

In the High Court of South Africa
KwaZulu-Natal Local Division, Durban

Case No :8267/2015

In the matter between :

Sunrise Energy (Pty) Ltd

First Applicant

Transnet National Ports Authority
of South Africa

Second Applicant

and

Ports Regulator of South Africa

First Respondent

Transnet National Ports Authority
of South Africa

Second Respondent

Avedia Energy (Pty) Ltd

Third Respondent

Judgment

Lopes J

[1] The applicant, Sunrise Energy (Pty) Ltd ('Sunrise'), seeks an order reviewing and setting aside a decision ('the Decision') of the first respondent, the Ports Regulator, made on appeal. The subject of the appeal, which was brought in terms

of s 46 of the National Ports Act, 2005('the National Ports Act'), was the conclusion of a concession agreement in terms of s 56 of the National Ports Act between Sunrise and Transnet National Ports Authority of South Africa ('the Authority') on the 3rd June 2013. Although the appeal panel consisted of three members, I shall refer to them collectively as 'the Regulator'.

History :

[2] The history of the matter is set out as follows :

- (a) In February of 2010 the Authority invited interested parties to submit 'Expressions of Interest' ('EOI') for the funding, development, design, construction, installation, maintenance and operation of a liquid petroleum gas facility ('the LPG facility') at the Port of Saldanha Bay. Sunrise submitted an EOI.
- (b) Pursuant to the EOI, the Authority then issued a Request for Proposals ('RFP') in December, 2010. The RFP was amended and re-issued during February 2011. The re-issue amendments related to the date by which proposals had to be submitted and the time schedule for comments, etc.
- (c) Sunrise is not a trader in LPG. Its intention was to operate a facility to receive, store and transfer LPG belonging to third parties, using offloading and storage facilities. On the 23rd February 2011 it had been granted licences by the National Energy Regulator of South Africa ('NERSA') to construct a loading facility and a storage facility at the Port of Saldanha Bay. Armed with the licences, Sunrise submitted its proposal to the Authority on the 10th

June 2011 to build a loading facility, consisting of a central buoy mooring ('CBM') located offshore, connected to an undersea pipeline leading to a 1.8 kilometre overland pipeline, and an LPG storage facility.

- (d) On the 26th January 2012 the Authority appointed Sunrise as the preferred bidder.
- (e) The third respondent, Avedia Energy (Pty) Ltd ('Avedia') also submitted an EOI. It did not, however, submit a proposal because :
 - (i) it is a trader in LPG and not a proposed terminal operator, and did not wish to construct a berthing facility; and
 - (ii) although it wished to construct a storage facility for LPG in the vicinity of the port, Avedia's business model did not cater for the basis of the RFP, which was expressed to be 'on the basis' of a BOOT (Build, Own, Operate, Transfer) model. As Avedia stated in its email of the 5th April 2012, at the end of the project the operator is obliged to hand over a fully functional and operating service to the State. That is not the way in which Avedia conducts business.
- (f) On the 6th March 2012, the Authority's Board Acquisitions and Disposals Committee informed Sunrise of its decision to negotiate and conclude a concession agreement with it. This culminated in the conclusion on the 3rd June 2013 of a concession agreement for the funding, design, development, construction and operation of an LPG facility at The Port of Saldanha Bay ('the agreement'). The agreement was concluded in terms of s 56 of the National Ports Act.

- (g) Simultaneously, Sunrise and the Authority concluded a separate contract in terms of which Sunrise sold to the Authority the land upon which it intended to construct the storage facility. This land was contiguous to the port limits (but outside them), and was by then owned by Sunrise.
- (h) Avedia was aware by the 12th March 2012 that Sunrise had been appointed as the preferred bidder. In an email dated the 5th April 2012 addressed to the Authority, Avedia set out the history of the matter as it saw it, and why it did not submit a proposal. Avedia complained, inter alia, of the fact that the land on which Sunrise proposed to build its storage facility was located outside the port.
- (i) Avedia believed that it was entitled to connect with the Sunrise pipeline in order to pump LPG to its own storage tanks, on the basis that the agreement was concluded on an 'open access' and 'common user' basis. To this end a meeting between the two companies was held in late 2012. Avedia wanted the pipeline connection to the Sunrise storage facility to be on land belonging to the Authority (i.e. between the ocean and the Sunrise storage facility). If it could do this, it would avoid having to pay storage and other fees to Sunrise.
- (j) What transpired at the meeting in late 2012 is disputed. Avedia believes it had secured an agreement to allow the interconnection where it desired it. Sunrise denies any such agreement was reached, and states that although Avedia is entitled to an interconnection, Sunrise is entitled to determine where that should be. This dispute cannot be resolved in this review hearing, and I am not requested to decide it.

