided heads of argument addressing the question whether the filing of a new application for a retail licence can revive the first application for a retail licence that was refused and not appealed. This court is of the view that there is not much difference between the two issues.

[41] In the argument raised in these heads of argument, relying on case law¹⁴ and the provisions of section 7 of the Promotion of Administrative Justice Act,¹⁵ it is contended that the Controller was *functus officio* after having considered the corresponding site and retail licence applications and correctly refused to accept the belated attempt to submit a new retail licence application. It is, further, submitted that it is compulsory to simultaneously submit the corresponding licences, and the Controller is bound to consider same as prescribed by the Act. Once considered, refused and communicated as in this matter, the Controller is *functus officio* and a new application cannot revive the process of adjudication.

[42] Can a retail licence application that has been finally decided by the Controller be replaced with another similar application? Put differently, can a retail licence application that was lodged with the Controller as a corresponding application to a specific site licence application be replaced with a new retail licence application when the Controller has already made a final decision thereon?

[43] It is trite law that the power to revoke or amend administrative decisions once communicated is limited. Whether the administrator, in question, is

¹⁴ Khammissa and Others v Master, Gauteng High Court and Others 2021 (1) SA 421 (GJ) p431 and Van Aswegen v Health Professions Council of South Africa and Others, 2021 (3) SA 238 (GP) para [19].

¹⁵ Act 3 of 2000.

functus officio must be answered with reference to the language of the legislation. The legislation must expressly authorise for the power to revoke the decision, and by implication prescribe the procedure to be followed. In addition, once the decision is communicated to the interested and affected parties, it is final and irrevocable.¹⁶

[44] The Act, in this matter, does not empower the Controller to revoke or amend the decision to refuse an application for a retail licence, once such decision has been made. Nor is there any prescribed procedure that can or should be followed in such event. As is trite, the Controller as a creature of statute has to comply with the provisions of the applicable legislation and/or regulations and can, as such, not revoke or amend the decision to refuse an application for a retail licence, once such decision has been made.

[45] It is not in dispute that at the time Texicam attempted to lodge a retail licence application, the Controller had already adjudicated and rejected the corresponding retail licence application (that of Kodin Motors) to Empire Crossing's site licence application. It is, also, common cause that at that time Empire Crossing's site licence application was on appeal before the Minister, hence counsel's contention that the Controller was *functus officio*. There being no provision in the Act and/or Regulations conferring the power to revoke or amend the decision to refuse an application for a retail licence on the Controller, the Controller, in this matter, could not revoke and/or amend the decision made in regard to Kodin Motors' retail licence application. By implication, in accepting Texicam's retail licence application and assessing it, it would have been tantamount to revoking or amending the decision previously made by the Controller in respect of Kodin Motors retail licence application, thus, reviving the process of adjudication.

¹⁶ Khammissa and Others v Master, Gauteng High Court and Others 2021 (1) SA 421 (GJ) at para 33.

[46] It is the view of this court that the decision of the Controller, rejecting an application, remains in place pending the Minister's decision on appeal. If the appeal is dismissed, the execution and/or operation of the Controller's decision kicks in. If the appeal is upheld, either the licence application is granted and a licence is issued or the licence application is remitted to the Controller for reconsideration. Therefore, until the Minister makes a decision remitting the licence application for reconsideration by the Controller, the Controller has no power to reconsider the licence application.

[47] In the final analysis, in filing the retail licence application, Texicam sought to revive an application that has been rejected by the Controller. As already indicated, the Controller became *functus officio* once a decision regarding the applications was made, the revival of the retail licence application could, thus, not be allowed. If it were to be allowed, it would simply mean that every time an applicant delays in lodging an appeal, the applicant can merely lodge a fresh application for reconsideration again by the Controller.

[48] As to whether the appeal lodged by Empire Crossing revived the site licence application, a leaf can be taken from the common law rule of practice applicable in the courts. When an appeal has been lodged against a judgment of a court, it is generally accepted that the execution of such judgment is automatically suspended with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with leave of the court.¹⁷

[49] Although the rule referred to above was, in *South Cape Corporation*, applied with judgments of the courts in mind, it is this court's view that such a rule would find application where a decision is that of a functionary.

[50] Unfortunately for the applicants, the lodgement of the new retail licence application by Texicam could not salvage the process. In a situation like this,

¹⁷ See *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977(3) SA 534 (A) at 544H – 545A.

the most practical and cost-effective solution for the applicants would have been to withdraw Empire Crossing's internal appeal and lodge a new retail and site licence applications, that is, start the process afresh. The situation might have been different had Kodin Motors withdrawn the retail licence application before the Controller made a decision on it.¹⁸

[51] In trying to salvage their case, the applicants' thesis is that the membership interest of the previous applicant (Kodin Motors) was transferred to the new retail licence applicant (Texicam). This new company, according to the applicants, now owns the retailing petroleum business and was, therefore, entitled to lodge a new retail application which application ought to have been accepted by the Controller.

