



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: 7690/2017

In the matter between:

ROITH HARILAL SOMAI

APPLICANT

and

**NATIONAL MINISTER:
DEPARTMENT OF ENERGY**

FIRST RESPONDENT

**THE CONTROLLER OF PETROLEUM
PRODUCTS**

SECOND RESPONDENT

MIDLANDS TRUST

THIRD RESPONDENT

QUICKSTEP 453 CC

FOURTH RESPONDENTS

REVERED INVESTMENTS CC

FIFTH RESPONDENT

Coram: Koen J
Heard: 8 February 2019
Delivered: 22 February 2019

ORDER

- (a) An order is granted in terms of paragraphs 2.1 and 2.2 of the Notice of Motion;
 - (b) the matter is remitted to the second respondent for a reconsideration of the site and retail licence applications; and
 - (c) A rule *nisi* is issued returnable on the 20th day of March 2019 at 9h30, calling upon the first and second respondents, in view of their failure to file any answering affidavits in reply to the criticisms raised by the applicant in his founding affidavit, why they should not pay the applicant's costs of the application;
 - (d) The applicant is directed to serve a copy of this order on the first and second respondents forthwith;
 - (e) The third, fourth and fifth respondents are directed to pay their own costs of the application.
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JUDGMENT

Koen J

[1] The applicant, who describes himself as a 'historically disadvantaged South African as defined (HDSA)' owns the immovable property situate at 61/63 Illings Road, Ladysmith (hereinafter referred to as 'the site'). The site was previously used as a service station from which petroleum products were retailed. It was however decommissioned well before the time that the applicant acquired the site.

[2] In 2013 the applicant applied for a site and retail licence to sell petroleum products from the site. That application apparently went astray. Fresh applications were subsequently made on 16 July 2014.¹

¹ Although some adverse inferences were sought to be drawn in the application papers from the fact that the first application went astray, Mr Kemp SC with him Mr S Moodley in argument disavowed drawing any such inference, in my view correctly so.

[3] Such applications are made in terms of the provisions of the Petroleum Products Act 120 of 1977 and the regulations promulgated pursuant thereto (hereinafter referred to as 'the Act').

[4] The Act contains *inter alia* the following provisions:

(a) Section 3 provides that the Minister, being the Minister of Minerals and Energy, shall appoint a person in the public service as the 'Controller of petroleum products and may appoint persons in the public service as regional controllers of petroleum products or as inspectors for the Republic or any part thereof.'

(b) Section 2A provides that:

'(1) A person may not –

(a) ...

(b) ...

(c) hold or develop a site without there being a site licence for that site;

(d) retail prescribed petroleum products without an applicable retail licence, issued by the Controller of Petroleum Products.'

(c) Section 2A(4) provides that any person applying for a site and retail licence must in the case of the site licence be the owner of the property concerned (unless it is publicly owned land) and must do so in the form and manner prescribed.

(d) Section 2B provides that:

'(1) The Controller of Petroleum Products must issue licences in accordance with the provisions of this Act.

(2) In considering the issue of any licences in terms of this Act, the Controller of Petroleum Products shall give effect to the provisions of section 2C and the following objectives:

(a) Promoting an efficient manufacturing, wholesaling and retailing petroleum industry;

(b) facilitating an environment conducive to efficient and commercially justifiable investment;

(c) the creation of employment opportunities and the development of small businesses in the petroleum sector;

(d) ensuring country wide availability of petroleum products at competitive prices;

(e) promoting access to affordable petroleum products by low-income consumers for household use.'

- (e) Section 2C deals with the 'Transformation of South African petroleum and liquid fuels industry' and provides:
- '(1) In considering licence applications in terms of this Act, the Controller of Petroleum Products shall –
- (a) promote the advancement of historically disadvantaged South Africans; and
 - (b) give effect to the Charter.
- (2) The Controller of Petroleum Products may require any category of licence holder to furnish information, as prescribed, in respect of the implementation of the Charter.
- (f) The Charter referred to is contained in Schedule 1 to the Act. It deals with *inter alia* the 'the interpretation' of 'the term historically disadvantaged South Africans (HDSA)' to refer to 'all persons and groups who have been discriminated against on the basis of race, gender and disability.' It also deals with the interpretation of 'HDSA companies' which are described as 'those companies that are owned or controlled by historically disadvantaged South Africans which operate on a basis to meet all aspects of this Charter...'.
- (g) In terms of s 12A(1) of the Act 'any person directly affected by 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.' In terms of sub-section (3) the 'Minister shall consider the appeal, and shall give his or her decision thereon, together with written reasons therefor, within the periods specified in the regulations.'
- [5] Excluding transitional licensing provisions contained in s 2D:
- (a) Regulation 18 to the Act provides:
- '(1) In evaluating an application for any retail licence, the Controller must, subject to subregulation (2), verify that-
- (a) the information and the documents submitted with the application form are true and correct;
 - (b) the notice contemplated in regulation 16(1) was published.
- (2) In the case of an application for a retail licence made by a person in respect of whom section 2D of the Act is not applicable, the Controller must be satisfied that that-
- (a) the retailing business is economically viable;

(b) the retailing business will promote licensing objectives stipulated in section 2B(2) of the Act.

