

7 SEPTEMBER 2009
NOT REPORTABLE

/EVDM

IN THE HIGH COURT OF SUID AFRICA
(NORTH GAUTENG HIGH COURT)

Case Number: 6629/2009

DELETE WHICHEVER IS NOT APPLICABLE

1) REPORTABLE: ~~YES~~/NO.

2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.

3) REVISED.

DATE 7/9/2009

SIGNATURE

GRIFFIER VAN DIE HOOGGEREGSHOF VAN S.A.
TRANSSVAALSE PROVINSIALE AFDELING
PRIVAATSAK/PRIVATE BAG X67

2009 -09- 07

PRETORIA 0001
TRANSSVAAL PROVINCIAL DIVISION
REGISTRAR OF THE SUPREME COURT OF S.A.

In the matter between:

CREAM MAJENTA 127 (PTY) LTD t/a BP LINDEN PARK APPLICANT

VS

SHELL SOUTH AFRICA MARKETING (PTY) LTD 1ST RESPONDENT

GAUTENG DEPARTMENT OF AGRICULTURE,
CONSERVATION & ENVIROMENT 2ND RESPONDENT

THE CONTROLER OF PETROLEUM PRODUCTS 3RD RESPONDENT

JOSEPH TSHOLOFELO RAMOTSHO 4TH RESPONDENT

CITY OF JOHANNESBURG DEPARTMENT AND
PLANNING, TRANSPORTATION AND ENVIRONMENT 5TH RESPONDENT

JUDGMENT

Delivered on: 07 September 2009

POTTERILL AJ

1. This application was struck from the urgent court roll due to lack of urgency.

Only the First Respondent is opposing the application with all the other respondents abiding by the Court's decision. The same application, non-

supplemented, was then set down on the opposed motion roll. After argument the Court is requested to grant only the following prayers as set out in the notice of motion:

“2 THAT an interim interdict be granted as against the First Respondent ordering the First Respondent to cease and desist from continuing with the erection and establishment of a petrol service filling station on the remaining extent of Erf 447, Linden Extension, Robindale, Randburg, Gauteng:

3THAT an interim interdict be granted against the Fourth Respondent not to operate or conduct the business of a retail outlet for petrol and ancillary sales.

6THAT the interim interdicts contained in Prayers 2 and 3 above shall remain in place until such time as the First and Fourth Respondents have obtained all the authorizations and licences that they require to hold and operate a petrol service filling station at the site, including but not limited to:-

6.1 A valid site licence;

6.2 A valid retail licence;

6.2 A valid Record of Decision from the Second Respondent;”

2. No argument was heard, and accordingly decision required, on the application to strike out.
3. The applicant submits that it is entitled to the interdictory relief claimed despite the first respondent's change in stance in now conceding they have no site licence. The applicant is seeking to assert its right not to have to face illegal competition. The applicant has reasonable apprehension of harm because despite having no site licence the attitude and *modus operandi* of the first respondent was to proceed with construction. An interdict is the only remedy

to safe-guard the applicant against the first and fourth respondents' unlawful conduct.

4. The first respondent submits that there is no genuine threat to the applicant and accordingly no interdict could be granted. The first respondent as a leading petroleum supplier stated it has no intention of acting illegally or to conduct the business of a filling station without the appropriate authorisation. It was argued if the first respondent should proceed with construction it would do so at its own peril. Furthermore the applicant has an alternative remedy for the offending ROD in that they can apply for a review thereof. The respondent argues that the interdict is in fact final relief couched in terms which no court can grant; the relief is seeking to direct the respondents not to disobey the law.
5. Both parties request costs to include costs of two counsel.
6. The applicant must on the established facts show that it has grounds for its fear. The applicant need not establish that on a balance of probabilities flowing from the undisputed facts that injury will result. In prayer 2 the applicant is requesting "*an interim interdict to cease and desist from continuing with the erection and establishment of a petrol service filling station on the remaining extent of Erf 447..*" It is never denied that already during October 2006 there was activity on the site. This led to the applicant writing a letter to the first respondent on 23 November 2006 with content that the construction of a filling station was not to commence without all relevant authorization and that the

applicant is directly affected by the proposed activity. The first respondent notes the content of this letter. Paragraphs 112.1 and 115.1 of the opposing affidavit by the first respondent respectively read as follows:

"The First Respondent admits that it has been and continues to build the garage filling station in accordance with the approval granted it.";

The construction continued again after the builders' holiday period."

