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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Reportable

Case no: AR 293/22

In the matter between:

OVERROX TRADING 70 CC **FIRST APPELLANT**

(THIRD RESPONDENT IN THE COURT A QUO)

TRAFFORD ROAD CONVENIENCE CENTRE(PTY)LTD **SECOND APPELLANT**

(FOURTH RESPONDENT IN THE COURT A QUO)

and

CONTROLLER OF PETROLEUM PRODUCTS **FIRST RESPONDENT**

(FIRST RESPONDENT IN THE COURT A QUO)

MINISTER OF ENERGY **SECOND RESPONDENT**

(SECOND RESPONDENT IN THE COURT A QUO)

METRO SERVICE STATION (PTY) LTD **THIRD RESPONDENT**

(FIRST APPLICANT IN THE COURT A QUO)

I MANGAROO PROPERTIES (PTY) LIMITED **FOURTH RESPONDENT**

(SECOND APPLICANT IN THE COURT A QUO)

UDS MOTORS CC **FIFTH RESPONDENT**

(THIRD APPLICANT IN THE COURT A QUO)

HARPERS HILLCREST AUTO CC **SIXTH RESPONDENT**
(FOURTH APPLICANT IN THE COURT A QUO)

Coram: OLSEN and NKOSI J, MOODLEY AJ

Heard: 29 November 2024

Delivered: 07 January 2025

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Durban (Shapiro AJ, sitting as court of first instance):

[1] The appeal against the order refusing with costs the appellants' application for an adjournment is dismissed.

[2] The appeal against the substitution order is upheld, and paragraph 2 of the order of the court *a quo* is set aside.

[3] The appellants' applications for the site and retail licences are referred back to the first respondent for reconsideration.

[4] Paragraphs 1 and 3 of the order of the court *a quo* are confirmed.

[5] Each party shall pay its own costs of appeal.

JUDGMENT

Nkosi J (Olsen J and Moodley AJ concurring):

Introduction

[1] This appeal emanates from an application that was brought by the third to sixth respondents in the court *a quo* seeking to review two administrative decisions ('the review application'): first, the first respondent's grant of a site licence to the first appellant and a retail licence to the second appellant, as well as the subsequent decision of the second respondent to dismiss the third to sixth respondents' appeal against such decision. The site and retail applications were in respect of the property described as Erf 1[…] P[…], which is situated at 4[...] M[...] Road Pinetown. ('the property').

Procedural background

[2] The appellants opposed the review application but failed to deliver their answering affidavit thereto until the matter was set down for hearing on 12 October 2021 by the third to sixth respondents. Consequently, on 1 October 2021, some 12 days prior to the hearing of the matter, the appellants brought an application for an adjournment ('the adjournment application'). They also sought an ancillary order directing them to deliver their answering affidavit within 15 days of the date of the adjournment order.

[3] By the time the adjournment application was launched, the delivery of the appellant's answering affidavit in the review application was already approximately 16 months out of time. The explanation provided by the appellants for the delay was that they had instructed their erstwhile attorney, who had since passed away, to instruct counsel to draft their answer. They said they 'genuinely believed' that she had done so and, thereafter, attended to the delivery thereof.

[4] The adjournment application was opposed by the third to sixth respondents, and was argued before the court *a quo* on 12 October 2021 prior to the hearing of the review application. The court *a quo* dismissed the adjournment application with costs on the basis that the appellants had failed to provide an acceptable explanation for their failure to deliver timeously their answering affidavit in the review application.

[5] Following its dismissal of the adjournment application, the court a quo proceeded to determine the review application on the basis of the pleadings placed before it. These included the third to sixth respondents' founding and supplementary affidavits, together with the annexures thereto, as well as the first and second respondent's explanatory affidavit, together with the record delivered by the first and second respondents comprising some 478 pages.

[6] After due consideration of the issues raised by the third to sixth respondents in the review application, the court *a quo* granted an order reviewing and setting aside the aforesaid decisions of the first and second respondents. In addition to such order, the court *a quo* granted *mero motu* an order substituting the first and second respondents' decisions with its own decision dismissing the appellants' applications for the granting of the site and the retail licences in respect of the property.

[7] Aggrieved by the aforesaid orders of the court a quo, the appellants applied for leave to appeal against both orders, but their application was refused by the court *a quo*. They then petitioned the Supreme Court of Appeal (SCA), and their petition to that Court was successful. With leave thus obtained, the appellants are now appealing to this court against the aforesaid orders of the court *a quo*.

Factual background

[8] The factual background to the matter, briefly stated, is as follows: in June 2016, the third to sixth respondents learned of the appellants' applications for site and retail licenses ('the licenses') for the property under the Petroleum Products Act 120 of 1977 ('the Act'). The first respondent approved the licenses on 9 November 2017.