(3) In determining the economic viability contemplated in sub-regulation (2)(a), the Controller must be satisfied that the net present value has been correctly calculated and is positive.'

(b) 'Sustainability' according to the interpretation provision in the Charter refers to: 'Medium to long term viability and adaptability through a presence across all facets of the liquid fuels value chain, o ventures with prospects of long term profitability; and Requisite levels of skills and access to technology.'

[6] The applicant duly submitted his applications with proof of the relevant advertisement. In terms of regulation 16(2)(e) read with regulation 16(4) of the regulations, objections to the application for licences to retail petroleum products must be made within 20 days of the advertisement of the application. It appears that only the objection by the fifth respondent was received timeously, and not that by the third and fourth respondents, but all the objections were seemingly considered.

[7] Notwithstanding it being required that the Controller² make a decision within 90 days, which period expired on 24 November 2014, a decision was only made on 22 February 2016. In a written letter by the Controller to the applicant, the latter was advised that the Controller had 'not approved the granting of the Site New in terms of the Petroleum Products Act' The reasons given were as follows (dealing with the objectives specified in s 2B of the Act):

'a. Promoting an efficient manufacturing, wholesaling and retailing petroleum industry. In assessing whether an application for a site license will contribute towards an efficient retailing petroleum industry, the Controller conducts site visit to inspect the area where the proposed site will be developed. During the site visit, competitor analysis is conducted to assess the impact the new development will have on the efficiency of the retailing petroleum activities. The Controller has conducted the site visit for the development of this site, and came to a conclusion that granting this site license will not promote an efficient retailing petroleum industry.

b. Facilitating an environment conducive to efficient and commercially justifiable investments.

After the thorough analysis on the documents submitted with the application and the area where the development will take place, the Controller believes that granting a site license will not be facilitating an environment conducive to efficient and commercially justifiable

² The Controller is the second respondent in this application.

investments. There are three (3) existing service stations that are situated within 1Km radius from the proposed site. The existing sites are currently pumping an average of 446,961.66 litres per month of fuel. A new to industry service station will negatively impact on the economic viability of the existing service stations.

c. The creation of employment opportunities and the development of small businesses in the petroleum sector.

The Controller acknowledges that the development of this service station may contribute towards the creation of employment and the development of small businesses in the petroleum sector. However, the development of this service station will have a negative impact on the existing sites and there is also no evidence to support that it will be economically viable to sustain the jobs that may be created.

d. Ensuring countrywide availability of petroleum products at competitive prices.'

During the site visit to the area where the proposed site is to be developed, the Controller established that there is sufficient availability of petroleum products catering vehicles travelling past the proposed site. There are three (3) service stations located within short distances from the proposed site, with ample capacity potential to accommodate additional demand should it be necessary. An additional service station in the area will negatively impact on the already low volumes pumped in the area. The issuing of the site licence for this site will not contribute towards competitive prices given that the price and margins of selling petroleum products are regulated.

e. Promoting access to affordable petroleum products by low income consumers for household use.

There is no evidence to suggest that the granting of the site license will promote access to affordable petroleum products by low income consumers for household use as the product intended to be sold will be diesel and petrol only. The site visit that the Controller has conducted and the documents or motivation by the applicant supports the view that this site will not contribute towards achieving the objectives of licensing.

These objectives are sufficiently analysed in view of all supporting evidence and the approval of the new application will be detrimental to the sustainability of the petroleum products retailing activity in the area. The petroleum products' market base of this area is very well supplied and thus the Controller cannot support a new entrant, hence disapproves Roith Harilal Somai new site license application.'

[8] On 19 April 2016 an appeal was lodged with the Minister³ raising various issues on the point of promoting an efficient manufacturing, wholesale and retailing

³ The Minister is the first respondent in the application.

petroleum industry, and complaining also of non-compliance with s 2C of the Act, specifically that the Controller had not considered the important duty he has to 'promote the advancement of historically disadvantaged South Africans, and give effect to the Chapter.'

[9] On 23 January 2017 the Minister refused the appeal.

