



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

CASE NO: 080409-2023

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 1 SEPTEMBER 2023

SIGNATURE

In the matter between:

FORSTER PATRICK MHLONGO

Applicant

and

THE CONTROLLER OF PETROLEUM PRODUCTS

First Respondent

THE TRUSTEES FOR THE TIME BEING OF PETER

NEVES TRUST BEING ELIZABETH IRENE NEVES

AND PRISCILLA FRANCINA RAMSBOTTOM

AND CHRISTOPHER GILBERT NEVES NNO

Second Respondent

ORDER

The application is dismissed, with costs.

J U D G M E N T

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

Introduction

[1] This is an urgent application by an operator of a filling station claiming an interdict to prevent the issuing and utilization of site and fuel retail licences granted to the second respondent pending the finalization of an appeal to be lodged against the granting of the said licences.

Salient facts

[2] As this judgment is in respect of an urgent application, it shall be kept brief. In short, the factual position is as set out hereunder.

[3] The second respondent obtained site and retail licences in 2017 to conduct a filling station at a property situated at the intersection of Managa and Sibange Roads, Masibekela, Mpumalanga (the second respondent's site). The second respondent claims that, due to intervention of the Covid 19 pandemic, the site could not be developed and the filling station did not materialize during extended periods of the licences. In terms of Regulations promulgated in terms of the Petroleum Products Act 120 of 1977 (the PPA), the licences have lapsed.

[4] In the meantime, the applicant has been granted site and retail licences on 22 January 2022 in respect of a different site, being one situated adjacent to the R571, also close to Managa Road, Masibekela, Mpumalanga. The two sites are less than two kilometres apart, but while second respondent's site is situated on the route leading to Eswatini, the applicant's site is on the route leading to Kamatipoort and from there to Mozambique.

[5] Apart from this aspect, second respondent's proposed filling station is situated in a complex of buildings, including retail shops and is situated with access directly from the main roads. The applicant's filling station is in turn, separated from the R571 by a set of buildings. Photographs contained in papers (and confirmed by second respondent's counsel who had performed an inspection in loco) indicate that while applicant's filling station appears to be somewhat dilapidated, in particular in relation to paving around it and with a dusty or ground access, the second respondent's proposed filling station is modern and with proper vehicular access. The applicant's filling station is called Elegant Vukuzenzele and the second respondent's proposed filling station will be called Ndondozi filling station.

[6] In December 2022 the second respondent applied afresh to the Controller of Fuel Products for the requisite site and retail licences necessary to operate a filling station on the same site as previously approved in 2017.

[7] In considering the granting of such licences, the Controller is guided by Section 2B (2) of the PPA which envisages the following objectives:

"2B. Licensing.—

- (2) *In considering the issuing of any licences in terms of this Act, the Controller of Petroleum Products shall give effect to the provisions of section 2C¹ 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”.*

[8] In terms of the Regulations, an applicant for a new site and retail licence must not only lodge such an application with the Controller but also display notice of it and advertise the application in the prescribed manner. This the second respondent has done. Any interested party then has 20 working days to lodge objections. The applicant does not say when he lodged his objection, nor did he provide the court with a copy of his objection. The second respondent assumed that the objection was lodged 3 months out of time on 13 March 2023 (based on the date on the copy of the objection received by the second respondent and which

¹ Section 2C deals with aspects relating to the transformation of the South African petroleum and liquid fuels industry and its provisions did not feature in this application.

it has annexed to its answering affidavit) but the letter from the Controller, dealing with the objection, indicates that it was only lodged on 14 June 2023. The second respondent has also annexed a copy of its response to the objection to its answering affidavit.

[9] The aforesaid letter from the Controller was dated 1 August 2023. It indicated that the objection was overruled and that the second respondent's requisite site and retail licences will be issued once conditions precedent were met. These conditions were simple and related to the lodging of a BBEE certificate and the provision of a Tax Compliance Status PIN.

[10] At the time of the aforesaid letter, construction of business premises at the second respondent's site has already been 80% completed and it has since been confirmed that the aforementioned conditions have been met. Immediately upon the issuing of licences, the filling station will therefore become operational. This is apparently imminent.