- (k) Matters came to a head in early 2014, over a year later than the late 2012 meeting, and more than 18 months after Sunrise was declared the preferred bidder. Avedia's perception was that Sunrise had changed its stance regarding the pipeline interconnection point, leaving Avedia with no option but to pursue an appeal to the Ports Regulator. It delivered its appeal on the 9th April 2014. The appeal was heard by the Regulator on the 12th and 13th July 2015, and the Decision was handed down on the 31st July 2015.
- (l) The appeal to the Regulator by Avedia was expressed to be against 'the grant of the concession'.
- (m) The final paragraph of the Decision of the Regulator was :

'The Section 56 process, together with the awarded concession between the Respondent [the Authority] and the Third Party [Sunrise] in the Port of Saldanha is, therefore, declared null and void. As a result, in accordance with Section 46(2)(e), the Ports Regulator sets aside the written decision by the Respondent to award the concession and the process thereof.'
- (n) Sunrise decided to review the Decision on the 13th August 2015. The Authority separately applied to review the Decision. By consent, the two applications were consolidated on the 25th August 2015. I initially heard argument on the 13th and 14th October 2015.

The Law :

- [3] The review applications by Sunrise and the Authority are brought in terms of the provisions of the Promotion of Administrative Justice Act, 2000 ('PAJA'). Mr *Dickson* SC who appeared for the Regulator, submitted that a court should only

review a decision if it was one that a reasonable decision-maker could not have reached. My attention was drawn to the specialist nature of the Regulator and the ‘deference’ which a court should pay to such a body. This was in line with the fundamental constitutional principle of the separation of powers.

[4] Mr *Dickson* referred me to *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC) at paragraph 45 where O’Regan J stated :

‘What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of the Court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.’

(Footnotes omitted).

[5] The Decision taken by the Regulator involved two preliminary issues as well as three issues on the merits. The resolution of all of these issues depended upon the Regulator’s interpretation of the National Ports Act.

[6] The following issues are those which were debated before me :

- (a) The finding of the Regulator that Avedia had the necessary standing to prosecute an appeal before it;
- (b) The grant of condonation by the Regulator of the late delivery by Avedia of its appeal;
- (c) The finding by the Regulator that the conclusion of the agreement was unlawful because :
 - (i) the exclusive use provisions in Clause 14.1 of the agreement render it contrary to the National Ports Act and the Petroleum Pipelines Act, 2003 ('the Petroleum Pipelines Act');
 - (ii) the land upon which Sunrise is to build its storage facility is not owned by the Authority; and
 - (iii) the land upon which Sunrise is to build its storage facility is outside the port limits, and the Authority has no jurisdiction to grant a concession in respect of such land.

Standing :

[7] At the hearing of the appeal, Sunrise challenged the standing of Avedia to proceed with its appeal. The right to an appeal is contained in s 46(1) of the National Ports Act, which provides :

- '(1) Any port user or licenced operator whose rights are adversely affected by a decision of the Authority may appeal against that decision to the Regulator in the manner directed under section 30(3).'

[8] The provisions of sub-s 30(3) provide that the Regulator may, with the concurrence of the Minister, issue directives not in conflict with the National Ports Act, and with regard to matters relating to the proper performance of the function of the Regulator including the administrative processes, for the holding of appeals and the hearing of complaints.

[9] Sunrise submitted to the Regulator that Avedia did not have standing as it was not a port user, and even if it was to be regarded as one, its rights had not been adversely affected by any decision of the Authority.

[10] In argument before me, Mr *Farlam*, who appeared for Sunrise together with Mr *Quixley*, both of who were led by Mr *Pammenter* SC, submitted that it was necessary to determine the decision against which the appeal was brought, in order to determine whether or not Avedia had the necessary standing to appeal. Mr *Farlam* submitted that Avedia, at no stage during the appeal, properly identified the decision against which it wished to appeal. He drew a distinction between a process and an agreement, and submitted that the adjudication by the Authority that Sunrise was the 'preferred bidder' was a decision, as was the resolution to conclude the agreement. Without a proper identification of the precise resolution, no appeal was competent.

[11] Mr *Farlam* submitted that the rights of Avedia had not in any way been affected by the conclusion of the agreement. This was because it was necessary

for Sunrise to comply with all the licence conditions imposed by NERSA in the performance of its own functions. Those conditions, read with the terms of the Agreement ensure that Avedia is entitled to an interconnection with the pipeline to be constructed by Sunrise.

[12] The Regulator referred to the directives published pursuant to the provisions of sub-s 30(3), which provide at Directive 8(1) that :

‘A port user or licenced operator whose rights are adversely affected by a written decision of the Authority and who wishes to appeal against that decision must lodge a Notice of Intention to Appeal with the Regulator within 15 days after receiving that written decision.’

[13] The Regulator then pointed out that a ‘port user’, although not defined in the National Ports Act, was defined in the directives to include future port users because the definition of a ‘port user’ in Directive 1 states :

‘... a port user means any person, who on an on-going basis, or from time to time, utilises port services and facilities, or who wishes to utilise port services and facilities ...’

Reference was made to a previous decision of the Regulator to justify the use of the directives as an aid to interpretation of the National Ports Act. The Regulator regarded the reference to the directive as a ‘natural progression’.

[14] The Regulator also regarded the Decision which was being appealed against by Avedia, as being the entire process leading to the conclusion by the Authority of the agreement with Sunrise – i.e. that the EOI process, the RFP, the adjudication,

the award and the conclusion of the agreement could all have a direct and adverse effect on Avedia's right to utilise the port services and a port facility (the LPG loading facility) that Sunrise had contracted to construct and operate.

