

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

10/06/2022

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 HIGHVELDT TECHNOPARK INVESTMENTS
(PTY) LTD**

Third Respondent

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

J U D G M E N T

MASHILE J:

INTRODUCTION

[1] This review application first served before this Court on 19 January 2021 as an urgent matter comprising Part A and B. On that day, the parties reached a transitory settlement in terms of which the Third and Fourth Respondents (“Highveld Technopark”) and (“NAD Property”) respectively agreed to halt construction of the filling station until early February 2021. In Part A of the application, the Applicant (“Pine Glow”) sought an order prohibiting Highveld Technopark and NAD Property, which will henceforth be referred to as the Respondents, from proceeding and/or commencing with the construction of a filling station alternatively, from continuing with operation of the filling station situated on a site described as Erf 930, Greenvale, Extension 1 Township, Registration Division K.U, Province of Mpumalanga (“the site”).

[2] In Part B of the application, Pine Glow sought to urgently review and set aside:

- 2.1 The decision of the Minister on the Respondents' appeals in terms of section 12A of the Petroleum Products Act, 120 of 1977 ("the PPA"), to refer the applications back to the Second Respondent ("the Controller") for re-evaluation; and
- 2.2 The decision of the Controller to approve the site and retail license applications of the Respondents in terms of the PPA; and
- 2.3 Lastly, it also sought an order that, under the exceptional circumstances of this matter, an appeal against the granting of the foregoing prayers will, as provided for in section 18 of the Superior Courts Act, 10 of 2013, not suspend the operation of the order of this Court setting aside the decisions of the First Respondent ("the Minister") and the Controller.

[3] When the urgent application returned to Court on 2 February 2021, it was struck off the roll for lack of urgency. The parties arranged that Part b be heard during the ordinary course on 3 May 2021. When they came back to Court in May 2021 to argue Part B, Highveld Technopark and NAD Property took a legal point that Pine Glow lacked *locus standi*. On that day the parties argued the point and judgment was reserved. The *locus standi* point was ultimately dismissed and the parties argued Part B on 25 October 2021.

[4] In its initial founding affidavit, Pine Glow sought to review and set aside the decisions of both the Minister and that of the Controller. I note that this is no longer the position in its supplemented founding affidavit. The review grounds now pertain to the decision of the Controller to re-evaluate his decision approving the license. The upshot of the reconsideration of the applications is that the Controller has now granted the licenses as applied for by the Respondents.

[5] Where I refer to Respondents in this judgment, it will mean Highveld Technopark and NAD Property otherwise and depending on the context, I will refer to them in their individual names. The Fifth to Ninth Respondents have been joined to this application insofar as they might have interest in case the proposed filling station elects to use one of their petroleum brands. Pine Glow seeks no relief or costs against the Tenth Respondent ("Tokivect") but it is cited as it operates a filling station on a site owned by Pine Glow. Besides, Pine Glow is also the wholesaler from which Tokivect purchases its petroleum products.

FACTUAL MATRIX

[6] The factual background of this application is substantially uncontested by either side. In April 2016, the Respondents applied to the Controller for site and retail licences in terms of the PPA for the establishment of a new filling station on the site. Following the application, the Controller granted the licenses on 3 November 2020 and on 12 November 2020, allocated G/2018/04/26/0001 and G/2018/04/26/0002 to the site and retail licenses respectively.

[7] Pine Glow, as it was entitled in terms of PPA regulations 4(2)(e) and 16(2)(e), objected to the license applications. On 9 November 2018, the Controller found that there was no need for the proposed filling station and that it would be incongruent with the objectives of the licencing system prescribed by PPA, the Controller refused the site and retail licences. In consequence of the Controller's decision, the Respondents noted an appeal to the Minister in terms of section 12A of the PPA against the Controller's decision to refuse the licenses.

[8] Pine Glow opposed the appeal. On 12 December 2019, Pine Glow received a notification from the Minister dated 10 December 2019 advising the parties that he has upheld the appeal and set aside the decision of the controller and referred the license applications of the Respondents back to the Controller for re-evaluation based on information submitted and other documentation obtained during the appeal process.