[11] The applicant has 60 days from date of rejection of his objection to appeal to Minister, an option which the applicant claims he will exercise. In his founding affidavit, the applicant left the court in the dark as to the grounds of his objection and the grounds of the proposed appeal. Notionally it appears that the applicant is concerned that the operation of the second respondent's filling station will cause volumes in his own filling station to drop. He makes this claim quoting from the second respondent's application to the Controller, albeit that the reference to a drop in volumes in that application was made in a different context, referring to further entrants to the market other than second respondent (and in relation to transient traffic).

[12] It is against this legal and factual backdrop that the applicant's application for an interim interdict must be evaluated.

Evaluation

[13] Adv Savvas, who appeared for the applicant, argued that the granting or refusal of the relief should be a simple weighing-up exercise and that a mere value judgment has to be exercised in respect of which side of a scale might be heavier. This appears to be an oversimplification of the matter.

[14] The starting point is the requirements for an interim interdict. These are trite and have been summarized in *Reckitt & Colman SA (Pty) Ltd v S C Johnson (SA) (Pty) Ltd*² as follows: “*The applicant must establish: (1) a clear right or, if not clear, that it has a prima facie right, (2) that there is a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted, (3) that the balance of convenience favours the grant of an interim interdict and (4) that the applicant has no other satisfactory remedy*”.

Prima facie right

[15] The applicant (correctly) conceded in his papers that “*there is no provision in the PPA (that) the granting of a licence to be, so to speak, “suspended” pending any internal review or subsequent review*”. The applicant however then proceeded to assert that “*the right which I have to an appeal or review is immediate and is of a constitutional nature. The right will be defeated if immediate relief is not granted*”.

[16] This assertion is unfounded. Whether an interim interdict is granted or not, will not impact on the applicant’s stated intention to lodge an appeal to the Minister (or to take the Minister’s decision on review, should it be adverse to the applicant’s interests and should grounds for a review exist) or his right to do so.

² [1995] 1 All SA 414 (T) 1995 (1) (SA) 725 (T) at 729I – 730G.

[17] Although the applicant's papers have been inelegantly formulated, it appears that the actual right which the applicant seeks to assert is not the right to an appeal (as relied on by the applicant as a ground of urgency), but the right to be protected "... *against unlawful competition that might be caused by a wrongfully awarded licence*"³.

[18] No grounds have been set out indicating that the second respondent's licences have been "wrongfully" awarded. The applicant left it to the second respondent to place his original objection before court. In it the applicant in as equally vague fashion as in his founding affidavit simply averred that the market was "overtraded" and there were "more than optimum" filling stations to satisfy the need. The applicant failed to deal with the response delivered by the second respondent to the Controller and similarly chose not to deal with any of the detail furnished in the answering affidavit in reply. Also, none of the grounds of appeal have been disclosed to this court despite the fact that this has squarely been placed in issue.

[19] If, on a beneficial interpretation of the applicant's papers, the prima facie right which the applicant seeks to protect is the maintenance of the status quo and the existing business of his filling station until such time as he may be able to convince the Minister that the Controller had not taken his business interests into consideration when it awarded licences to the rival business of the second respondent, that contention is open to serious doubt. The second respondent's application to the Controller clearly indicated that the second respondent had, on more than one occasion in that application, disclosed the presence of the applicant's business, its nature and location. Clearly, so the second respondent contended, the Controller must have applied its mind to these facts when acting in implementation of the PPA when considering and granting the competing

³ Par 33.4 of the founding affidavit.

licences to the second respondent. These contentions made in the answering affidavit were not responded to by the applicant. I find that the applicant's claim to a prima facie right is therefore subject to serious doubt⁴.

[20] In the event that I may be too stringent in my assessment of the applicant's claim and, should it be deemed that the prima facie right which the applicant seeks to assert is only open to "some doubt" and not "serious doubt", I shall deal with the remainder of the requirements for an interim interdict as relied on by the applicant.