[15] In conclusion on this point, the Regulator stated :

'The appellant [Avedia], therefore, satisfies the requirements set out in Directive 8(1), namely, that the appellant is a future port user whose rights are adversely affected by a written decision (Section 56 agreement) of the Respondent [the Authority] and therefore wishes to appeal against that decision.'

[16] I agree with the submission of Mr *Farlam* that one cannot use the directives as an aid to interpretation of the National Ports Act. As he submitted, doing so may have the unfortunate consequence that the Regulator and the Minister would then be able to amend the provisions of the National Ports Act without the consent of the legislature. In my view, an additional problem is that the powers given to the Regulator and the Minister in terms of sub-s 30(3) do not include the power to issue directives defining what words used in the National Ports Act should mean. That is a matter for interpretation of the act itself. Sub-s 30(3) specifically guards against that occurring, where it states that the directives issued 'not be in conflict with the Act ...'

[17] However, that is not the end of the matter. The common law of standing has been expanded by the provisions of s 38 of the Constitution. Although that is specifically made applicable to standing in relation to a right in the Bill of Rights which has been infringed or threatened, it reflects a broadening approach in our law

to the matter of standing. In the present case, however, the standing of persons who may appeal is set out in s 46 of the National Ports Act. The parties are agreed that the only relevant person with the right to appeal in this matter is ‘any port user ... whose rights are adversely affected by a decision of the Authority.’ (This is on the basis that Avedia concedes that it is not a licenced operator.)

[18] Does Avedia then fall within the ambit of a ‘ports user’ and have its rights been affected by the decision of the Authority? As is made clear in the history set out above, Avedia was involved in the EOI process and, for its own reasons, elected not to submit a proposal. However, at all stages Avedia had the expressed intention to create a storage facility for LPG in the vicinity of, but not within, the Port of Saldanha Bay. The papers reveal that that was envisaged to be on a piece of land outside the port limits, but in close proximity to both the port limits and to the proposed storage facility to be built by Sunrise.

[19] Although the dispute between Sunrise and Avedia with regard to the proper place for an interconnection between the Avedia storage facility and the pipeline of Sunrise has not been finalised, it was the subject of debate and an alleged agreement between the parties. Whether an agreement was actually concluded in late 2012 is not really the point. What is important is that Avedia maintains that it has the right to an interconnection and in that regard has every intention of pursuing the remedies available to it, both legal and otherwise, to secure the interconnection.

[20] It may be suggested that it is somewhat illogical that someone who is in the process of negotiating for the right to interconnect with a pipeline situated within the port limits does not constitute a 'port user'. On this basis it may not seem unreasonable for the Regulator to have considered Avedia as a 'port user'. But I do not believe that this conclusion is in accordance with a purposive interpretation of the statute and the interpretations of 'port services' and 'port terminal'. What s 46 of the National Ports Act provides is that existing port users whose rights are affected by a decision of the Authority may appeal that decision. Avedia is an own-interest standing appellant whose rights have allegedly been adversely affected by a decision of the Authority. In the National Ports Act, no consideration has been given to potential or future port users, whose future rights may be affected, in the future. Such persons do not fall within the category where the 'right remedy is sought by the right person in the right proceedings' – see *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) 222 (SCA) para 28.

[21] In my view the fact that the provisions of sub-s 46(1) are couched entirely in the present tense is a strong indication of the intention of the legislature. There is no doubt that decisions of the Authority may impact on existing port users or licenced operators. It seems clear that sub-s 46(1) was intended to deal with persons whose rights were affected by decisions of the Authority which impacted on them. This would appear to me to be in line with the functions of the Authority and the Regulator – i.e. to provide for the administration of the ports in South Africa and to provide for matters connected therewith. The ambit of the appeal provision is very narrow when compared to, for example, s 47 which deals with complaints which may be lodged

with the Regulator against the Authority. Here the category of persons who may complain is much wider.

[22] Mr *Rosenberg* SC, who appeared together with Ms *de Villiers*, submitted in Avedia's heads of argument that the words 'port user' are used in sub-ss 12(c), 12(f), 46(1), 62(1)(d), 72(4) and s 82 of the National Ports Act. None of these sub-sections give any indication that 'port user' should include future port users. Sub-s 82(1)(c) refers to the National Port Users Forum. One wonders how that body would react to the suggestion that persons who are not currently port users, but who wish or intend to be so in the future, could influence or direct the actions of the Forum.

[23] If s 46 includes 'future port users' must that status have been attained by Avedia at the time of the agreement appealed against, or could it rely upon the status despite the fact that it would only acquire such status at a later stage? This is complicated by Directive 8(1) which provides that Avedia had to have exercised its right to appeal within 15 days of the written decision of the Authority which adversely affected its rights. This would have affected Avedia's rights if it had acquired the status of 'future port user' after the 15 day period. Is it sufficient then that a person may merely want to use the facilities in the future? When does the cut-off time arise? If other regulatory permissions will be required of a 'future port user', must they be obtained at the time of lodging an appeal? If the Authority is unaware of the intention of a person to become a 'future port user', how is that to be dealt with? Are 'future licenced operators' then also to be included within the ambit of s 46(1)?

