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

CASE NO: 2023 -123792

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: [Y/NO]

(3) REVISED: [Y/N]

(4) SIGNATURE:

DATE: 15/12/2023

In the matter between:

EMO ENERGY (PTY) LTD

Applicant

and

MINISTER OF MINERAL RESOURCES AND ENERGY

1st Respondent

THE CONTROLLER OF PETROLEUM PRODUCTS,

2nd Respondent

**DIRECTOR-GENERAL, DEPARTMENT OF MINERAL
RESOURCES AND ENERGY**

3rd Respondent

FUEL RETAILERS ASSOCIATION

4TH Respondent

**Civil Law and procedure - requirements for granting of a final interdict – where
facts show a review application -application is dismissed-no order as to costs**

JUDGMENT

KHWINANA AJ

INTRODUCTION

- [1] The intervening party has applied to be joined as the fourth respondent which application I have considered and they were joined as such.
- [2] This court has been requested to dispense with forms and services provided in terms of Rule 6 (12) of the Uniform Rules of Court and directing that this matter be heard on an urgent basis.
- [3] The application is to suspend the immediate cancellation of the Petroleum Product wholesale license number W[...] that was cancelled on the 02nd of June 2023 by the second Respondent.
- [4] That the applicant be granted leave to supplement its papers for Part B which will be postponed sine die.
- [5] That the dismissal of the appeal by the second Respondent on the 04th of October 2023 be declared unlawful and have no legal force or effect.
- [6] That the Second Respondent be ordered to withdraw the cancellation within a period of 30 thirty days of this order.
- [7] That the First and Second Respondent pay costs of this application the one paying the other be absolved.

BACKGROUND

- [8] The applicant submits that they run a business which is a going concern, and the suspension/cancellation of the trading license is unlawful. The applicant says the unlawful conduct was orchestrated by its former employees who have since been fired in compliance with the act. It is alleged that the applicant has suffered no harm or no prejudice as to date they continue to trade and do business without the requisite licence.

- [9] On the 26th day of August 2022, the Second Respondent caused a notice in terms of section 2A(3) to be served on the applicant for contravening the Petroleum Act 120/1977. The applicant is alleged to be retailing or selling quantities that are below the prescribed limit of 1500 litres per transaction. This was confirmed through a site visit and has been confirmed by the applicant. The applicant was given fourteen days to comply with the notice.
- [10] The second notice was given on the 29th day of November 2022 again for the applicant to comply with the laws governing the wholesale license. The applicant received a notice of intention to cancel the license during January 2023. On the 25th January 2023, the cancellation of the intention to cancel was received by the applicant. A final notice of contravention was sent to the applicant on the 10th day of May 2023.

LEGAL MATRIX

- [11] It is imperative to unpack the meaning of the interdict and the review taking into account the argument raised by the fourth respondent in this matter. An **interdict** is a court order that prohibits a person from performing a specific action or requires them to perform a specific action. It is usually granted when there is a risk of harm or damage to a person or property. Interdicts can be temporary or permanent, depending on the circumstances¹. On the other hand, a **review** is a legal process that allows a court to review the decision of an administrative body or tribunal. The court will examine the decision to determine whether it was made lawfully and reasonably. If the court finds that the decision was unlawful or unreasonable, it may set it aside or refer it back to the administrative body for reconsideration².

- [12] In LF Boshoff Investments (Pty) Ltd v Cape Town Municipality³ as follows:

¹ United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others (1032/2019) [2021] ZASCA 4 (13 January 2021)

² Altech Radio Holdings (Pty) Limited and Others v City of Tshwane Metropolitan Municipality (1104/2019) [2020] ZASCA 122 (5 October 2020)

³ 1969 (2) SA 256 (C) 267

"Briefly these requisites are that the Applicant for such temporary relief must show –

- (a) That the right which is the subject matter of the main action and which he seeks to protect using interim relief is clear or, if not clear, is prima facie established, though open to some doubt;
- (b) that, if the right is only prime facie established, there is a well-grounded apprehension of irreparable harm to the Applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;
- (c) that the balance of convenience favours the granting of interim relief, and
- (d) Section 6(1) provides that '[a]ny person may institute proceedings in a court . . . for the judicial review of an administrative action'.

