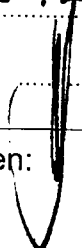


IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)
REPUBLIC OF SOUTH AFRICA



28 / 2 / 2017 .

Case Number: 61057/2013

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES/ NO
(2)	OF INTEREST TO OTHER JUDGES: YES/ NO
(3)	REVISED
DATE:	28 . 2 . 2017
SIGNATURE:	

In the matter between:

PE CONVENIÉCE CENTRE (PTY) LIMITED

Applicant

and

BEN MARTIN

In his capacity as MINISTER OF ENERGY

First Respondent

JDG PROPERTY CC

Second Respondent

BARLEDA 760 CC

Third Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

- [1] The applicant seeks an order reviewing and setting aside a decision of the first respondent's predecessor to uphold an appeal lodged by the second and third respondents against a decision of the Commissioner of Petroleum Products ("the Commissioner") to deny their applications for a site- and retail licence.

- [2] The applicant is a licensed retailer of petroleum products and conducts a filling station at 1 Wells Estate, St. Georges Strand, Nelson Bay Municipality, Port Elizabeth.

- [3] The second and third respondents are desirous of operating a filling station in the same vicinity to wit, on the corner of Buick and Addo roads, Markman Township, Wells Estate, Nelson Mandela Bay Municipality, Port Elizabeth ("the site").

FACTS AND STATUTORY FRAMEWORK

- [4] The retailing of petroleum products is regulated by the Petroleum Products Act, 120 of 1997 ("the Act"). Until the promulgation of the Petroleum Products Amendment Act, 58 of 2003, the industry was relatively unregulated. The 2003 Amendment Act introduced, for the first time, a licensing framework for, *inter alia*, the retail of petroleum products. To this end sections 2B, 2C

and 2E of the Act read with the regulations promulgated in terms of the Act, introduced a licensing system regulating the retailing of petroleum products.

- [5] In terms of the Act, a filling station must have a site license for the immovable property from which the retailing will be conducted and a retail license for the selling of petroleum products. In terms of section 2B of the Act, the Controller must issue licenses in accordance with the provisions of the Act.
- [6] In reaching a decision in respect of applications for a retail or site license, the Controller takes various factors into account, including but not limited, to the total mass or volume of petroleum products sold by licensed retailers. [See: Section 2E(3)(d).]
- [7] The second and third respondents duly lodged the relevant applications to obtain licenses in order to conduct a filling station on the site with the Controller.
- [8] Once an application for a license has been filed with the Controller, any person who wishes to object to the issuing of such license, may in respect of a site licence, in terms of regulation 4 and in respect of a retail licence, in

terms of regulation 16 of the regulations promulgated in terms of the Act, file an objection.

- [9] The applicant duly filed an objection with the Controller, which objection centred on the sales volumes of existing filling stations in the area of the proposed filling station. In this respect, the applicant being an existing retailer had, manifestly, an interest in the opening of a further filling station.
- [10] The Controller upheld the applicant's objection and informed the first and second respondents on 20 August 2012 that their applications were unsuccessful.
- [11] Section 12A of the Act, which forms the subject matter of this application, pertain to appeals against decisions of the Controller and reads as follows:
- "(1) Any person directly affected by a decision of the Controller of Petroleum Products may, notwithstanding any other rights such a person may have, appeal to the Minister against such decision.*
- (2) An appeal in terms of paragraph (a) shall be lodged within 60 days after such decision has been made known to the affected person and shall be accompanied by-*
- (a) a written explanation setting out the nature of the appeal;*
- (b) any documentary evidence upon which the appeal is based.*

(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."*

[12] The second and third respondents duly filed an appeal within the stipulated time period.

[13] Neither the Controller nor the second or third respondents informed the applicant of the appeal and consequently the applicant was not afforded an opportunity to study the grounds of appeal and the further submissions submitted by the second and third respondents. In essence the appeal was adjudicated upon by the first respondent without affording the applicant an opportunity to respond to the grounds of appeal and the further submissions that were made.

[14] The first formal notification the applicant received of the appeal was by virtue of an e-mail received on 11 July 2013 from Mr Cloete, the Regional Energy Director for the Eastern Cape Region. The e-mail stated the following:

"As an interested and affected party, you are hereby informed that the appeal submitted by the applicant against the refusal of their new retail license was successful and that the Minister of Energy has subsequently granted both new site and retail licenses."

- [15] The fact that the applicant was only considered to be an *"interested and affected"* party after the appeal was heard, is somewhat peculiar.

SUBMISSIONS AND DISCUSSION

- [16] The applicant submitted that the *audi alterem partem* principle entrenched in the Constitution and given effect to in section 3(1) of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA), is applicable to the appeal process and that the first respondent's failure to adhere to procedural fairness renders the decision to be reviewed and set aside.

