REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(MPUMALANGA DIVISION, MBOMBELA)

(1)	REPORTABLE:NO
(2)	OF INTEREST TO OTHER JUDGES:YES
(3)	REVISED: YES
.....	22/10/2021
SIGNATURE	DATE

CASE NO: 3525/2020

In the matter between:

PINE GLOW INVESTMENTS (PTY) LTD	Applicant
and	
THE MINISTER OF ENERGY	First Respondent
THE CONTROLLER OF PETROLEUM PRODUCTS	Second Respondent
ERF 6 HIGHVELD TECHNOPARK INVESTMENTS (PTY) LTD	Third Respondent

NAD PROPERTY INCOME FUND (PTY) LTD	Fourth Respondent
ROYALE ENERGY (PTY) LTD	Fifth Respondent
ROYALE ENERGY GROUP (PTY) LTD	Sixth Respondent
ROYALE ENERGY MANAGEMENT SERVICE (PTY) LTD	Seventh Respondent
ROYALE ENERGY OLIFANTSFONTEIN (PTY) LTD	Eighth Respondent
VIVA OIL (PTY) LTD	Ninth Respondent
TOKIVACT (PTY) LTD	Tenth Respondent

JUDGMENT

MASHILE J:

INTRODUCTION

[1] Unless context suggests otherwise, Respondents in this judgment means the Third and Fourth Respondents. This matter first served before this Court as an urgent review application in terms of Uniform Rule of Court 6(12) (b) consisting of Parts A and B. The former, on interim basis, sought to interdict the Respondents from proceeding with the building of a filling station in the area of Acornhoek, Mpumalanga. The application was meant to be heard on 19 January 2021 but the parties arranged that the Respondents would temporarily cease construction of the filling station for approximately two weeks. On that understanding, the application was postponed to 2 February 2021.

[2] Again and as per the parties' agreement, the application for the interim relief as described *supra* came before this Court on 2 February 2021. Following argument on urgency, the Court considered the application and struck it off the roll of that day on the ground that there was no justification for urgency. Subsequently, the parties resolved to set the matter down for 3 May 2021 for the hearing of Part B. On that day, the Respondents raised *locus standi as* a preliminary point, which they stated only dawned upon them during the course of the previous day, 2 May 2021.

[3] The questions that had to be decided on that day became firstly, whether or not the Respondents were entitled to raise *locus standi* at that late juncture of the proceedings especially bearing in mind that Part A had already been decided without such having been advanced as a grave controversy. Secondly, whether or not the Court should uphold the issue of *locus standi* as a preliminary point and dismiss the application without deciding the merits. On the first aspect, I ruled in favour of hearing the point *in limine.* In doing so, the Court was guided by the decision in the matter of *Tulip Diamonds FZE v Minister of Justice & Constitutional Development & Others* **2013 (10) BCLR 1180 (CC)** where the Court stated at Paragraph 25:

> *"I do not agree with Tulip's approach. Courts have stated that it would create an intolerable situation if a Court were to be precluded from giving the right decision on accepted facts merely because a party failed to raise a legal point as a result of an error of law on its part. It would be intolerable if this Court were to be bound by an error of law made by a party which that party then, within reasonable time, corrected. There must be exceptionally good reason for a court's assessment of law to be fettered by a party's error."*

[4] Although it was manifest that *locus standi* was raised very late in the proceedings, the Court decided that the late introduction of the point on its own could not constitute extraordinary reason contemplated in the Tulip case *supra* to bar the Respondents from introducing it as a preliminary issue. Having allowed the

Respondents to introduce the issue as a *point in limine*, the case was argued and judgment was reserved. The parties were directed to obtain another date on which the merits would, depending on the outcome on *locus standi*, be argued. I was later advised that the request of the Court that the matter be heard as a special motion had been heeded and that the parties have been allocated the 25th to 27th of October 2021 as dates on which the application would be heard. As such, this judgment is on whether or not the Applicant has established that it has *locus standi*

LOCUS STANDI

[5] The Respondents have fervently contended that the Applicant, as a wholesaler of petroleum products, has failed to establish that it has *locus standi* in that it will not be 'adversely and materially affected' by the decision of the Second Respondent awarding the license to the Respondents. Instead, the Applicant, argues the Respondents, has sought to show how the approval of another license would negatively or prejudicially affect operators of filling stations in the area. The lack of demonstration of prejudice to the Applicant in the founding papers means that it has simply failed to allege and prove *locus standi.* As such, conclude the Respondents, this failure is fatal and the application as a whole ought to be dismissed.

[6] Conversely, the Applicant contends that from inception *locus standi* was never an issue in these proceedings. Part A was argued and finalized without the issue surfacing. It would be unconscionable if this Court were to entertain the point at this late juncture of the proceedings. In any event, the Respondents did not or seriously contest the allegations of the Applicant made in that regard. To the extent necessary, maintained the Applicant, the *locus standi* allegations made in the founding papers are sufficient.