[9] On 5 February 2020, Pine Glow reacted to the decision of the Minister stating that:

9.1 The Minister is required to decide the appeals and not empowered to refer the applications back to the Controller; and

9.2 The Controller is *functus officio*.

[10] Standing the Minister's ground, his office reverted to Pine Glow in an e-mail message of 27 February 2020 recording the intransigent stance of the Minister on the matter. On 26 November 2020, Pine Glow alleges that it learnt for the first time that construction of what appeared to be a filling station had taken root on the site. On 30 November 2020, Pine Glow wrote to the Controller and to the attorneys of the Respondents demanding that the Controller gives direction ending construction or proof that licences had been issued to Highveld Technopark and NAD Property in terms of the PPA.

[11] On 7 December 2020, the attorneys of the Respondents furnished Pine Glow with letters confirming the issuing of site and retail licences to the Respondents. The attorney further verified that the construction on the site was indeed a filling station. Pine Glow claims that other than the response from the attorneys of the Respondents, it has not heard from the Controller

[12] This Court has been provided with e-mail message communications that preceded the dispute between Pine Glow and the Respondents suggesting that they had a long established business relationship concerning the site and these petroleum license applications. These exchange of e-mail messages are common cause consequently I do not intend to quote them extensively. While they may not be directly relevant to the outcome of this judgment, they nonetheless establish the motive behind this review application.

[13] The Respondents allege that the e-mails indubitably reveal that Pine Glow was actively involved in the planning of the proposed new site and assisted the Respondents with advice and planning. It began on 24 November 2017 when Mr Arnold Le Roux, an employee of Pine Glow, sent an e-mail message to Japie, a director of both Respondents, annexing a draft layout plan of the proposed filling station. On 13 February 2018, one Rina Groves a property manager in the employ of the Applicant addressed an email correspondence to Riaan Kock of a Kock & Associates Inc., which represents the Respondents in this matter and is also the firm responsible for the license applications.

[14] Groves requests Kock to send her copies of the license applications and to inform her of the progress of the said license applications. On 14 February 2018, Wimpie de Beer, the Senior Manager: Property and Brand Development of Pine Glow, wrote to Kock requesting and emphasizing that Pine Glow needed to peruse and signoff on the final versions of the license application prior to Kock's submission to the Minister. On 14 February 2018, startled by the request, Kock replied and said that he did not appreciate why De Beer wanted to sign off on any documents and copies of the applications when Caltex Mpumalanga North Marketer was not the client in this matter.

[15] Responding to the above on 15 February 2018, De Beer stated that Kock was correct and confirmed that they were not the client but said that their interests thought were closely aligned. De beer added that incidentally, they had recommended the Respondents' services to the client for this application. He concluded by saying that the reason for the perusal of the application was to ensure that there was no room for an objection nor for the Minister to cause undue delays, due to technical or other reasons.

[16] On 19 February 2018, Mr Moeen Omar ("Omar"), the Property and Brand Director of Pine Glow who is also the deponent to the founding affidavit in this matter, sent an email to Japie stating that as the project manager for the license process, their duty was to protect both parties' mutual interest, by ensuring that the application complied with requirements to prevent delays or non-approval. He then concluded his message by stating that they understood that time was of the essence to all parties.

[17] The Respondents now allege that the assessment of Pine Glow of the trade area was that there was a definite need for the introduction of a new player at the premises as the current Caltex Plaza filling station would not be able to cope with the increase in demand. Pine Glow has always been aware of the contents of the respective license applications and had no difficulty with the validity of any document and/or required rights that could prevent the license applications being granted to the Respondents. The parties only became estranged when NAD Properties refused to accept an unfair clause that Pine Glow wished to introduce in the proposed supply agreement.

GROUND FOR REVIEW

[18] As stated earlier, the review has, to the extent that it does not challenge the Minister's decision to uphold the appeal and to remit it to the Controller for re-evaluation, shifted focus to the Controller's pronouncement to grant the licenses to the Respondents following re-evaluation. Pine Glow has put forward five grounds as the basis on which the decision of the Controller should be reviewed and set aside by this Court and these are:

- 18.1 The Controller was not authorised by section 12A of the PPA or any other provision in the said Act to re-evaluate applications previously finally decided by him;
- 18.2 The Controller's decision to re-evaluate the applications and reverse his final refusal was materially influenced by an error of law;
- 18.3 The Controller's decision to re-evaluate and approve the applications was procedurally unfair;
- 18.4 The Controller was biased or can reasonably be suspected to have been biased;
and

18.5 The Controller's decision to re-evaluate the applications and reverse his final refusal was unlawful as he was *functus officio*.