[13] In terms of PAJA Section 6(2) then codifies the grounds upon which a court may review administrative action. The effect is that administrative actions as defined in the PAJA are subject to review, in terms of s 6(1), by a court based on the grounds of review codified in s 6(2). Section 8 deals with the remedies that may be awarded when administrative action is reviewed and found to be either unlawful, unreasonable or procedurally unfair. Section 8(1) provides that the 'court . . . in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable', including mandatory and prohibitory interdicts, the setting aside of administrative action, declarators and, in exceptional circumstances, substituting or varying administrative action and even directing the payment of compensation. that the Applicant has no other satisfactory remedy."⁴

[14] In terms of the "bulk" means 1500 litres or more, per transaction of petroleum products;

⁴ TMT Services & Supplies (Pty) Ltd t/a Traffic Management Technologies v MEC: Department of Transport, Province of KwaZulu-Natal and Others (Case no. 1059/2020) [2022] ZASCA 27 (15 March 2022)

In terms of Regulation 20(2)⁵ The Controller may not suspend or cancel a license unless—

(a) the licensed wholesaler has been informed in writing of the intention to cancel or suspend such licence—

(i) setting out the particulars of the alleged failure or contravention; and

(ii) calling upon the licensed wholesaler to make the representations to the Controller that may be necessary within 30 days after the date of that notice.

(b) The Controller has considered—

(i) steps taken by the licensed wholesaler to remedy the alleged failure or contravention concerned or to prevent any such failure or contravention from being repeated; and

(ii) any other relevant matter submitted by way of the representations contemplated in paragraph (a)(ii).

21. Termination of licence

(1) A licence ceases to be valid if—

(a) the licence is surrendered to the Controller;

(b) the licence is cancelled by the Controller in accordance with regulation 20(2); or

(c) the licensed activity is no longer a going concern.

⁵ REGULATIONS REGARDING PETROLEUM PRODUCTS WHOLESALE LICENCES [Updated to 19 December 2012]

- [15] In terms of Section 12B was introduced by the Petroleum Products Amendment Act 58 of 2003. As appears from the long title of the Amendment Act, one of its objectives was “to promote the transformation of the South African petroleum and liquid fuels industry”. Schedule 1 to the Amendment Act introduced an industry charter “on empowering historically disadvantaged South Africans in the petroleum and liquid fuels industry”. Section 12B also promotes transformation by protecting small retailers against unfair and unreasonable treatment at the hands of powerful wholesalers⁶.
- [16] While the transformational objectives of the Petroleum Products Amendment Act and Section 12B are vital for promoting equity and inclusivity in the South African petroleum industry, it is equally crucial to maintain the rule of law and ensure that all parties adhere to the established legal and regulatory frameworks. This balanced approach is essential for achieving sustainable and meaningful transformation in the industry.
- [17] In the matter of The Business Zone 1010 CC t/a Emmarentia Convenience Centre v Engen Petroleum Limited and Others,⁷ Mhlantla J held “I am satisfied that the decisions of both the Controller and Minister amount to administrative action capable of a PAJA review. The decisions they were called upon to make, in terms of the powers conferred on them by the Act, clearly affected the rights of the parties to the dispute and had a direct, external legal effect on the legal relationship between the parties.” (my emphasis)
- [18] “Wholesale” means the purchase and sale in bulk of petroleum products by a licensed wholesaler to or from another licensed wholesaler, or to or from a licensed manufacturer, or sale to a licensed retailer or an end-consumer for own consumption and “wholesaler” shall be interpreted accordingly;

⁶ The Business Zone 1010 CC t/a Emmarentia Convenience Centre v Engen Petroleum Limited and Others [2017] ZACC 2

⁷ [2017] **ZACC** 2

- [19] In terms of the Constitution section 22 “Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law”. This right should not be likely taken away.
- [20] The right to choose one's trade, occupation, or profession freely, as enshrined in Section 22 of the Constitution, represents a fundamental aspect of personal liberty and autonomy. This constitutional provision acknowledges the importance of individual choice in determining one's professional path, which is integral to personal development, economic self-sufficiency, and the fulfilment of human potential.
- [21] However, the Constitution also wisely allows for the regulation of these professions by law. This aspect is crucial for maintaining standards, ensuring public safety, and protecting the interests of the community at large. Such regulation is not intended to unduly restrict the freedom of choice in professions but to balance individual rights with the collective well-being.
- [22] In considering the right to choose one's profession, it is paramount that any regulatory measures imposed by law are reasonable, justifiable, and serve a legitimate public interest. Regulations should not be arbitrary or excessively burdensome, as this would undermine the essence of the freedom granted by the Constitution. Instead, they should be designed to enhance the integrity, safety, and effectiveness of professional practices, ultimately benefiting both the individuals in the profession and the society they serve.
- [23] Thus, while the right to choose a profession is a fundamental freedom that should not be lightly infringed upon, it is equally important to acknowledge the role of reasonable and necessary regulations in ensuring that professional practices align with broader societal values and needs. The balance between individual freedom and regulatory oversight is delicate and requires constant vigilance to ensure both are maintained in harmony.