[24] If the legislature had intended to broaden the ambit of potential appellants it would have been a simple matter to word the section differently. That it did not do so is an indication of its intention to narrow the ambit of those who may appeal. The legislature clearly intended that the parties who could appeal a decision of the Authority should be limited – i.e. only port users and licenced operators. Other persons are not prevented from using, for example, a review procedure. This limitation is clearly with a view to achieving efficiency and finality when the Authority makes decisions. In my view Avedia does not fall within the ambit of a ‘port user’ as set out in s 46.

[25] In this regard the Regulator :

- erred in law by finding that the use of the directives could be an aid to the interpretation of the National Ports Act;
- failed to apply the recognised principles of interpretation to interpret the meaning of ‘port user’ in the National Ports Act;
- did not provide a rational and justifiable basis for concluding that Avedia fell within the definition of a ‘port user’ as that phrase is used in the National Ports Act;
- erred in using the provisions of s 39 of the Constitution as a basis for deciding on the proper interpretation of ‘port user’, without any rational application of s 39 to the facts of the matter before it.

[26] I now need to consider whether, if I am incorrect in my exclusion of Avedia as a port user, whether Avedia's rights have been 'adversely affected by a decision of the Authority'.

[27] Mr *Rosenberg* submitted in Avedia's heads of argument that the Regulator noted in the Decision that Avedia wished to use Sunrise's terminal to handle its LPG cargo, and to deliver it through a pipeline to its own storage facility, and if it could not use that terminal, then another existing facility in the port. This approach demonstrates clearly that Avedia intended, in the future only, to use the port facilities and/or port services as defined in the Act. The whole purpose of the EOI and RFP requires the use of a method other than loading LPG at the dock-side. This is for safety considerations.

[28] Two NERSA licences were granted to Avedia, and referred to by Mr *Rosenberg* :

- (a) a licence for the construction of a petroleum storage facility granted on the 1st July 2014;
- (b) a licence for the construction of a petroleum pipeline running from what is described as 'the Sunrise Energy interconnection point to the Avedia Energy storage facility ... in Saldanha Bay', also granted on the 1st July 2014.

[29] In my view the Regulator was not entitled to include, when considering the standing of Avedia, NERSA licences which were issued after the delivery of the appeal. Those licences may never be used, if the project is abandoned for reasons having nothing to do with Avedia's intention to use the port. In that light, to grant Avedia the right of standing, is premature.

[30] In *Administrative Law in South Africa*, 2nd edition by Cora Hoexter, at page 488 the learned author states :

'The issue of standing is divorced from the substance of a case. It is therefore a question to be decided *in limine*, before the merits are considered.'

[31] In *Giant Concerts CC v Rinaldo Investments (Pty Ltd and Others* 2013 (3) BCLR 251 (CC) the Constitutional Court considered at length the issue of standing. At paragraph 30, Cameron J stated :

'The Supreme Court of Appeal has rightly suggested that "adversely affects" in the definition of administrative action was probably intended to convey that administrative action is action that has the capacity to affect legal rights, and that impacts directly and immediately on individuals. The effect of this is that Giant, as an own-interest litigant, had to show that the decision it seeks to attack had the capacity to affect its own legal rights or its interests.'

[32] The provisions of sub-s 46(1) make it clear in my view that the only persons entitled to appeal are those who are effectively 'own-interest litigants'.

[33] In *Giant Concerts*, Cameron J continued at paragraph 33 :

‘[33] The separation of the merits from the question of standing has two implications for the own-interest litigant. First, it signals that the nature of the interest that confers standing on the own-interest litigant is insulated from the merits of the challenge he or she seeks to bring. An own-interest litigant does not acquire standing from the invalidity of the challenged decision or law, but from the effect it will have on his or her interests or potential interests. He or she has standing to bring the challenge even if the decision in law is in fact valid. But the interests that confer standing to bring the challenge, and the impact the decision or law has on them, must be demonstrated.

[34] Second, it seems that an own-interest litigant may be denied standing even though the result could be that an unlawful decision stands. This is not illogical. As the Supreme Court of Appeal pointed out, standing determines solely whether *this* particular litigant is entitled to mount the challenge : a successful challenge to a public decision can be brought only if “the right remedy is sought by the right person in the right proceedings”. To this observation one must add that the interests of justice under the Constitution may require courts to be hesitant to dispose of cases on standing alone where broader concerns of accountability and responsiveness may require investigation and determination of the merits. By corollary, there may be cases where the interest of justice or the public interest might compel a court to scrutinize action even if the applicant’s standing is questionable. When the public interest cries out for relief, an applicant should not fail merely for acting in his or her own interest.

[35] Hence, where a litigant acts solely in his or her own interest, there is no broad or unqualified capacity to litigate against illegalities. Something more must be shown.’

In the present matter Sunrise was declared by the Authority to be the successful bidder in the RFP process. Thereafter and after considerable negotiation between the Authority and Sunrise, the agreement was concluded.