ISSUES

[19] It is apparent from the facts described above that some of the issues to be considered by this Court are:

19.1 To establish what the repercussions of Pine Glow not to challenge the decision of the Minister to uphold the appeal, set it aside and remit it to the Controller for re-evaluation are, if any;

19.2 In terms of the PPA, does the Minister's referral of the matter back to the Controller constitute a fresh decision by the Controller or is the decision of the Controller following his re-evaluation essentially his own or that of the Minister?

19.3 Whether or not Pine Glow has exhausted its internal remedies in terms of PPA, which provides for an internal appeal;

19.4 The validity or irregularity of the decision taken by the Controller on re-evaluation;

19.5 Does the court have a remedial discretion regardless of a declaration of irregularity that it may find.

LEGAL FRAMEWORK

[20] Section 1 of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA") defines 'administrative action' as:

"administrative action" means any decision taken, or any failure to take a decision, by –

1. (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 ...”*

[20] To the extent that there seems to be a dispute on whether or not the Minister made a decision when he referred the matter back to the Controller, the definition of the word, decision, in PAJA may be beneficial. Section 1 of PAJA also defines ‘decision’ as meaning any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to...”

[21] Section 3(2) of PPA provides that:

- “(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)."*

[22] Dealing with appeals, Section 12A of PPA provides as follows:

"(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.*

(2) ...

(a) ...

(b) ...

- (3) *The Minister shall consider the appeal, and shall give his or her decision thereon, together with written reasons therefor, within the period specified in the regulations."*

[23] To the extent that Pine Glow is vigorously contending that Section 12A of PPA gives the Minister no discretion when considering the appeal but to make his decision and furnish reasons therefor, the case of *CompCare Wellness Medical Scheme v Registrar of Medical Schemes and others*¹) may be of great value. Tersely, CompCare had in terms of the Medical Schemes Act 131 of 1998 applied to the Registrar for approval of a name change. The Registrar refused approval on the ground that the new name was likely to mislead the public as, if approved, it would bear part of the name of the scheme's administrator.

[24] On appeal, the Registrar's decision was upheld by an appeal committee of the Council. The Appeal Board reversed the decision of the Appeal Committee of the

¹ [2020] JOL 48124 (SCA)

Council. Upholding the appeal of Compcare, the Appeal Board ordered the Registrar to give effect to the name-change but attached conditions with which Compcare had to comply. In a review and setting aside application by the Registrar and the Council that ensued, the Gauteng North Division, agreed with the Registrar but granted leave to the SCA. The latter subsequently held that the empowering legislation did not give the Appeal Board authority to approve the name-change and then to attach conditions. The appeal before the SCA therefore succeeded.

[25] Insofar as the *functus officio* status of the Controller is concerned, Pine Glow has referred this Court to the matter of *Manok Family Trust v Blue Horizon Investment 10 (Pty) Limited and Others*² where at Paragraph 17 and in circumstances substantially akin to the present the Court states:

"I have mentioned above that a regional commissioner has no power, sourced from the Act, to reverse a decision made in terms of s 11(4) and that his decision to preclude Kgoshi Manok's land claim was final. He was therefore functus officio and could not reverse or ignore the decision he had already made. Until set aside by a court in proceedings for judicial review, which could have been instituted by the regional commissioner himself (see Municipal Manager: Qaukeni Local Municipality & another v FV General Trading CC 2010 (1) SA 356 (SCA) para 23 and the cases there cited) the decision exists in fact and has legal consequences. It could not simply be overlooked or reversed (Oudekraal, supra, para 26)."

[25] In holding as it did, the Court in *Manok supra* was following in the footsteps of a long established case law one of which is *Thompson, trading as Maharaj & Sons v Chief Constable, Durban*³ where the court held at D et second page 668 that:

"The general rule is that, in the absence of special statutory provision, once a judicial or quasi-judicial decision has been given, the Court or officer giving it is functus officio in respect of the matter to which it relates. There are rare exceptions to this rule, but the tendency to-day is to restrict rather than to extend the scope of the exceptions. Minister of Agricultural Economics and

² 2014 (5) SA 503 (SCA)

³ 1965 (4) SA 662 (D)

Marketing v Virginia Cheese and Food Co. (1941) (Pty.) Ltd., 1961 (4) SA 415 (T). See also Vellyammal E v. Winser, 1928 NPD 36, and Childerley Estate Stores v Standard Bank of SA Ltd., 1924 OPD 163...