LEGAL FRAMEWORK

[7] It is a suitable moment to turn to case law to seek guidance on the issue. I note that both parties have referred this Court to the matter of *Giant Concerts CC v Ronaldo Investments (Pty) Ltd & Others,* **2013 (3) BCLR 251 (CC)** where the Court held at Paragraph [41] that:

"These cases make it plain that Constitutional own-interest standing is broader than the traditional common law standing, but that a litigant must nevertheless show that his or her rights or interests are directly affected by the challenged law or conduct. The authorities show:

(a) To establish own-interest standing under the Constitution a litigant need not show the same 'sufficient, personal and direct interest' that the common law requires, but must still show that a contested law or decision directly affects his or her rights or interests, or potential rights or interests.

(b) This requirement must be generously and broadly interpreted to accord with constitutional goals.

(c) The interest must, however, be real and not hypothetical or academic.

(d) Even under the requirements for common law standing, the interest need not be capable of monetary valuation, but in a challenge to legislation purely financial self-interest may not be enough – the interest of justice must also favour affording standing.

(e) Standing is not a technical or strictly-defined concept. And there is no magical formula for conferring it. It is a tool a Court employs to determine whether a litigant is entitled to claim its time, and to put the opposing litigant to trouble.

(f) Each case depends on its own facts. There can be no general rule covering all cases. In each case, an Applicant must show that he or she has the necessary interest in an infringement or a threatened infringement. And there a measure of pragmatism is needed."

[8] The Controller is appointed by the Minister in terms of Section 3 of the Petroleum Products Act, 120 of 1977 ("the PPA"). Subsections 1 to 3 of the PPA respectively provide:

"3. Appointment and powers of controllers and inspectors. — (1) The Minister—

(a) shall, subject to the laws governing the public service, appoint any person in the public service as 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) may on such conditions and at such remuneration as he or she may in consultation with the Minister of Finance determine, appoint or authorised any other person or person belonging to any other category of persons to act as regional controller of petroleum products or as inspector for the Republic or any part thereof.

(2) Subject to the provisions of this Act, the Controller of Petroleum Products, a regional controller of petroleum products and an inspector—

(a) may assist the Minister in the exercise of his powers and the performance of his functions under this Act;

(b) may gather such information in connection with the operation or administration of this Act as the Minister may desire, and investigate any offence relating to this Act.

(3) The Minister shall, subject to the provisions of this Act, determine the powers, duties and functions of the Controller of Petroleum Products, a regional controller of petroleum products and an inspector, and different powers, duties and functions may thus be determined in respect of different persons or categories of persons appointed or authorized under subsection (1)."

[9] The Minister can thus assign duties to a Controller or a Regional Controller anywhere in the Republic of South Africa. The Jurisdiction of a Controller or Regional Controller is as such, determined by the Minister. The powers that the Controller exercises can also be wide or circumscribed by the Minister. The Controller's approval of the license to the Respondents indubitably constitutes an act by an administrative body. It is therefore an administrative action as defined in Section 1 of the Promotion of administrative Justice Act, 3 of 2000, which provides that:

> " *'administrative action' means any decision taken, or any failure to take a decision, by-*
>
> *(a) an organ of state, when-*
>
> (i) *exercising a power in terms of the Constitution or a provincial constitution; or*
>
> (ii) *exercising a public power or performing a public function in terms of any legislation; or*
>
> *(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include-*
>
> *(aa) the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79 (1) and (4), 84 (2) (a), (b), (c), (d), (f), (g), (h), (l) and (k), 85(2)(b), (c), (d) and (e), 91 (2), (3), (4) and (5), 92 (3), 93,97, 98,99 and 100 of the Constitution;"*

[10] It is common cause that a party must allege and demonstrate that it has *locus standi.* In the context of PAJA, that its interests have been affected by the unlawful

action of the administrative action. The Applicant ought therefore to establish that it has been 'materially and adversely affected' by the administrative action of the Controller by approving the license. In Tulip the Court stated:

"that its interests or potential interests are directly affected by the alleged unlawfulness of the actions taken by the respondents. To succeed, Tulip must establish both components of own-interest standing: interest and directly effect. As discussed in Giant Concerts, Tulip must demonstrate that its interests are more than hypothetical or academic. It must also show that its interest and the direct effect are not unsubstantiated. Mere allegations, without more, are not sufficient to prove the elements of own-interest standing."

ANALYSIS

[11] It is evident that both parties ascribe a great measure of significance to the case of Giant Concerts CC *supra* but derive from it two divergent outcomes. The upshot of the Giant Concerts CC case is that there cannot be a rigid rule and that each case must be assessed with reference to its peculiar circumstances having regard to the parameters laid down in the case. It is settled that Constitutional own-interest standing is broader than the traditional common law standing. That said, a party ought to nonetheless establish that its rights are directly affected by the impugned law or conduct. This requirement must be demonstrated with due regard to the 5 limitations set out in the Giant Concerts CC case *supra.*

[12] The requirement above must be liberally and broadly interpreted to accord with constitutional goals. The Applicant has asserted in this regard that an additional license in an environment where there are existing filling stations able to sustain the current population and its business activities, approval of additional site and retail licenses without concomitant growth in the economy of the area might serve no more than to dislodge one of the operators manifestly eliciting the question whether or not it is necessary at all. In fulfilling its constitutional imperatives, the

PPA provides in Section 2B that:

"2B. Licensing. — (1) The Controller of Petroleum Products must issue licenses in accordance with the provisions of this Act.