In paragraph 44 of the opposing affidavit first respondent states: *"the First Respondent has all approvals it requires to complete the construction of the garage filling station."*

This is simply not true; the first respondent does not have a valid site licence. In terms of Section 2A(1)(c) the First Respondent may not ...*"or develop a site without there being a site licence for that site.* The first respondent may not construct on, or develop the site. The first respondent will not only be doing it at their own peril, they will be acting unlawfully. On the facts set out above the first respondent was developing the site and the applicant had a well-grounded apprehension that they would continue and needed to be stopped. Despite an undertaking by the respondent that it will refrain from any alleged wrongful conduct the court is not precluded from granting an interim interdict; **Mcilongo NO v Minister of Law and Order** 1990(4) SA 181(E). The issue is whether it would be reasonable for a man in the position of applicant to nevertheless apprehend injury despite the undertaking or assurance by the respondent that the alleged infringements will not incur. The first respondent's conduct over a long period does not inspire confidence that it will refrain from developing the site. In paragraph 44 of the affidavit it was

prepared to tell half-truths to the court and the applicant has a well-grounded apprehension of injury.

7. An interlocutory interdict may be granted to restrain a breach of a statutory provision. In **Glas v Glas** 1980(3) WLD p263 on p266 C-E it is set out as follows:

“The only basis on which a person can approach the Court to obtain an interdict, be it a prohibitory or a mandatory one, to protect statutory rights is that set forth in two leading cases, Patz v Greene 1907 TS 427 and Roodepoort –Maraisburg Town Council v Eastern Properties (Pty) Ltd 1933 AD 87. The effect of these cases, which have firmly laid down the law in this regard, is adequately summarized by McKerron in the Law of Delict 7th ed at 282 where, referring to the judgment of Stratford JA in the Roodepoort-Maraisburg Municipality case, the learned author says:

“He then repeated with slight modifications the rule laid down in Patz vGreen. The rule as amended by Stratford JA may be stated in the form of two propositions:

- (1) where it appears, either from a reading of the enactment itself, or from that plus a regard to surrounding circumstances, that the Legislature has prohibited the doing of any act either wholly or partly in the interests of any person or class of persons, any such person can claim an interdict to enforce the prohibition without proof of damage;*
- (2) where the doing of an act is prohibited in the public interest, any member of the public who can prove damage or a well founded apprehension of damage , can claim an interdict to enforce the prohibition.”*

In *casu* the Legislature has prohibited the development of a site until one is in possession of a site licence. The applicant can claim an interdict to enforce the prohibition.

8. As for the ROD it is true that the applicant did have an alternative remedy to have this process reviewed. This however would not have prohibited the first respondent from developing the site. The first respondent started to do so without a site licence. The review process was thus not a bar to obtaining an interdict.

9. I accordingly make the following order:

9.1 THAT an interim interdict be granted as against the First Respondent ordering the First Respondent to cease and desist from continuing with the erection and establishment of a petrol service filling station on the remaining extent of Erf 447, Linden Extension, Robindale, Randburg, Gauteng:

9.2 THAT the interim interdict contained in ^{Prayer} ~~Prayers~~ 9.1 shall remain in place until such time as the First ~~and~~ ^{Respondent} Respondent has obtained all the authorizations and licences that it requires to hold and operate a petrol service filling station at the site.

9.3 THAT the first respondent is to pay the costs, including costs of two counsel.



S Potterill Acting Judge of the High Court

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