[10] The applicant launched the present application on 13 July 2017. *Ex facie* the notice of motion the relief claimed is as follows:

- '1. **KINDLY TAKE NOTICE THAT** the Applicant intends to make application to the above Honourable Court for the review of the following administrative action:
 - 1.1 The decision of the Second Respondent (the Controller of Petroleum Products) to refuse to grant site and retail licences to the Applicant, pursuant to an application made by the Applicant in respect thereof in terms of S 2(B)(1) of the Petroleum Products Act, 120 of 1997 as amended ;
 - 1.2 The decision of the First Respondent (the Minister of Energy) to dismiss the Appeal by the Applicant against the decision of the Second Respondent and claims an order in the following terms:
 - 2.1 **THAT** the Second Respondent's refusal to grant the site and retail licences to the Applicant is hereby reviewed and set aside;
 - 2.2 **THAT** the First Respondent's dismissal of the Applicant's appeal is hereby reviewed and set aside;
 - 2.3 **THAT** the Second Respondent is ordered to issue the site and retail licences applied for by the Applicant within 30 days of the date of Judgment herein; alternatively
 - 2.4 **THAT** the matter is remitted to the First Respondent for a reconsideration of the appeal and/or to the Second Respondent for reconsideration of the licence application; and
 - 2.5 **THAT** the costs of this application, on the scale of between attorney and client, be borne by those Respondents who oppose this application, jointly and severally, the one paying the other to be absolved.'

[11] The application is opposed by the third, fourth, and fifth respondents, who were also the objectors to the licence applications made to the Controller, and who are the holders of site and retail licences issued pursuant to the provisions of the Act in respect of service stations in the immediate area of the applicant's site. The first and second respondents have not opposed the application, have not participated in the application by filing any response thereto at all, and abide by the decision of the

court. Their stance might very well result from the fact that costs were only being sought against such respondents as may 'oppose this application.' Such inactivity by the first and second respondents appears to be their common *modus operandi* in applications of this nature, if regard is had *inter alia* also to the judgments in *Nine Nine Ninety Nine Projects (Pty) Limited and Another v The Minister of Department of Energy National Government and Others*⁴ and *The Business Zone 101 CC v The Controller of Petroleum Products and Two Others*⁵ in which there was likewise no appearance for the Controller and Minister.

[12] In the affidavit filed in support of the relief claimed, the applicant's specifically complains that:

(a) 'A reading of the decision of the Controller... makes it very clear that the Controller failed entirely to consider Section 2C of the Act. There is no mention of Section 2C, nor is there any narrative that could give the reader the impression that the section was considered. Further, in the result of the Appeal to the Minister (at point e), the Minister states as follows: "I am satisfied that the Controller assessed the retailing businesses as being 72% HDSA. Accordingly, the Controller was very alive to the HDSA status of the Appellant." However the Controller made no such finding. Further, the HDSA status of the Applicant herein is 100% and not 72%. It is submitted that this statement by the Minister and the failure of the Controller to consider Section 2C amounts, on this basis alone, to a reviewable irregularity on the basis on section 6(2)(b) and sections 6(2)(f)(cc) and (dd) of PAJA';

(b) Objection is taken to a finding by the Controller that 'the granting of the license will not promote an efficient retailing industry.' The difficulty with this determination is that the Controller does not state exactly what the meaning of 'efficiency' is in this context.

[13] Mr Kemp has confined the argument of the applicant to the above two considerations.

[14] Although the application is opposed by the objectors (the third to fifth respondents), on aspects regarding what the Minister and the Controller had or

⁴ [2014] ZAGPPHC 335, dated 30 April 2014, judgment of Makhubele AJ with whom Raulinga J and Thulare AJ concurred.

⁵ Judgment of Prinsloo J: 2014 JDR 0952 (GNP), Gauteng Division, Pretoria Case No. 7282/2013, dated 9 May 2014.

should have taken into account, the third to fifth respondents expressly deferred to the Minister and Controller, plainly in the expectation that they would file an affidavit(s) to deal with the applicant's specific complaints. Unfortunately no such affidavits were filed by the first and second applicants respectively, on these material issues.

[15] It is most unfortunate, notwithstanding it being for the applicant to demonstrate to this court that there are grounds upon which a review can be sustained, for functionaries such as the Minister and the Controller not to take this court into their confidence by explaining fully their motivation, particularly in regard to specific complaints raised in the founding papers which clearly called for an explanation. That is particularly so in the present matter in regard to the alleged finding by the Controller that the retailing business would be '72% HDSA'.

[16] It is trite law that the decision of the Minister and the Controller would be reviewable in terms of the provisions of the PAJA as their decisions amount to 'administrative action.'

[17] A misdirection with regard to the evaluation of material facts generally does not render a decision reviewable.⁶ That statement must however be confined to the facts that are placed before the Minister and/or the Controller and are evaluated. But if there are facts not investigated or evaluated which should have been evaluated as they could and would have a material bearing on the outcome of the applications, then the decisions fall to be reviewed. The reason for the decisions being reviewable is that a mandatory and material condition prescribed by an empowering statutory provision was not considered, or that the decision was materially influenced by an error of law.