[34] It is clear from the papers in this matter that the only reason the appeal was eventually lodged was because Avedia and Sunrise could not agree on the exact location of the pipeline interconnection proposed by Avedia. Indeed, Mr *Rosenberg* stated in argument before me that it was only because Sunrise had, as he put it, 'reneged on the agreement of late 2012', that Avedia proceeded with the appeal.

[35] It was also conceded by Mr *Pammenter* that Sunrise had no option but to allow the interconnection sought by Avedia. The only point in dispute was where that interconnection would take place. Even though the agreement refers to the concession being granted on 'open access' and 'common user' basis, that does not mean that the award to Sunrise as the preferred bidder and the conclusion of the agreement have adversely affected the rights of Avedia. At the time those decisions were made by the Authority, Avedia did not have a licence from NERSA for the construction of a pipeline from its proposed storage facility to the pipeline to be erected by Sunrise. The issue of where the inter-connection is to take place, is in any event, something which can be placed before NERSA and decided by it in the exercise of its mediation and/or arbitration powers.

[36] This is more particularly so when one considers that the Regulator stated that 'It would be better left for NERSA to rule on the legality of the Third Party's actions to refuse the tie-in on the basis of technical and financial argument.'

[37] In arriving at its decision on whether Avedia's rights had been adversely affected, the Regulator did not in any way analyse or apply any meaningful interpretation to the provisions of the National Ports Act. What it did was to rely solely upon the provisions of Directive 8(1). In its conclusion, the Regulator stated :

'By virtue of the fact that the Ports Regulator is convinced that the Appellant is a port user, and on the basis that the Appellant's appeal is vested in their legal right to make use of the port facilities and/or services in terms of the Act, the Appellant therefore satisfies the requirements set out in Directive 8(1), namely, that the Appellant is a future port user whose rights are adversely affected by a written decision (Section 56 agreement) of the Respondent and therefore wishes to appeal against that decision.'

[38] It is significant in assessing any 'adverse effects' to the rights of Avedia, that Avedia had no intention of competing with Sunrise in the bidding process pursuant to the issue of the RFP. Avedia's reasons for not doing so were that it is a trader in LPG products and that the form of the concession did not fit within its business model.

[39] Avedia admitted in its email of the 5th April 2012 that 'upon a detailed and thorough consideration of the RFP', it decided not to submit a bid. It also suggested that the LPG project proposed by Sunrise (and accepted by the Authority) departed materially from the fundamental terms of the RFP outlined above. These concerns were raised with the Authority by Avedia in its email. Avedia complained, inter alia, that the concession model would be in the nature of BOOT model and that the

operator of the facility would be obliged to construct and operate a berthing facility, involving a longer time line for construction, etc.

[40] In referring to the ‘fundamentally flawed tender process’ Avedia complains that it ‘may well have tendered’ if the Authority had issued an RFP on the basis ultimately contemplated between Sunrise and the Authority. In the light of other statements in the email this latter suggestion seems a hollow one – Avedia at no stage wished to construct and operate a mooring type loading facility, and clearly did not want to hand over to the Authority the assets of any project it financed and built! At the time of delivery of its appeal, Avedia had not yet begun to construct its LPG storage facility, and had no licence to construct and operate such a facility. The agreement concluded between Sunrise and the Authority did not affect Avedia’s rights at all. The inability of Avedia to agree an interconnection point with Sunrise is what has affected its rights. This has nothing to do with the award of the project to Sunrise and the resultant agreement.

[41] The Regulator erred in law in finding that the agreement ‘has a direct and adverse effect, with a direct external legal effect, on the Appellant’s rights [Avedia’s] to utilise port services and a port facility (LPG loading facility) that the Respondent [the Authority] has contracted the Third Party [Sunrise] to construct and operate.’

[42] No evidence of any adverse effect as a result of that decision (as opposed to any stance adopted by Sunrise) was put before the Regulator. The Regulator also

erred in law by finding that the provisions of PAJA and s 33 of the Constitution required it to expand the ambit or interpretation of the National Ports Act based on accepted legal principles.

[43] In my view the decision of the Regulator with regard to its interpretation of s 46(1) is not one at which a reasonable Regulator could or should have arrived at.

[44] I am accordingly of the view that the decisions taken by the Authority in following the process up to, and the conclusion of the agreement with Sunrise, have not 'adversely affected' the rights of Avedia.

Condonation :

[45] Having considered the arguments before it, the Regulator granted condonation of the late filing of the appeal. In terms of the provisions of Directive 8(2), any port user whose rights are adversely affected, and who wishes to appeal, must request written information from the decision of the Authority not more than 15 days after becoming aware of the decision. Even where no written confirmation of the decision is received, a Notice of Intention to Appeal must be lodged within ten days after requesting written confirmation from the Authority. Directive 8(5) provides that service of the notice of Intention to Appeal does not suspend the operation of the decision appealed against unless a Court orders otherwise. Clearly then, the intention of the legislature is that administrative appeals to the Regulator be dealt with expeditiously.

[46] In granting condonation, the Regulator set out the factors which it considered were relevant. They include :

- (a) the extent and cause of the delay;
- (b) the prejudice to other litigants;
- (c) the reasonableness of the explanation for the delay;
- (d) the significance of the issues to be decided; and
- (e) the prospects of success.