ANALYSIS

- [24] It is imperative to mention that I found that the intervening party had a direct and substantial interest in the matter and therefore decided *ex tempore* that they be joined as the fourth Respondent. I proceeded to consider the urgency of the application considering the rights of the applicant to trade that were cancelled by the first Respondent. I found that the application is urgent and should be heard.
- [25] I am now ceased with deciding whether the application should be pursued as an interdict or a review. This application stems from the Respondent's decision to revoke the applicant's wholesale trading license due to alleged non-compliance with regulations related to product sales. The applicant acknowledges operating in the manner described but contends that a contract with a Taxi association, which maintains an account with them, fulfills the requirement of 1500 litres through multiple taxis refueling at their facility.
- [26] The applicant acknowledges that there may have been instances where individuals, not part of the taxi association, benefited from wholesale purchases due to actions of former employees, who have since been dismissed to ensure compliance with regulations. The basis of the applicant's case is that the decision to revoke their license was procedurally flawed. Specifically, they argue that in May 2023, they did not receive a notice of intention to suspend the license, a step that had been followed in the past and is mandated by the relevant act.
- [27] The applicant further argues that their expectation of receiving a new notice of intent to revoke the license was based on past instances where such notices were issued and then withdrawn before any cancellation occurred. This expectation, they claim, was not met when their license was abruptly revoked. Additionally, the applicant emphasizes that they have actively addressed the non-compliance issues by terminating the employment of those involved in the misconduct. This action is part of their broader argument, which also includes their operation in line with a contract with a Taxi association, asserting that this arrangement meets the 1500-liters requirement through various taxis refueling at their facility.

[28] The test was postulated as follows in Webster vs Mitchell⁸:

“In an application for a temporary interdict, applicant’s right need not be shown by a balance of probabilities; it is sufficient if such right is prima facie established, though open to some doubt. The proper manner of approach is to take the facts as set out by the applicant together with any facts set out by the respondent that the applicant cannot dispute and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered, and if serious doubt is thrown upon the case of the applicant, he could not succeed. In considering the harm involved in the grant or refusal of a temporary interdict, where a clear right to relief is not shown, the Court acts on the balance of convenience. If, though there is prejudice to the respondent, that prejudice is less than that of the applicant, the interdict will be granted. Subject, if possible, to conditions which will protect the respondent.”

[29] The applicant must first establish prima facie right to the license, even if it's subject to some doubt. Here, the applicant claims a right to operate under the license, backed by their contract with the Taxi Association and efforts to comply with regulations by dismissing non-compliant employees.

[30] The next step is to consider the facts presented by both parties, focusing on those that the applicant cannot dispute. In this case, it's acknowledged that the applicant was operating under the license and took steps to comply with regulations. The respondent's action of revoking the license without prior notice, as previously done, is also a critical uncontested fact.

[31] The court must assess whether the applicant could likely succeed in obtaining final relief at trial based on these facts and inherent probabilities. Given the

⁸ 1948 (1) SA 1186 (WLD)

lack of notice and the applicant's attempts at compliance, there is a reasonable chance of success in a final trial.