[26] In the matter of *Bronkhorstspuit Liquor Licensing Board v Rayton Bottle Store (Pty) Ltd and Another*⁴ it was held that where an unfavourable decision affects the rights and interests of only the applicant(s) ... such a decision may be revoked by the public authority concerned. However, where the rights or interests of other parties are also at stake, the public authority is regarded as being *functus officio*. So, it would appear that the rule is intransigent in those circumstances where an administrative authority's decision to revisit his or her decision will negatively affect the rights of others.

[27] The Respondents have argued that an administrative action remains valid until legal measures to set it aside are taken. To this argument I need to point out that the rule is not inflexible and that it all depends on the circumstances of each case. Paragraphs 43 and 44 of *Merafong City Local Municipality v Anglogold Ashanti Limited*⁵ below are illustrative of the point:

"[43] But it is important to note what *Kirland* did not do. It did not fossilise possibly unlawful - and constitutionally invalid - administrative action as indefinitely effective. It expressly recognised that the *Oudekraal* principle puts a provisional brake on determining invalidity. The brake is imposed for rule of law reasons and for good administration. It does not bring the process to an irreversible halt. What it requires is that the allegedly unlawful action be challenged by the right actor in the right proceedings. Until that happens, for rule of law reasons, the decision stands.

[44] *Oudekraal* and *Kirland* did not impose an absolute obligation on private citizens to take the initiative to strike down invalid administrative decisions affecting them. Both decisions recognised that there may be occasions where an administrative decision or ruling should be treated as invalid even though no action has been taken to strike it

⁴ 1950 (3) SA 598 (T), 601 F-H

⁵ [2016] JOL 36772 (CC)

down.⁶⁶ Neither decision expressly circumscribed the circumstances in which an administrative decision could be attacked reactively as invalid.⁶⁷ As important, they did not imply or entail that, unless they bring court proceedings to challenge an administrative decision, public authorities are obliged to accept it as valid.⁶⁸ And neither imposed an absolute duty of proactivity on public authorities. It all depends on the circumstances.”

ANALYSIS

CONSEQUENCES OF PINE GLOW’S FAILURE TO CHALLENGE THE MINISTER TO SEND THE MATTER BACK TO THE CONTROLLER FOR RE-EVALUATION

[28] The starting point here is that this Court accepts that the decision of the Minister to refer the matter back to the Controller was an administrative action and so was the decision to re-evaluate and approve the licenses. Pine Glow argues that to the extent that the Minister remitted the applications back to the Controller instead of considering them, making a decision and furnishing his written reasons therefor, the action is unlawful. Section 12A of the PPA, continues the argument, requires him to evaluate and to make a decision and does not give him any power to remit.

[29] Now that the Minister has remitted the matter to the Controller, what is the legitimacy of his decision? In the absence of any challenge, his decision to refer the matter back to the Controller stands either because the PPA allows him to do so or circumstances in this matter are such that his decision should be legitimised. Merafong *supra* is clear that an unlawful administrative action in certain circumstances may, unless challenged, be permitted to stand. However, before I explore whether or not circumstances are favourable for that to happen, it is proper to first determine whether or not there are provisions in the PPA that support the Minister’s action.

[30] Sections 3(2)(a) and 12A(3) read together make it clear that the Controller may assist the Minister in the exercise of his powers and the performance of his functions under this Act. Some of the powers exercised by the Minister under the PPA are those

relating to consideration of appeals described in Section 12A(3). If the Controller is in terms of Section 3(2)(a) expected to assist the Minister in the exercise of his powers and performance of his duties under the PPA, it must follow that the Minister is equally entitled to call upon the Controller to assist him in the exercise of his powers and performance of his functions as prescribed in the PPA.

[31] The Minister was therefore entitled to refer the matter to the Controller and the latter was expected to assist as requested. In doing so, the Controller was discharging his responsibilities set out in Section 3(2)(a) of the PPA. Contrary to what Pine Glow would have this court believe, the Controller was not revisiting his own decision but was merely executing instructions of the Minister. It is manifest from the facts of this matter that the instruction to re-evaluate emanated from the Minister and not the Controller.

[32] In the circumstances, the finding of this Court must be that in terms of the PPA the Minister was and has always been at liberty to refer the applications back to the Controller for reconsideration. This case must be distinguished from cases such as *CompCare supra* where the Minister was not authorised, not even by implication, to remit. The mere fact that Section 3(2)(a) of the PPA envisages the Controller assisting the Minister on any matter prescribed under the PPA means that the Minister could not have been precluded from referring the matter to the Controller.