The Regulator also referred to authority for the proposition that none of the above factors are decisive save where there are no prospects of success.

[47] The reasoning of the Regulator was based upon the view that a wider approach is desired where the Act is unclear, in order to allow the Regulator an area of discretion to prevent undesirable conduct by the Authority and to create legal and regulatory certainty by enforcing the principle of legality. The Regulator further expressed the view that :

‘If it is clear from the facts of the Appeal that the Respondent [the Authority] is acting in contravention of the Act, and the Appellant has a possible prospect of success, then condonation cannot close the door to such.’

[48] This is one of the statements by the Regulator which indicate that it considered the question of legality as being a factor which overrides all others. The Regulator failed to consider all aspects of the requirements for condonation.

[49] The Regulator did not properly consider the extent and cause of the delay and the reasonableness of the explanation for the delay. The Regulator stated with regard to the prejudice suffered by Sunrise, that no documents had been submitted in detail to demonstrate the prejudice suffered by Sunrise, and Sunrise had not asked the Regulator to invoke the confidential provisions which would have entitled the Regulator to scrutinise Sunrise's documents in confidence to establish the extent of any prejudice that Sunrise may have suffered. The Regulator recorded, however, that Sunrise claimed that 60 per cent of the LPG bullet structures (the tanks in which the LPG was to be stored) had been completed.

[50] The Regulator also dismissed the submissions of Sunrise that if the process were to be delayed by several years, it would be to the detriment of the public interest. The Regulator merely regarded the concept of legality as trumping that submission. The argument of Sunrise in this regard was described by the Regulator as being 'without any substance'. The Regulator also appeared to regard it as important that Avedia had attempted to prevent any further expenditure and possible prejudice to Sunrise by :

- (a) bringing these facts to the attention of Sunrise through correspondence prior to the appeal;

- (b) by requesting an urgent and foreshortened process to be followed by the Regulator in terms of directive 8(7).

The Regulator regarded these aspects as significant, despite the complete lack of any analysis of the delay and the reasons therefor by Avedia. The Regulator clearly regarded Avedia's prospects of success as decisive, and referred to the fact that 'the vital importance of this case to set a precedent for any future reckless application of the Act by the Respondent [the Authority] and the public's right and interest to have the Act upheld, ensuring the Respondent's adherence thereto, triumphs over any other factors in consideration of condonation in this matter.'

[51] In considering the grant by the Regulator of condonation, it is necessary firstly to look at the nature and extent of the delay and Avedia's explanation for it. In doing so it is important to bear in mind that the entire procedure extended over a number of years, obviously involving a great deal of time and effort on the part of the employees of the various companies involved, and all of which was no doubt carried out at great expense. The process began in 2009 with the issue of the EOI. The RFP was issued in December 2010, and Sunrise was appointed as the preferred bidder on the 26th January 2012. On its own version, as early as the 12th March 2012, Avedia became aware that Sunrise had been appointed as the preferred bidder. The Avedia email of the 5th April 2012 indicates that Avedia was well aware of what it viewed as significant problems, both in the RFP, and the basis upon which it was intended that the Authority would conclude the agreement with Sunrise. The agreement was subsequently concluded on the 3rd June 2013 some 15 months later.

[52] Avedia contends that during that 15 month period, it was negotiating with Sunrise to finalise the interconnection of its own proposed pipeline with that which is to be built by Sunrise. According to Mr *Rosenberg*, it was only when Sunrise 'renege'd' on its agreement with Avedia as to where the interconnection would take place, that it considered the appeal application. This was in late February 2014. Avedia then delivered its appeal on the 2nd April 2014.

[53] In my view it is not necessary to set out detailed extracts of the correspondence between Sunrise and Avedia during the intervening period between March of 2012 and April of 2014. What is clear is that the parties were involved in commercial negotiations in order to attempt to agree on the interconnection point. It was only when Avedia realised that it would not succeed in extracting an agreement from Sunrise that the decision to appeal was made. When Mr *Rosenberg* was asked why, if Avedia had been aware during March 2012 of the legal problems involved in the matter, it had not immediately launched an appeal, he submitted that in November of 2012 Avedia's concern had been to get the interconnection where it wanted it, and that was its main concern. He submitted that it would not have been commercially astute to 'bring the legal magnifying glass to bear', at an early stage when Avedia was negotiating with Sunrise. It was only when Sunrise reversed its attitude that it was necessary to launch the appeal.

[54] Mr *Rosenberg* also submitted that in terms of the Petroleum Pipelines Act, Sunrise was obliged to permit access on a 'common user' basis if it was technically feasible to achieve the inter-connection. What the correspondence and the

submissions by Avedia make clear is that it was attempting to negotiate a commercial position of advantage, which it was unable to do. When it realised that it could not do so, it launched the appeal. Whilst there may be debates about which party was 'in bad faith' I do not believe that it is necessary to reach a definitive answer to that question.

[55] It is clear that in our law a party cannot abide a decision by an administrative body or an action by any other person, for an extended period of time, whilst it decides whether to appeal, and that decision depends upon resolving the matter by way of an appeal or recourse to a court of law.