- [32] Any facts contradicting the applicant's case should be examined. If these create serious doubt about the applicant's case, it weakens their position. In this scenario, the respondent would need to provide compelling reasons for revoking the license without notice to cast doubt on the applicant's case.
- [33] Where a clear right is not established, the court acts on the balance of convenience. The harm to both parties is weighed. If the harm to the applicant from the cancellation of the license outweighs the harm to the respondent (and the public interest), a temporary interdict might be more suitable. In this case, the abrupt cancellation of the license without notice could cause significant harm to the applicant, especially considering their steps toward compliance.
- [34] If an interdict is granted, it may come with conditions to protect the respondent. This could include ensuring continued adherence to regulations or monitoring of the applicant's operations.
- [35] in terms of **(Regulation 20(2)(a))**: The regulation mandates that before suspending or cancelling a license, the licensed wholesaler must be informed in writing of the intent to do so. This notice must detail the particulars of the alleged failure or contravention and invite the wholesaler to make necessary representations within 30 days. In this case, the applicant's primary contention is that such a notice was not provided, which is a direct violation of the regulation's stipulations.
- [36] In terms of **Regulation 20(2)(a)(ii)**: The regulation not only requires notification but also ensures that the wholesaler has a fair opportunity to respond to the allegations. This step is crucial for due process and allows the licensee to present their case or take corrective actions. The absence of this opportunity in the applicant's case further strengthens their argument for an interdict.

- [37] In terms of **(Regulation 20(2)(b))**: The regulation also obligates the Controller to consider any steps taken by the wholesaler to remedy the alleged failure or prevent its recurrence, as well as any other relevant matters presented in their representations. It would seem that the applicant's information or steps taken for compliance (like firing non-compliant employees), this aspect of procedural fairness was overlooked. In terms of the Regulation, it is prudent upon the Controller to consider such information and steps taken to adhere to compliance.
- [38] Given these regulatory requirements, the applicant's pursuit of an interdict is grounded in the argument that the Controller's actions (or inactions) contravened the established legal procedure. By not issuing the required notice and considering the applicant's subsequent compliance efforts, the Controller denied the applicant procedural fairness.
- [39] It is the duty of this court, in considering the interdict, to assess whether the lack of adherence to the regulatory procedure by the Controller constitutes a sufficient basis for granting temporary relief. The court must weigh the potential harm to the applicant from the license suspension or cancellation without due process against any potential harm to the public interest or the regulatory objectives of the Controller.
- [40] This court must balance the need to uphold regulatory standards and procedures against the rights and interests of the applicant. The lack of procedural fairness, as alleged by the applicant, tip this balance in favour of granting an interdict, particularly because the applicant shows a willingness and effort to comply with regulatory requirements.
- [41] Moseneke DCJ in *National Treasury and others vs Opposition to Urban Tolling Alliance and others*⁹ when he stated as follows: "Under the Setlogelo test, the prima facie right claimant must establish is not merely the right to approach a

⁹ 2012 (6) SA 223 (CC) at para 50

Court to review an administrative decision. It is a right to which, if not protected by an interdict, irreparable harm would ensue. An interdict is meant to prevent future conduct and not decisions already made. Quite apart from the right to review and to set aside impugned decisions, the applicants should have demonstrated a prima facie right that it threatened by impending or imminent irreparable harm. The right to review the impugned decisions did not require any preservation pendente lite.”

[42] Where the applicant seeks the Court to interfere with the exercise of statutory power conferred on the Minister, the applicant must demonstrate exceptional circumstances. It is imperative to recognize that the application at hand is for an interdict, where the existence of a clear right is a prerequisite. This differs fundamentally from situations where rights have already been stripped away. The nature of the applicant's approach to this court is flawed; it appears to erroneously seek a review or dismissal of a decision of the Second Respondent. Such an approach is misaligned with the requirements for an interdict.

[43] Therefore, upon careful consideration of the facts and legal principles applicable, this Court finds that the application is ill-conceived and does not meet the established criteria for the relief sought. Consequently, the application is dismissed.

COSTS

[38] In reviewing the circumstances of this case, it is apparent that the application was not brought in the correct procedural manner by the applicant. However, it is equally clear that the second respondent has not fully adhered to the relevant regulations. This shared responsibility for the procedural irregularities and non-compliance with regulatory requirements impacts the decision on costs.

[39] In light of these considerations, this Court could find reasons to depart from the norm in respect of the cost order. I find that it would not be just or equitable to award costs against either party. The principle of fairness dictates

that when both parties have contributed to the situation that has necessitated legal proceedings, neither should be unduly penalized in terms of costs.

Order

The application is dismissed, no order as to costs.

**KHWINANA ENB
ACTING JUDGE OF GAUTENG HIGH COURT**

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Counsel for 1st to 3rd Respondent: ADV B. NTHAMBELENI/
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Instructed by: TSHEPO MOFOKENG ATTORNEYS

DATE OF HEARING: 08TH DECEMBER 2023

DATE OF JUDGMENT: 15TH DECEMBER 2023