[33] Turning to the issue whether or not the circumstances are such that the unchallenged decision of the Minister to refer the applications back to the Controller should stand. This question is somewhat rhetorical because firstly, it should be the end of the matter because the finding in *casu* is that the Minister **was** not legislatively prohibited. Secondly, Pine Glow wants to do this in circumstances where it has consciously withdrawn its attack on the Minister's action to remit the matter to the Controller. Indeed, it might be that the Controller was *functus officio* but that is not the issue. The Controller was simply discharging his duty of assisting the Minister. Ordinarily, it should be accepted that without instructions from the Minister, the Controller would not have re-evaluated his decision.

WAS THE CONTROLLER FUNCTUS OFFICIO WHEN HE RE-EVALUATED THE APPLICATIONS

[34] The answer to this question would have been in the affirmative if the decision to re-evaluate was his own. However, when the Controller re-assessed the applications, it was on instructions from the Minister. The Controller was therefore fulfilling his duties contemplated in Section 3(2)(a) of the PPA. Accordingly, he cannot be said to have been *functus officio*. While the cases on *functus officio* echo and represent the current position of our law on when a party becomes *functus officio*, they are not germane to the facts of this matter. As such, no reliance should be made on them.

HAS PINE GLOW EXHAUSTED ALL THE INTERNAL REMEDIES AVAILABLE TO IT

[35] The Respondents contend that Pine Glow has not exhausted the available internal remedies that are provided by the PPA. Pine Glow, so argues the Respondents, should have taken the decision of the Controller on appeal to the Minister presumably for the second time. This argument is fallacious because the decision that the Controller made was not his own. The Controller arrived at it following the Minister discovering, during his consideration of the appeal, that the Controller had not considered some information that should have been part of his deliberations. He then directed the Controller to take into account the information that the Controller should have weighed-up before making a decision.

[36] If I am right that ordinarily, the Controller would not have reversed his decision because he was *functus officio*, his decision to re-assess was part of the Minister's consideration of the appeal. In this sense Pine Glow only had one opportunity to appeal the matter to the Minister, which it has utilized. Pine Glow could not have been expected to appeal the decision of the Minister because that was the extent to which its right to appeal could take it. There is therefore no merit in the assertion that Pine Glow should have endeavoured to exhaust all available remedies. The reality is that there were none.

WAS THE MINISTER FUNCTUS OFFICIO

[37] The Minister could not have been *functus officio* at any juncture on these facts. He upheld the appeal following his discovery that the Controller had failed to consider some weighty information. Based thereon, he ordered the Controller to re-evaluate the applications with in mind the new information. Again, it is worth reiterating that the decision to re-assess the applications was not one made by the Controller but by the Minister. There is nothing irregular about the Controller's re-evaluation of the applications. The decision of Pine Glow to withdraw the attack on the Minister's decision was, in the opinion of this Court, inappropriate as it is targeted at the wrong party.

CONCLUSION

[38] In view of the approach adopted by this Court, it will be unproductive to explore any of the remaining matters raised by the parties. The findings of this Court are as follows:

- 38.1 The failure of Pine Glow to challenge the decision of the Minister means, on the facts of this matter, that his decision stands, not so much because of the peculiar facts in this matter but because legislatively the Minister was, during the exercise of his powers and performance of his duties under the PPA, entitled to refer the applications to the Controller for assistance when deciding the appeal;
- 38.2 The Controller could not have been *functus officio* because he made a decision only once and that is when he refused the licenses. The decision to re-evaluate the applications was one taken by the Minister and not the Controller;
- 38.3 In the absence of any challenge to the Minister's decision, there is no attack on the decision to grant the licenses;
- 38.4 Pine Glow was entitled to approach this Court for relief as, contrary to what the Respondents would have this Court believe, exhausted all internal remedies that were available to it;

38.5 The Minister could not have been *functus officio* as his decision to uphold the appeal and to re-evaluate albeit through the Controller, was made once; and

38.6 There was nothing irregular or unlawful about the re-evaluation performed by the Controller.

COSTS

[39] I am not persuaded that the general rule that costs follow results should be altered.

ORDER

[40] The application to review and set aside the decision of the Controller fails and I make the following order:

The application is dismissed with costs including those of two Counsel, where so employed.



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 10 June 2022 at 10:00.

APPEARANCES:

Counsel for the Applicant:

**Adv MC Erasmus SC
Adv J van Heerden**

Instructed by:

WDT Attorneys

Counsel for the Respondents:

Adv JA Venter

Instructed by:

Riaan Kock & Associates Inc

Date of Judgment:

10 June 2022