[56] That Avedia sat and did nothing about prosecuting the appeal for a period of two years cannot in my view be explained or condoned by the fact that it was attempting to resolve the matter on a commercial basis. The effect of allowing that, would be that Avedia was permitted to use the prospect of a pending appeal as a pressure tactic in its commercial negotiations. No doubt that may be a valid tactic for a negotiating party to adopt, but it cannot be acceptable for it simply to ignore the time limits laid down for the appeal, and allow an extended period to pass, before it takes the necessary action.

[57] There are important policy considerations, relating to the finalisation of matters and certainty in the law, that require that appeals are proceeded with

expeditiously and in accordance with the rules laid down to enable them to be dealt with. In the founding affidavit in Avedia's appeal, the following is stated :

'119. As I explained above, Avedia only became aware in late February 2014 that the concession adversely affects its rights. Up until then it had every reason to believe that the concession had been concluded so as to incorporate the inter-connection agreement.

120. As soon as Avedia became aware that the concession had not been granted on that basis, it took steps to protect its rights. It briefed legal representatives and a competition economist with expertise in petroleum facilities. Avedia sent letters of demand to the Authority and met with the Ports Regulator.

121. In the circumstances of the above, it is submitted that Avedia has shown good cause for the condonation of the time periods within which to lodge this appeal as provided for in s 54(1)(b) of the Ports Act and Ports Directive 19.'

The explanation set out above is in my view inadequate to begin to deal with the time period which had elapsed. It is clear from the email of the 5th April 2012 that Avedia was aware of the problems, as it saw them, in the RFP and the proposed agreement to be concluded with Sunrise. Mr *Rosenberg* submitted that Sunrise only gained access to the agreement during early 2014. In my view there is no reason why Avedia could not have obtained the agreement earlier. The agreement was only requested for the first time on the 11th December 2013. It would have been an easy matter for Avedia to have obtained a copy of the agreement. That it chose not to do so until December of 2013, indicates in my view that it did not at that stage think it was necessary or desirable to proceed with the appeal.

[58] In my view it is also significant that Avedia's principal complaint appears to be that the agreement concluded between Sunrise and the Authority does not provide

for the precise interconnection point. Mr *Rosenberg* submits that because of the conditions contained on the NERSA licences (both those obtained by Sunrise and those obtained by Avedia) an interconnection is to be allowed if it is technically feasible. As indicated above, the Regulator thought this should be decided by NERSA.

[59] In all the circumstances, the conclusion that Avedia took no steps whatsoever to protect its rights by way of the prosecution of its appeal or any other legal process, because it wished to reach a commercial agreement with Sunrise, cannot assist it in endeavouring to explain away its excessive delay in bringing the appeal.

[60] The Regulator did not adequately deal with this aspect in arriving at its decision on condonation. It only deals with this aspect in the following statement by it :

‘Therefore, although the Appellant cannot have been expected to be aware of the terms of the Concession agreement prior to when it received same in March 2014, having sight of the RFP, a model similar to BOOT is clear, the fact that it is not on land and within the port boundary is also apparent. The Appellant attempted to prevent any further expenditure and possible prejudice to the Respondent and the Third Party by bringing these facts to the parties’ attention through correspondence prior to the appeal, and by requesting an urgent and foreshortened process be followed by the Regulator in terms of Directive 8(7). Nevertheless, the Appellant’s prospects of success, and the vital importance of this case to set a precedent for any future reckless application of the Act by the Respondent, and the public’s right and interest to have the Act upheld, ensuring the Respondent’s adherence thereto, triumphs over any other factors in consideration of condonation in this matter.’

[61] The first part of this reasoning is clearly fallacious because Avedia was clearly aware that the Authority and Sunrise proposed to conclude an agreement on the very factors referred to by the Regulator – i.e. the BOOT model and that the storage land was not within the port boundary . I say that because these aspects are raised in the email of the 5th April 2012. It is also clear from the above extract that the Regulator regarded the issue of legality to be so decisive, and its own interpretation of that issue so certain, that all other aspects of condonation were to be overridden by them.

[62] The Regulator also dismissed the submissions of Sunrise with regard to the prejudice it had suffered as a result of the delay. The Regulator gives no basis for dismissing the allegation by Sunrise that 60 per cent of the LPG bullet structures were complete.

[63] It is also unclear on what basis the Regulator dismisses as being ‘without any substance’ the suggestion that it is in the public interest that the agreement proceed and that the LPG facility be constructed and operated forthwith. It is clear from the original correspondence that the driving motive for construction of the facility was safety. Some four years had passed since the concept was mooted in the EOI and what is clear is that the whole process was being held up by the wish of Avedia to continue to conduct its commercial negotiations. In my view the entire project is a

significant one, and it is clearly in the public interest that projects of this nature proceed with expedition. It cannot reasonably be contended otherwise.

[64] The final aspect which falls to be considered is the prospects of success which Avedia had in succeeding in the appeal. This the Regulator regarded as a trump card. That is not as I understand the principles laid out in *Giant Concerts* and in *M S v S (Centre for Child Law as amicus curiae)* 2011 (2) SACR 88, para 15.