[18] *All Pay Consolidated v Chief Executive Officer, Sassa*⁷ emphasised the importance of 'black economic empowerment' in matters of this nature. Significantly in paras 55 it was stated:

'Substantive empowerment, not mere formal compliance, is what matters. It makes a mockery of true empowerment if two opposite ends of the spectrum are allowed to be passed off as compliance with the substantive demands of empowerment'.

⁶ *Dumani v Nair and another* [2012] ZASCA 196, 2013 (2) SA 274 (SCA), [2013] 2 All SA 125 (SCA).

⁷ 2014 (1) SA 604 (CC) at paras 46 to 55.

[19] Section 2C of the Act does not simply enjoin the Controller to have regard to an applicant being an HDSA, but enjoins the Controller actively ‘...to promote the advancement of historically disadvantaged South Africans’ and to give effect to the Charter.

[20] Ex facie the reasons given by the Controller for refusing the licences he had not taken into account that the applicant was a HDSA, leave aside promoting the advancement of such persons. No mention is made thereof.

[21] The Minister’s reference in the appeal to the applicant being 72% HDSA is perplexing. The applicant is a natural person, not a corporate entity. One would expect him to be 100% HDSA as he contends in his application to the Controller, or not at all. Notwithstanding this aspect being specifically queried and raised as pointing to the applicant’s HDSA status never being considered at all or not considered properly, alternatively that the Minister materially misdirected himself in regard thereto, the point was simply left unanswered by the first and second respondents. The only reasonable inference is that s 2C was not considered, alternatively if considered that the reasoning in respect thereof suffers from some irrationality, which the applicant has complained of but which the Minister and the Controller have not sought to explain, hence allowing the inference to stand uncontradicted. The Minister’s and the Controller’s silence is deafening. The HDSA status was a highly relevant consideration which was apparently not considered at all, alternatively in regard to which there was a misdirection.

[22] I agree with the submission by Mr Kemp for the applicant that on that basis alone, the review must succeed.

[23] There are also various submissions that were advanced in regard to the question of ‘efficient industry’ which is a vague term, not defined and subjective. In view of the conclusion to which I have come above it is not necessary to submit the arguments in this regard to any further scrutiny, and I accordingly refrain from doing so, particularly where the applications are to be remitted and considered afresh.

[24] The review accordingly succeeds. The matter has not been properly considered and should be referred back to be considered properly. I am not disposed to, and the present matter is in my view not an instance where this court should, substitute its finding for that of the Minister and the Controller.

[25] Regarding the issue of costs, although the application was opposed by the third to fifth respondents on further grounds, not considered in this judgment, it

appears to me that the primary issue related to the Minister and the Controller having adopted a supine approach in regard to the criticisms raised by the applicant in the founding papers, *inter alia* on the applicant's HDSA status. The Minister and the Controller should be called upon to show cause why they should not be directed to pay the costs of this application, excluding the costs of the third, fourth and fifth respondents. The costs of the third, fourth and fifth respondents should, in the exercise of my discretion on costs and the reasons for reviewing the decisions of the Minister and the Controller, be borne by those respondents rather than them being also liable for the applicant's costs due to the applicant having been substantially successful but due to the failure of the first and second respondents to respond.

[26] Accordingly, I make the following order:

- (a) An order is granted in terms of paragraphs 2.1 and 2.2 of the Notice of Motion;
- (b) the matter is remitted to the second respondent for a reconsideration of the site and retail licence applications; and
- (c) A rule *nisi* is issued returnable on the 20th day of March 2019 at 9h30, calling upon the first and second respondents, in view of their failure to file any answering affidavits in reply to the criticisms raised by the applicant in his founding affidavit, why they should not pay the applicant's costs of the application;
- (d) The applicant is directed to serve a copy of this order on the first and second respondents forthwith;
- (e) The third, fourth and fifth respondents are directed to pay their own costs of the application.

KOEN J

APPEARANCES

PLAINTIFF'S COUNSEL: Mr K J KEMP SC with S MOODLEY

PLAINTIFF'S ATTORNEYS:

NARAIN NAIDOO & ASSOCIATES

Ref.: - N Naidoo/Kevin/S17

Tel.: 033 345 8146

1ST AND 2ND RESPONDENT'S COUNSEL: No appearance –

Abide by the decision of the court.

1ST AND 2ND RESPONDENT'S ATTORNEY:

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Ref.: 572/00000/17/S/P27

Tel.: 031 365 2558

C/O Cajee Setsubi Chetty Inc.

3RD, 4TH AND 5TH RESPONDENT'S COUNSEL: MR J.C. KING SC

3RD, 4TH AND 5TH RESPONDENT'S ATTORNEY:

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