[52] In the court's view, and as correctly argued by the respondents, Texicam's retail licence application, was brought into the picture solely for the purpose of trying to resuscitate Kodin Motors' application which was not appealed. The period of appeal, which is sixty (60) days after the refusal of the application by the Controller, had long come and gone. Moreover, without Kodin Motors' appeal, the Controller's decision became final and the application disposed of. The lodging of another new similar application could not revive it.

[53] Even if it can be accepted that there was a wilful election by Kodin Motors not to pursue an appeal against the Controller's decision in respect of the retail licence application, and, to handover its (Kodin Motors) membership interest to Texicam, a challenge that was to face the applicants was that a retail licence is not transferable,¹⁹ as such, Kodin Motors' name could not be substituted with that of Texicam so that Texicam could proceed with the appeal. Therefore, Texicam had to apply afresh for a retail licence, and in doing so, it had to, also, comply with the provisions of regulation 15(4) which requires a

¹⁸ Section 2B(4) of the Act.

'The Controller of Petroleum Products must issue only one retail licence per site'.

¹⁹ Regulation 22(7).

corresponding site licence application. Similarly, in such circumstances, the lodging of a new application could, still, not revive Kodin Motors' retail licence application.

[54] Even though Texicam's retail licence application would have been accepted by the Controller it would still require a site licence application to accompany it. Empire Crossing's site licence application would not serve as a corresponding application to the retail licence application because its corresponding retail licence application was not approved and an appeal was not lodged.

[55] And again, should this court set aside the decision of the Minister and refer Empire Crossing's site licence application back to the Controller for reconsideration, as sought by the applicants, there will be no corresponding retail licence application for it and that situation will prevent the Controller from considering that site licence application as the corresponding retail licence application that accompanied that site licence application was decided by the Controller and has been disposed of.

The Minister's decision to dismiss Empire Crossing's Appeal was correct

[56] The respondents contend that Empire Crossing did not have *locus standi* to pursue an appeal because an appeal could not be pursued without an appeal against the refusal of the retail licence application or in the event of a retail licence application having been approved and would then exist, and based thereon an appeal against a refusal of the site licence could then be pursued.

[57] It is this court's view that where the Controller has refused to grant the site and retail licence applications that were lodged together as corresponding each other, and an internal appeal process is launched by either of the applicants, for the Minister to consider anyone of the applications, both licence applications must still exist at the time of such consideration. It follows that both

applicants must appeal the respective decisions of the Controller refusing to grant the applications.

[58] Therefore, at the time when the Minister is to consider the appeal of any one of the licence applications, the Minister must be satisfied that the other corresponding licence application exists. Such application would exist if an appeal in respect of that application was lodged. If, as it happened in this matter, any one of the applications does not proceed to the appeal stage, then the process of appeal cannot be proceeded with as the corresponding licence application will not be in existence.

[59] In this matter, with Empire Crossing having lodged the appeal, for the Minister to be able to consider Empire Crossing's appeal, Kodin Motors had, also to lodge an appeal against the Controller's rejection of its retail licence application. This should have been done, so that at the time the Minister considers Empire Crossing's appeal, there is a corresponding retail licence application (on appeal) that was lodged together with the site licence application. Without a corresponding retail licence application that was lodged together with the site licence application, accompanying the site licence application that was on appeal, the Minister could not assess that appeal.

[60] It is common cause that Kodin Motors did not lodge an appeal against the Controller's decision in respect of the retail licence application. It can, therefore, be safely assumed that Kodin Motors had accepted the outcome of the Controller's decision. And, given that the Controller's decision was not appealed, it became final. There was, as a result, no corresponding retail licence application accompanying the site licence application on appeal.

[61] In the same way as the Controller, in performing his/her duties in terms of the Act and the Regulations, the Minister is bound thereby and has no inherent jurisdiction or a discretion to circumvent or deviate from the empowering statutory provisions. The Minister cannot approve a site licence

application and/or grant the appeal without a corresponding retail licence application.

[62] As, rightly submitted on behalf of the respondents, it is this court's view that the decision by Kodin Motors not to pursue the retail licence application on appeal, is a fatal flaw in the process regarding Empire Crossing's site licence application. The lodgement of a retail licence application by another entity could not revive Kodin Motors' retail licence application and could not salvage the appeal process, as well.

Conclusion

[63] It is common cause, in this matter, that the requirements of regulation 15(4) were complied with at the time when the Controller considered Empire Crossing's site licence application and Kodin Motors' corresponding retail licence application. This was so because Kodin Motors' retail licence application was lodged together with the corresponding site licence application lodged by Empire Crossing. Both applications were, as such, in existence and they were both considered by the Controller and rejected.

[64] It is, also, not in dispute that after the Controller made the decision refusing to approve the two licence applications, Empire Crossing appealed the Controller's decision against its application whereas Kodin Motors opted not to do so. As a result, the Minister dismissed the appeal against the Controller's refusal to approve Empire Crossing's site licence application, on the basis that there was no corresponding retail licence application before him.