- [17] In support of its submission, the applicant relies on section 3(1) and 3(2) of PAJA, which reads as follows:

"3. *Procedurally fair administrative action affecting any person*

(1) *Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.*

(2) (a) *A fair administrative procedure depends on the circumstances of each case.*

(b) *In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)—*

(i) *adequate notice of the nature and purpose of the proposed administrative action;*

(ii) *a reasonable opportunity to make representations;*

(iii) *a clear statement of the administrative action;*

(iv) *adequate notice of any right of review or internal appeal, where applicable; and*

(v) *adequate notice of the right to request reasons in terms of section 5."*

[18] I pause to mention that only the second and third respondents oppose the application, the first respondent having filed a notice to abide by the court's decision.

[19] The second and third respondents' opposition to the relief claimed by the applicant, is based on two grounds, to wit:

- i. the applicant does not have a statutory right to be heard during the appeal process; and
- ii. the applicant has neither a right that has been adversely and materially affected by the decision of the first respondent nor a legitimate expectation to be heard in the appeal process.

Statutory right

[20] The second and third respondents are correct, insofar as neither section 12A of the Act nor the regulations provides for participation in the appeal process by any party.

[21] The question then arises whether the absence of such statutory right excludes the applicability of the *audi alteram partem* principle. In *South*

African Roads Board v Johannesburg City Council 1991 (4) SA 1 (A), the court held as follows at 10 G–I:

"... a rule of natural justice which comes into play whenever a statute empowers a public official or body to do an act or give a decision prejudicially affecting an individual in his liberty or property or existing rights, or whenever such an individual has a legitimate expectation entitling him to a hearing, unless the statute expressly or by implication indicates the contrary; . . ."

- [22] Neither section 12A nor the regulations expressly prohibits the participation of a successful objector in the appeal process. In the premises, the absence of a statutory right to be heard does not exclude the rules of natural justice. [Also see: *Du Preez and Another v Truth and Reconciliation Commission* 1997 (3) SA 204 AD.]

Right to be heard

- [23] The right to be heard only exists on the precondition that *"...the administrative action ... materially and adversely affect the rights or legitimate expectations of the aggrieved person."* [See: *Walele v City of Cape Town and Others* 2008 (6) SA 129 CC at para [28].]

- [24] Relying on the aforesaid decision, Mr Du Plessis SC appearing with Mr Van As and Mr Molea for the second and third respondents, submitted that the

decision by the first respondent to uphold the appeal and grant licenses to the second and third respondents, did not materially and adversely affect any rights of the applicant. He, furthermore, submitted that the applicant is not a party to the procedure between the first, second and third respondents.

[24] According to the second and third respondents, the mere fact that the applicant had a right in terms of regulation 4 and 16 to file an objection to their application, does not confer any further rights on the applicant to participate in the appeal process.

[25] This notion was, however, dispelled in *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism and Another* 2005 (3) SA 156 C. Although the facts differ somewhat, in that the regulation dealing with participation by interested parties envisaged participation through the whole process, the concept of participation until the conclusion of a process was upheld. The matter dealt with further participation by interested parties in terms of regulation 3(1)(f) of the regulations promulgated in terms of the Environmental Conservation Act 73 of 1989 (ECA), which regulation provided for the participation of all interested parties in all relevant procedures contemplated in the regulations.

- [26] Eskom wanted to erect a modular reactor at its Koeberg Nuclear Power Station and in order to get the necessary authority to do so had to submit an environmental impact report (EIR) with the relevant decision maker. The regulations to ECA, which includes regulation 3(1)(f) prescribed the procedures, submission and consideration of EIRs.
- [27] A draft EIR was made available to the applicant and the applicant filed submissions in respect thereof. Thereafter new facts were added to the EIR and submitted as a final document to the decision-maker, without affording the applicant an opportunity to respond to the new facts contained therein.
- [28] According to the decision-maker, once the final EIR was submitted, interested parties no longer had a right to participate in the proceedings. The court held as follows at 173 H – 174 A:
- “.....In these circumstances, I am of the view that the applicant, as an interested party, was entitled, as part of its right to procedural fairness, to a reasonable opportunity to make representations to the DG on the new aspects not previously addressed in its submission in relation to the draft EIR.”*
- [29] Procedural fairness in South African Law depends on the circumstances of each case. It has been held in numerous decisions that fairness in the

context of administration law cannot be reduced to a one-size-fits-all formula.¹

[30] The concept of procedural fairness affords a party the opportunity to participate in procedures that might impact on a variety of such party's interests. The only caveat is that the Administration should not be overly burdened by the right to participate.

[31] In the present instance the Legislator acknowledged through the promulgation of regulation 4 and 16 that the interests of parties, in this instance more specifically existing filling stations, will be affected by the issuing of further retailing licenses in the same area.