[9] Dissatisfied with the decision, the third to sixth respondents appealed to the second respondent, as provided for in the Act. However, their appeal was dismissed by the second respondent. Aggrieved by the dismissal of their appeal by the second respondent, the third to sixth respondents launched review proceedings in the court a quo to challenge the decisions of both the first and second respondents.

[10] At the time when the review proceedings were initiated, the respondents were represented by Sue Moodley Attorneys, which was a sole practitioner practice. During or about January 2021 Ms Moodley passed away having not delivered the appellants' answering affidavit in the review application. According to Robert Kisten, who is the representative of the appellants, the appellants became aware during or about September 2021 that an answering affidavit on their behalf had not been delivered in the review application.

[11] As indicated in the preceding paragraphs of this judgment, the court *a quo* was not satisfied with an explanation provided by the appellants for their failure to deliver timeously their answering affidavit in the review application. Consequently, it refused their application for adjournment with costs, and granted the review application. It also granted *mero motu* an order substituting the decisions of the first and second respondents with its own decision dismissing the appellants' applications for the granting of the site and retail licenses.

Issues on appeal

[12] The appeal presents two primary issues for determination by this court. First, whether the court *a quo* erred in refusing the appellants' application for an adjournment, thus preventing them from filing their answering affidavit. Second, whether the court *a quo* was justified in issuing a *mero motu* substitution order in the review application.

Discussion

[13] Against the factual background set out above, I am now proceeding to consider the issues which form the basis of the appeal as fully set out hereunder. Bearing in mind that the appeal is against two separate orders of the court *a quo*, I think it will not only be appropriate but also just and equitable, for this court to determine the appellants' grounds of appeal against each order separately. This is more so as it is common cause that the substitution order was not part of the relief that was sought by the third to sixth respondents in the proceedings appealed against.

Issue 1: Refusal to grant an application for adjournment

[14] Notably, the refusal of the court *a quo* to grant the appellants' application for adjournment was preceded by an elaborate analysis by that court of the appellants' explanation of their failure to deliver their answering affidavit timeously. Based on its analysis of the appellants' explanation, the court a quo found that the appellants had failed to provide an acceptable explanation for their failure to deliver their answering affidavit timeously.

[15] Aggrieved by the decision of the court *a quo*, the appellant's contention was that the refusal of the court *a quo* to grant their application for adjournment deprived them of an opportunity to file an answering affidavit in the review application under the circumstances where:

(a) they had no knowledge of and/or control over the conduct of Ms Moodley, who was their erstwhile attorney and is now deceased, yet the dilatoriness of Ms Moodley was ascribed to them;

(b) the refusal of an adjournment not only had the effect of preventing them from filing an answering affidavit in the review application, but the court a quo furthermore failed to take that fact into consideration in the exercise of its discretion, and;

(c) without finding that the appellants acted *mala fide*, the court *a quo* exercised its discretion against the granting of the adjournment sought.

[16] Based on the grounds set out in the preceding paragraph, the appellants sought to persuade this court to grant an order setting aside the court a quo's refusal to grant their application for adjournment. This raised the question as to whether it is legally competent for this court to grant such an order in the first place and, if so, under what circumstances.

[17] The responses to the questions posed in the preceding paragraph can be found in the judgment of the Constitutional Court in the matter of *National Coalition for Gay & Lesbian Equality v Minister of Home Affairs*[1], where the following was held: 'A Court of appeal is not entitled to set aside the decision of a lower court granting or refusing a postponement in the exercise of its discretion merely because the Court of appeal would itself, on the facts of the matter before the lower court, have come to a

[1] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA I; 2000 (1) BCLR 39 at para 11.

different conclusion; it may interfere only when it appears that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.'

[18] In the present case, it was not indicated by the appellants as to whether it was their contention that the refusal by the court *a quo* to grant their application for postponement was influenced by any of the factors that may warrant interference by this court with the discretion of the court *a quo*. This was one of the issues raised by this court with Mr Wallis SC, who appeared for the appellants.

[19] In response, it was conceded by Mr Wallis SC and, in my view, correctly, that the court *a quo* cannot be faulted for having misdirected itself in any way in the exercise of its discretion to refuse the appellant's application for an adjournment. However, rather than abandon that point completely, Mr Wallis submitted that it should nonetheless be considered by this court jointly with the appellants' remaining ground of appeal against the substitution order that was issued by the court *a quo*.

[20] With respect, I disagree with Mr Wallis. In the light of the appellants' failure to demonstrate to this court that the court *a quo* had misdirected itself in the exercise of its discretion to refuse their application for adjournment, there is nothing entitling this court to interfere with the court *a quo's* exercise of its discretion in that regard. In fact, it is a cause for concern that some practitioners tend to adopt a cavalier attitude when it comes to compliance with the court rules. When called upon to explain their recalcitrant conduct, they engage in a blame game with their clients to avoid the consequences of their non-compliance.