Well-grounded apprehension

[21] Apart from vaguely asserting that "... *the threat of harm to my business is real, immediate and conclusive*", no facts have been put up by the applicant to support this claim. One is left in the dark as to how many, if any, of the applicant's local clientele would now prefer to drive past the applicant's filling station down the road to Eswatini in order to rather fill up at the second respondent's filling station. The applicant also hasn't before targeted transient traffic, being the second respondent's primary targeted market. There is no indication of what volume of the applicant's untargeted market, would have preferred to turn off the road and visit the applicant's local filling station instead of having continued on their way as before. Of course, the erection of a new filling station in reasonable proximity to an existing filling station might notionally create some fear of a reduction in whatever transient traffic, may have contributed to the applicant's turnover, but the applicant has not, as the second respondent has done in its licence application, put forward any factual evidence to indicate that the market, and in particular, the transient market, is not big enough for two filling stations. In fact, the second respondent's proposed filling station is situated at an intersection "down the road" from the applicant's filling

⁴ See *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189 – 1190.

station, being a spot frequented by minibus taxis. There is not even a smidgen of allegation that this segment of the transient market was previously or to date, served by the applicant's filling station. The alleged harm therefore appears to be more perceived than real.

Balance of convenience

[22] Apart from vague generalities, the applicant has not placed any facts before the court regarding its "inconvenience", should an interim interdict not be granted. On the other hand, the second respondent has indicated that it has already made a huge investment in the construction of the new business premises where a "wide shopping experience" will be offered, not only to transient traffic, but also to persons coming from Eswatini. Commercial tourism is therefore increased thereby. This is enhanced by the proposed filling station with easy traffic ingress and egress from the intersection and the availability of new ablution facilities. More than 50 local people have already been employed in these shops and a further 20 people will be employed in the second respondent's proposed filling station. Part of the second respondent's licence proposals also contain a commitment to distribute and invest 5% of its net profit to various community projects.

[23] Should the commencement of the operation of the proposed filling station of the second respondent be delayed until the applicant's appeal is lodged and the Minister has decided thereon and the applicant has thereafter exhausted its already threatened subsequent review processes, the benefits to the transient traffic, tourism and the local communities referred to above, would be unduly delayed. Even if notionally the applicant might eventually be successful in the proposed review processes, there is little reason why these benefits should not be enjoyed in the interim by third parties other than the parties to this litigation.

[24] On the other hand, should an interim interdict be granted, the second respondent contended that this would only serve to protect the applicant's historical monopoly and self-interest. I agree with this contention.

[25] I find that there is therefore no balance of convenience favouring the applicant.

Alternate remedy

[26] The second respondent contends that any potential loss of income by the applicant is largely self-created. He operates a second-rate filing station with little or no attraction. The second respondent's assertion that the applicant's site "*... remains questionable due to the poor standard of the dilapidated buildings, lack of paving, proper signage and proper business environment for touristic enhancement*", is not only confirmed by photographs, but has not been attacked at all in reply. The applicant has not in the past made any attempt, by way of signage or ease of access, to lure any transient traffic to his site, nor has he expressed any intention to attempt to do so in future. This, and the repair and renovation of his facility, are all real and practical alternatives open to the applicant, none of which have to date been explored⁵. The lack of doing so also give credence to the second respondent's accusation that the application is an attempt at maintaining a monopoly with only self-interest at heart.

Discretion

[27] In exercising the value judgment⁶ which Adv Savvas enjoined this court to make I, considered in particular the factors relating to exclusive self-interest on the one hand and the considerations mentioned above in respect of the balance of convenience, not only of the parties, but also of others, on the other hand. The

⁵ See also *L F Boshoff Investment (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (C) in this regard.

⁶ As part of the exercise of a court's discretion as also contemplated in *Beecham Group Ltd v B-M Group (Pty) Ltd* 1977 (1) SA 50 (T).

latter outweigh the former. Added to this the real and practical alternative avenues available to the applicant. As a consequence I find that the applicant has failed to make out a case for the granting of an interim interdict.

Costs

[28] I find no cogent reason why the general rule that costs should follow the event, should not apply.

Order

[29] The following order is made:

The application is dismissed, with costs.



N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 29 August 2023

Judgment delivered: 1 September 2023

APPEARANCES:

For the Applicant:

Attorney for the Applicant:

Adv B G Savvas

Murray Kotze & Associates
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For the Second Respondent:

Attorney for the Second Respondent:

Adv D J Sibuyi

Mthunzi Chambers, Pretoria