[65] What is disturbing in the decision of the Regulator, is that it regards its own view of the prospects as being so decisive that it sweeps away any other considerations. Although I do not deal with the merits of the appeal :

- (a) the Regulator's decision on the merits relies upon an interpretation of the National Ports Act;
- (b) that interpretation is by no means a straightforward matter given that various of the aspects are not defined or described in the National Ports Act;
- (c) the submissions of the various senior counsel who appeared before me provide ample evidence of the complexity of any decision on the merits.

[66] In all the circumstances I am of the view that the Regulator's decision on condonation is constructed upon an incorrect application of the law (i.e. in the respect that the prospects of success and legality trump all other matters). In addition the Regulator has failed to take into account relevant factors such as the

extensive delay in bringing the appeal without any or any adequate explanation therefor. The Regulator has also dismissed out of hand suggestions of prejudice suffered by Sunrise and a consideration of the public interest. Whilst it may be correct that Sunrise did not provide detailed documentation, such financial prejudice is, in the nature of the launching of a project such as the LPG offloading facility, obvious. Clearly, considerable cost must have gone into the preparation of Sunrise's responses to the EOI and its proposal together with the negotiations with the Authority and the conclusion of the agreement. In this regard, a significant factor which was ignored by the Regulator, is that Sunrise purchased the land upon which the bullet storage tanks were to be situated, and had finished 60 per cent of the construction of the bullet storage tanks. The purchase of the land by the Authority is evidenced by the simultaneous agreement which was concluded with Sunrise undertaking to transfer that land to the Authority.

[67] In all the circumstances I am satisfied that the decision of the Regulator both with regard to standing and with regard to condonation are fundamentally flawed in the aspects set out above. It is therefore unnecessary, and indeed undesirable for me to deal with the merits of the agreement. As the decision which the Regulator should have arrived at is clear, it would serve no purpose to refer the matter back to the Regulator.

[68] On the 23rd October 2015, and prior to my finalising this judgment, Avedia delivered an application to lead further evidence in the review proceedings. The further evidence related only to a letter dated the 28th July 2015 addressed by the

Chief Executive of the Authority to NERSA. The letter, *inter alia*, refers to the NERSA licence issued to Avedia for the construction of a petroleum pipeline to interconnect with the Sunrise pipeline. The letter records that the Authority will not approve of such an interconnection by Avedia or any other party between the Multi-buoy mooring and the Sunrise storage tanks, but will support an interconnection at the back-end of the Sunrise storage facility.

[69] Various objections to the admission of the further evidence have been raised by both Sunrise and the Authority. They complain, *inter alia*, that the letter has not been signed and there is no evidence that it was sent.

[70] Upon receiving the application, I gave directions to the parties for the filing of affidavits with a view to completing the application papers so that the matter could be heard by me on Thursday 5th November 2015 at 9.30am.

[71] Ms *de Villiers*, who appeared for Avedia conceded that there was no rule or authority which would enable me to expand the record compiled in terms of Rule 53. Given that the record was the basis upon which the Regulator made its decision, I have difficulty with the notion that I could expand the record with evidence which was not before the Regulator, and then make a decision which I think the Regulator would have made if it had seen the new evidence.

[72] Ms *de Villiers* submitted that the 'just and equitable' jurisdiction given to a court in terms of s 8(1) of PAJA, could be invoked by me to expand the record with the new evidence which Avedia sought to adduce.

[73] As submitted by Mr *Singh*, s 8 deals with remedies which a court may invoke once it has established that the decision had been validly challenged. Ms *de Villiers* conceded this argument in reply, and, in my view, correctly so.

[74] Mr *Slabbert*, who appeared for Sunrise submitted that no reliance could be placed upon the letter which was an unsigned letter, almost certainly illegally obtained and was a communication between two regulatory bodies.

[75] In my view there are many possible reasons why the letter may have been drafted. There is no evidence it was ever sent. All that is a mystery which I am not called upon to solve! In the circumstances I do not believe that I have the power to admit the letter as further evidence. Even if I did so, as I do not consider the merits of the main application in this judgment, it would be of no moment, given the little weight which could be attached to it.

[76] I accordingly dismiss the application to adduce the letter as evidence, with costs.

[77] I make the following additional order :

- (a) the Decision of the Ports Regulator handed down on the 31st July 2015 is reviewed and set aside.
- (b) the Decision is replaced with an order that the appeal of Avedia Energy (Pty) Ltd is dismissed with costs;
- (c) Avedia Energy (Pty) Ltd is directed to pay the review costs (including the costs of the application to adduce further evidence) of the first and second applicants including those costs consequent upon the employment of senior counsel, and where applicable, three counsel;
- (d) I make no order with regard to any costs payable by the first respondent, the Ports Regulator of South Africa, to any other party.

Date of hearing : 13th and 14th October and 5th November 2015

Date of judgment : 20th November 2015

Counsel for the First Applicant : C J Pammenter SC with P Farlam and G Quixley (instructed by Slabbert Venter Yanoutsos Inc)

Counsel for the Second Applicant : N Singh SC (instructed by Woodhead Bigby Inc)

Counsel for the First Respondent : A J Dickson SC (instructed by PKX Attorneys)

Counsel for the Third Respondent : S P Rosenberg SC with C de Villiers (instructed by Werksmans Attorneys)