[32] The fact that the first respondent considered the applicant as "*an interested and affected party*" even after the appeal was heard appears from the e-mail

¹ See: *Du Preez v Truth and Reconciliation Commission* 1997 (3) SA 204 (A) at 231-3; *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC) para 39; *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) para 219; *Janse van Rensburg NO v Minister of Trade and Industry NO* 2001 (1) SA 29 (CC) para 24; *Permanent Secretary, Department of Education and Welfare, Eastern Cape, v Ed-U-College (PE) (Section 21) Inc* 2001 (2) SA 1 (CC) para 19; *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 (3) SA 1151 (CC) para 101; *Chairman, Board on Tariffs and Trade v Brenco Inc* 2001 (4) SA 511 (SCA) paras 13 and 14; *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC) paras 113-14.

of Mr Earle Cloete (Regional Energy Director of the Eastern Cape Region: Department of Energy) dated 11 July 2013.

- [33] Section 12A, furthermore, makes provision for “*a written explanation setting out the nature of the appeal*” and for the submission of “*any documentary evidence upon which the appeal is based.*”
- [34] The applicant’s objection was based on the contents of the applications submitted by the second and third respondents to the Controller. The applicant’s objection was upheld.
- [35] To allow the second and third respondent’s to get a proverbial *second bite at the cherry* without affording the applicant an opportunity to respond to the further explanations and documentary evidence is manifestly unfair.
- [36] In the premises, I am of the view that the appeal process followed by the first respondent was procedurally unfair insofar as the applicant:
- i. did not get adequate notice of the appeal;
 - ii. did not have access to the further documents filed by the second and third respondents; and
 - iii. was not given an opportunity to respond to the further explanations and documentary evidence submitted by the second and third respondents.

CONCLUSION

- [37] In the premises, the first respondent's decision stands to be reviewed and set aside.

REMEDY

- [38] Section 8 of PAJA provides that a court may, in a judicial review in terms of the Act, grant any order that is just and equitable in the circumstances. This discretion includes the right to set aside the administrative action and to remit the matter for reconsideration by the administrator (section 8(1)(c)(i)).
- [39] Both parties submitted that this court should follow the route envisaged in section (8)(1)(c)(ii), i.e to substitute the first respondent's decision by a decision of the court.
- [40] As stated in the introductory portion to section (8)(1)(c)(ii), this discretion will only be exercised in exceptional circumstances. I am not convinced that such circumstances exist *in casu* and am not prepared to exercise my discretion in this regard.
- [41] In order to provide clarity in respect of the appeal process, I am, however, prepared to issue directions in terms of section 8(1)(c)(i).

COSTS

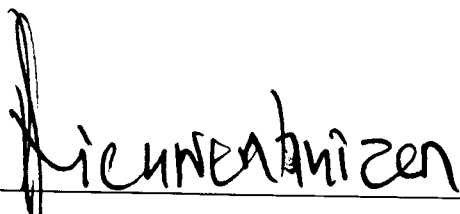
- [42] The applicant sought a cost order against the first respondent jointly and severally with any of the other respondents that may oppose the application. Mr du Plessis SC submitted that the second and third respondents' opposition to the application was well founded and that a cost order against them should not follow. The fact of the matter is, however, that the matter would not have proceeded on an opposed basis, if the second and third respondents did not persist in their opposition of the application.
- [43] The applicant has been materially successful and I see no reason why a normal cost order should not follow.

ORDER

In the premises, I make the following order:

1. The first respondent's decision to uphold the appeal of the second and third respondents in respect of their applications for retail and site licenses in terms of the Petroleum Products Act, 120 of 1977 is reviewed and set aside.
2. The matter is remitted to the first respondent for reconsideration.
3. The first respondent is directed to afford the applicant a reasonable period within which to file a response, if any, to the applicant's appeal, prior to reconsidering the matter.

4. The first, second and third respondents are ordered to pay the costs of the application, jointly and severally, the one to pay the other to be absolved.

A handwritten signature in black ink, appearing to read 'Nieuwenhuizen', is written over a horizontal line.

N JANSE VAN NIEUWENHUIZEN J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

APPEARANCES

Counsel for the Applicant.

Instructed by.

Mr Gideon Erasmus (Right of appearance.)

Erasmus Attorneys (023 5411 900 / 082 446
4424) Ref: No: GE/PE Markman Review

Counsel for the First Respondent.

Instructed by.

The first respondent no longer opposes the
application

State Attorney's Office Ref: Ms J L de Lange/E
Snyman/M Masenamela

Counsel for the Second and

Third Respondents:

Instructed by:

Advocate R du Plessis SC, Advocate E van As
and Advocate M Molea

A Kock & Associates Inc (011 958 0700)

Ref: Mr R Kock/E121