[65] Therefore, two applications corresponding each other were lodged with the Controller. Both applications were considered by the Controller and not approved. One application was appealed and no appeal was lodged in respect of the other application. The one application for which the appeal was not lodged, was as a result, disposed of. The Minister could, as a result, do nothing but to dismiss the appeal.

[66] On the basis of this scenario, the Controller was correct to have refused to accept Texicam's retail licence application. Similarly, on the basis that there was no retail licence application before the Minister, the Minister was correct to have dismissed Empire Crossing's site licence application.

Whether the Provisions of Regulation 16(2)(a) are Ultra Vires the Act

[67] The basis of the applicants' argument that the provisions of regulation 6(2)(a) are *ultra vires* is that it includes the additional requirement of 'need' that imposes more onerous requirements on licence applicants. The contention is that the Minister was not empowered by the Act to impose such additional requirement and this renders the regulation *ultra vires* the Act.

[68] This court dealt with the issue of the validity of regulation 6(2)(a) and found it to be *ultra vires* the Act in the matter of *Westvaal Holdings (Pty) Ltd v Minister of Energy*,²⁰ which was referred to by counsel for all the parties during argument.

[69] In *Westvaal*, the applicants sought leave, in terms of uniform rule 28 (4), to amend the notice of motion in a review application they had launched against the respondents. The applicants wanted the amendment by inserting the following prayers:

- "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.

²⁰ 2016 JDR 0298 (GP).

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 above."

[70] Thus, the issue of the validity of regulation 6(2)(a) came under deliberation by the court whilst determining whether the amendment should be allowed or not. In the end, the court allowed the amendment of prayer 5 of the proposed amendments and disallowed the applicant's amendment of the notice of motion in relation to prayers 4 and 6 which were in respect of regulation 6(2)(a). The main reason for such refusal was that in the court's view the insertion of the two prayers into the notice of motion did not introduce a triable issue. It made a finding, in that regard, on the basis that the provisions of regulation 6(2)(a) were not *ultra vires* the Act.

[71] In a more recent matter of *Quick Serve Petrol Station (Pty) Ltd v Minister of Energy*,²¹ the court, *per* Baqwa J, was again called upon to consider the requirements of 'need' as contained in regulation 6(2)(a), in the adjudication of site licence applications. Even in that judgment, the court was not called upon to decide on the validity of regulation 6(2)(a) *per se*, but was in fact dealing with the question of the Minister's failure to comply with the doctrine of *audi alterem partem*. It is under those circumstances that it had the opportunity to consider whether regulation 6(2)(a) was *ultra vires* the Act.

[72] The court in *Quick Serve* referred to *Westvaal* with approval and held as follows:

"[54] I have considered the judgment of Madam Justice Kubushi, and I concur therewith.

²¹ 2017 JDR 1337 (GP).

[55] Regarding the present application, therefore, I find that the Minister acted *intra vires* his powers in considering whether there was a need for the site."

[73] *Westvaal* was taken on appeal to the Full Court of this Division and was overturned. However, it need to be stated that what was on appeal in *Westvaal* was not the issue of the validity of regulation 6(2)(a) but the issue of whether the amendment of the notice of motion should have been allowed. The Full Court did not, pronounce itself on the question of whether or not the provisions of regulation 6(2)(a) were *ultra vires* the Act. The trial court's judgment was overturned on the basis that the amendment should have been allowed mainly because the issue of whether regulation 6(2)(a) was *ultra vires* or not was a triable issue that the review court was supposed to have dealt with.

[74] This court was informed that even though the appeal was upheld the matter was never proceeded further with.

[75] It is this court's view that it has already pronounced itself on this issue and cannot be expected to re-evaluate its pronouncement. The law as it now stands is that the regulation 6(2)(a) is not *ultra vires* the Act.

COST

[76] In conclusion it is the view of this court that the application has no merit both in respect of the relief to have the decisions of the Minister and the Controller reviewed and set aside, as well as the relief that the provisions of Regulation 6(2)(a) be declared *ultra vires*. The application, as a result, falls to be dismissed

[77] Tom Campher Motors requested the dismissal of the application with the applicants to pay the costs on a punitive scale. This court in the exercise of its discretion is of the view that this matter does not warrant costs on a punitive scale. As such, costs are to be awarded in favour of the Minister, the Controller and Tom Campher Motors on a party and party scale.

[78] Both counsel for the Minister and the Controller and for Tom Campher Motors requested costs that include costs occasioned by the employment of two counsel. The court is of the view that the matter warranted the employment of two counsel and such costs are granted.

ORDER

[79] Consequently, the following order is made:

1. The application is dismissed.
2. The applicants are ordered jointly and severally the one paying the other to be absolved, to pay the costs of the first, second and third respondents on a party and party scale.
3. The costs are to include costs occasioned by the employment of two counsel in respect of the first, second and third respondents.



E.M KUBUSHI

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on 21 July 2022.

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APPLICANTS' COUNSEL: ADV S D WAGENER SC

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FIRST & SECOND RESPONDENT COUNSEL: ADV MMW VAN ZYL SC

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