



**IN THE HIGH COURT OF SOUTH AFRICA  
(NORTH GAUTENG HIGH COURT. PRETORIA)**

**CASE NO: 57963/08**

**DATE: 2009-02-13**

**In the matter between:**

**IVOR GUSTAV GOUWS AND  
IVORSON FILLING STATION CC**

**Applicant**

**And**

**J K GADDIN AND OTHERS**

**Respondent**

**JUDGMENT**

**LEDWABA J:** The applicant filed an urgent application in terms whereof, pending the finalisation of his review application which I will hereinafter refer to as “the main application” issued on 10 December 2008 that the 3rd respondent should be

temporarily interdicted and be prohibited from conducting business under the Petroleum Product Act of 1977 on Erf 1017 at Marble Hall.

The application is opposed by the 3rd respondent only. The other respondents indicated that they would abide by the decision of this Court. The order sought by the applicant in the main application reads as follows:

1. "That the decision of the 1st respondent on appeal, to grant site and retail licenses in respect of Erf 1017, Marble Hall, to the 3rd or joint 3rd respondents be reviewed and set aside in terms of Rule 53, alternatively Rule 6.
2. That the decision of the second respondent to refuse the 3rd or joint 3rd respondents site and retail licenses be restored.
3. That the record of decision by the Department of Agriculture and Land Administration of the Mpumalanga Provincial Government - (17/2/4NK108) in favour of the 3rd or joint 3rd respondents in respect of Erf 1017, Marble Hall be set aside ex tunc(?) and be declared and be declared nil and void."

At the hearing of this application the 1st, 2nd and 4th respondents had not yet filed records of the proceedings and no opposing papers by the said respondents have been filed yet to the main application.

On the facts in the papers, it is stated that at Marble Hall there are four existing licenses for filling stations. Applicant owns two filling stations since about 1986 and thinks that the license issued to the 3rd respondent would cause his filling stations to lose business and he would become bankrupt. He further states that he would suffer serious and irrevocable loss and damages.

I also need to mention that this application before me consists of 286 pages excluding 199 pages of the main application which the applicant incorporated into this urgent application.

The applicant further alleged in this application that the grounds of review set out in the main application are reaffirmed in this application. Applicant's submission is that the ROD from the Provincial Government of Mpumalanga, the 4th respondent, which was taken on 5 December 2006 by which the 4th respondent granted authorisation to 3rd respondent in terms of section 22 of the Environmental Conservation Act, 73 of 1989, to construct a filling station is void. According to the applicant the ROD had to be considered by the state department of the Limpopo Provincial Government 10 and not the Mpumalanga Government.

Applicant further submitted that it is a precondition to a legally cognisable application to the 2nd respondent for a site licence which is also a 'precondition to a

valid retail licence.

It is also stated in the papers that the retail licence of the 3rd respondent was granted by the 1st respondent on appeal after the decision of the 2nd respondent to refuse the granting of the site and retail licence to the 3rd respondent. It is also clear on the facts of this case that the construction of the 3rd respondent's filling station commenced in about September 2008 and construction continued even during the December 20 holidays which is a clear indication that the 3rd respondent would like to commence business as soon as possible. It was further submitted that the fuel for calibrating pumps has been poured. This simply means that there is fuel in the tanks which are at the construction place.

The 3rd respondent in its answering affidavit to this urgent application stated that he also represents the joint 3rd respondent being Ivorson Filling Station CC in which he holds 100% of the member's interest.

The 3rd respondent in the answering affidavit stated that the review application was materially flawed in that the provisions of section 7(1) of the Promotion of Administrative Justice Act, 3 of 2000, which is commonly known as PAJA, which states that the review procedure must be instituted without reasonable delay and not later than 180 days after the date was not complied with.

The applicant's counsel countered the argument by stating that there is an affidavit under oath by one Mr Gideon Erasmus that an appeal has been lodged as an internal remedy in this matter. In one of the letters attached to the application from EBB which is an institution of Mr G Erasmus, dated 16 October 2008 it was stated that the MEC would be approached and be requested to withdraw the ROD that was issued to the 3rd respondent.

If the applicant's version that an appeal has been launched is accepted this simply means that the internal remedies have not yet been exhausted when this review application was filed.

During the submissions made to me, both counsel made detailed submissions regarding section 1 of the Constitution's 12th Amendment Act, 205 on whether the Mpumalanga Province had the jurisdiction or not to issue the ROD. The Court was given detailed heads of argument which dealt with that aspect. I am not going to decide on the said issue in this matter.

In my view the issue calls for a joinder of other relevant parties who should make further inputs on the existence of the protocols which are referred to in the heads. This is an issue that I cannot make a prima facie view upon or decide upon due to lack of time and information on the issue.

It is clear that the 3rd respondent in commencing with the construction of the business had obtained the required legal documents which were issued by government authorities and relevant bodies to be contacted before a filling station can be established. Unless such documents or licenses are withdrawn by the relevant authorities the licenses remain valid unless they are set aside by the Court or unless they are patently clear that they are void.

On the papers before me I do not have enough information to form a prima facie view on the applicant's application for review because the record of the proceedings had not yet been filed and the respondents have not yet filed their answering affidavit. It is clear on the application before me that as far as certain aspects are concerned there are dispute of facts and in the presence of such dispute of facts I will refer to *Reckitt Coleman SA (Pty) Limited v S C Johnson and Son SA (Pty) Limited* 1995 1 SA 725 (TPD) at 730B to C wherein the Court said the following:

"When the applicant cannot show a clear right and more particularly where there are disputes of fact relevant to the determination of the issues, the Court's approach in determining whether the applicant's right is prima facie established, though open to some doubt, is to take the facts set out by the applicant, together with any facts set out by the respondent, which the applicant cannot dispute and to consider whether, having regard to the inherent probabilities, the applicant should and not could, on those facts, obtain relief a the trial of the main action.

The facts set out in contradiction by the respondent should then be considered and if serious doubt is thrown upon the case of the applicant it cannot succeed.” In this matter I need to adopt a robust approach and weigh the balance of convenience if the temporary interdict is to be granted.

The 3rd respondent, as I have earlier indicated, had the necessary documents which allowed him to commence with the structure. I was told, and it has been stated in the papers, and there are photos also showing how far the structure has commenced and from those documents it was submitted on behalf of the 3rd respondent that the structure is now 80% complete. It was further submitted on behalf of the respondent that millions 10 of rands have now been spent on the project which had already started in September 2008.

The main application which has been filed by the applicant is still in its initial stage and it may take about a year to two years before it is finalised. If this temporary interdict is not granted the applicant may lose some customers who may go to the 3rd respondent’s filling station if it commences with business. However, I am not totally convinced that a new filling station would cause the applicant to lose business to an extent that it would be bankrupt.

The applicant has been running two filling stations at Marble Hall for about 20

years. If he offered good services to his customers, I have got reason to believe that those customers would be loyal to him. The question of job losses has also been raised by the applicant that should his filling station be bankrupt his employees would lose their jobs. Such an aspect should also be weighed against the job creations that would be made by the 3rd respondent if it commences with the business.

The applicant has not, in my view, showed that he would suffer irreparable harm if the interdict was not granted. What he just alluded was that his business would be bankrupt without furnishing more information which is material to support that allegation and as applicant has indicated that an appeal was filed herein, I am of the view that the applicant has an alternative remedy in this matter. The appeal that he alleges that was filed may be pursued.

After seriously considering all the facts and circumstances of this case I am of the view that the balance of convenience does not favour the granting of the temporary interdict. I, therefore, make the following order:

The application is dismissed with costs.