(2) In considering the issuing of any licenses 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 countrywide availability of petroleum products at competitive prices; and

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

[13] Section 2b is meant to promote the transformative agenda contained in Section 2C, which provides that:

"2C. Transformation of South African petroleum and liquid fuels industry. —

(1) In considering license 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 license holder to furnish information, as prescribed, in respect of the implementation of the Charter."

[14] While the addition of another license may not necessarily have the effect of destroying the transformative agenda, it will certainly not create a harmonious relationship between the different operators. This may result in an unintended chaos – one filling station developing while another folds, fails and disappears. This is certainly not adding to the development of the economy of the area as intended in the PPA for the number of filling stations might remain the same. As such, the introduction of another filling station may not add any value and might not assist to achieve the constitutional goals referred to in the Giant Concerts CC case *supra.*

[15] At paragraph 7 of its founding affidavit the Applicant alleges that it is the site license holder for the Caltex Acornhoek Mall filling station. The physical license, however, refers to Caltex Acornhoek Plaza. I have reflected on this and accept that reference to Mall instead of Plaza was inadvertent. At paragraphs 65 and 66 of the same affidavit it states as follows:

"65. The revenues the applicant, as a licenced wholesaler, and proprietors of filling stations stand to lose as explained above are significant and irrecoverable if the respondents' licences were to be set aside on review after the proposed filling station commenced operations.

66. While it is difficult to quantify precisely what those losses will be, the respondents' own applications suggest that they expect to attain sales volumes of approximately 350 000 litres per month. This would represent a collective financial loss to the

existing filling stations in the order of R775 600, 00 (Seven hundred and seventy-five thousand six hundred Rand) per month (350 000 litres x the regulated retail margin of R 2.216 per litre). This collective financial loss will result in the existing and to-be-affected filling stations in the vicinity falling below the efficiency objective of the PPA."

[16] The fact that the Applicant is a site license holder for Caltex Acornhoek Mall filling station on its own gives it a direct interest in the matter. The tenth Respondent firstly, is a business tenant of the Applicant because it operates a filling station on land belonging to the Applicant. Secondly, it stands to reason that the Applicant derives income in the form of rentals by being the holder of the site license. Should there be a decline in the number or volume of petroleum products sold to the Tenth Respondent, the knock on effect on the Applicant as a holder of a wholesale license will be inexorable. As such, its interest is not only direct but also real and not suppositious in the manner contemplated in the Giant Concerts CC case *supra*.

[17] At paragraph 66 of the founding affidavit, the Applicant specifically alleges that 'as a wholesale license holder and as a proprietor of filling stations' it stands to lose on revenue when the Respondents commence with operation of the filling station. It could well be that the Applicant does not specify the margins of its expected loss but the Respondents themselves make the point that they anticipate to attain sale volumes of approximately 350 Litres per month.

[18] The 350 Litres that the Respondents expect to pump monthly essentially means that the existing filling stations, including the Applicant as a wholesale supplier of petroleum products, will absorb the decline in volumes especially in circumstances where the introduction is not supported by increase in the size of the population and business activity.

[19] The Respondents denial that the Applicant will be materially and adversely affected when their new filling station commences operations is staggering. The expected loss of income is material and it will affect the Applicant negatively insofar

as it will diminish its financial margins. Over and above the financial interest it cannot be in the interest of justice to deny the Applicant of *locus standi* where the granting of another license may not enhance the constitutional goals set in the PPA – to ensure the observance of the transformative agenda as contained in Section 2C of the PPA. The satisfaction of the transformative agenda does not entail substituting one previously disadvantaged individual by another.

CONCLUSION

[20] Against that background, the administrative action of the controller and/or the Minister has materially and adversely affected the Applicant as envisaged in the Tulip case *supra*. In the circumstances, the Applicant has successfully demonstrated that it has *locus standi* it being immaterial that there is no specific rubric under which it traverses the subject. The Respondents' *point in limine* concerning *locus standi* fails and I make the following order:

1. The point in limine is dismissed;

2. The Applicant's *locus standi* is confirmed; and

3. The Respondents are to pay the costs of the Applicant.

B A MASHILE

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 22 October 2021 at 10:00.

APPEARANCES:

Counsel for the Applicant:	**Adv MC Erasmus SC**
Instructed by:	**WDT Attorneys**
Counsel for the 3rd and 4th Respondents:	**Adv A Venter**
Instructed by:	**A. Kock & Associates Inc**
Date of Judgment:	**22 October 2021**