[21] In *Uitenhage Transitional Local Council v SA Revenue Services*[2] the consequences of non-compliance with the court rules were spelled out by the Supreme Court of Appeal (SCA), per Reher JA, as follows:

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[2] *Uitenhage Transitional Local Council v South African Revenue Service* [2003] ZASCA 76; 2004 (1) SA 292 (SCA) at para 6.

'One would have hoped that the many admonitions concerning what is required of an applicant in a condonation application would be trite knowledge among practitioners who are entrusted with the preparation of appeals to this Court: condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.'

[22] While the learned Judge may have directed the above remarks to the practitioners who prepare appeals to the SCA, his remarks are not necessarily restricted to the flagrant breaches of the SCA Rules. They are equally applicable to any practitioner who fails to comply with the rules of any court without an acceptable explanation. This is irrespective of whether the breach is attributable to the practitioner or his or her client. The effect is the same, the proper administration of justice is hampered by such conduct.

[23] Regrettably, the erstwhile attorney of the appellants is not around to respond to the appellant's allegation that she is solely to blame for the failure to deliver their answering affidavit in the review application. However, in my view, the appellants themselves are equally to blame because they ought to have known that their erstwhile attorney could not possibly have prepared their answering affidavit without first consulting with them to obtain their detailed instructions on oath in response to the third to sixth respondents' founding and supplementary affidavits, as well as the first and second respondents' explanatory affidavits.

[24] Therefore, insofar as the appellant's appeal is directed at the court *a quo's* refusal to grant them an adjournment, I am satisfied that that part of the appeal is without any merit and, therefore, must fail.

Issue 2: Substitution order in the review proceedings

[25] Regarding the substitution order that was issued by the court *a quo*, the argument raised by the appellants is that the affidavits filed by the third to sixth respondents in support of the review application did not seek or make out a case for

the existence of exceptional circumstances, which is the prerequisite for the granting of a substitution order in terms of the Promotion of Administrative Justice Act 3 of 2000 ('P AJA'). It is common cause that the respondents did not argue that a substitution order could or should be made.

[26] Under s 8(1)*(c)* of PAJA, the court in proceedings for judicial review may grant an order that is just and equitable, including an order:

'Setting aside an administrative action and -
(i) remitting the matter for reconsideration by the administrator, with or without directions; or
(ii) in exceptional cases -
(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or
(bb) directing the administrator or any other party to the proceedings to pay compensation;
…'

[27] Prior to the promulgation of PAJA, the issuing of substitution orders in review applications was regulated by the common law, the application of which was articulated by the court in The University of the *Western Cape & Others v Member of Executive Committee for Health and Social Services & Others*[3] in the following terms:
'Our courts have repeatedly laid down that they do not want to usurp the powers of the authorities to whom the legislation has vested the powers to decide one way or the other. To do otherwise would constitute an unwarranted usurpation of the powers entrusted to the public authorities by the relevant statute. Therefore, in the ordinary course the Courts will refer the matter back because the Court is slow to assume a discretion which has by statute been entrusted to another functionary or repository of power. It is only in exceptional circumstances that this principle will be departed from.'

[3] *The University of the Western Cape & Others v Member of Executive Committee for Health and Social Services & Others*, 1998(3) SA 124 at 130-131 paras I-B.

[28] In PAJA, the term 'exceptional cases' was adopted by the legislature to describe the circumstances under which the court may issue an order substituting or varying the administrative action of an administrative body in terms of that Act. For guidance as to when a case may be regarded as 'exceptional' as envisaged in PAJA, the following was held by the Supreme Court of Appeal in Gauteng *Gambling Board v Silverstar Development Ltd and Others*[4]:

'A case is exceptional when, upon a proper consideration of all the relevant facts, a court is persuaded that a decision to exercise the power should not be left to the designated functionary. How that conclusion is to be reached is not statutorily ordained and will depend on established principles informed by the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair.'

[29] The instances where our courts were prepared to substitute their own decisions for those of administrative bodies include, *inter alia*, cases where: it would serve no purpose to remit the matter to the administrative body concerned because the end-result is a foregone conclusion[5]; it is more than likely that further delay would cause undue prejudice to the other party if the matter is remitted[6]; there is a reasonable apprehension of bias or incompetence on the part of the decision-maker[7]; the court is in as good a position as the decision-maker to make the decision[8]; and there is a likelihood of the decision-maker not applying his or her mind fairly or at all.

[30] In the present case, it was not suggested by any of the parties that exceptional circumstances existed that justified the court *a quo* issuing the substitution order by reason of any or more of the factors set out in the preceding paragraph. Had that been the case, not only the appellants but also the first and second respondents would have been entitled to file their formal responses to such suggestions. In the circumstances, I am of the view that the appellant's right to be heard was infringed by the substitution order that was issued by the court *a quo*.

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[4] *Gauteng Gambling Board v Silverstar Development Ltd and Others* [2005] ZASCA 19; 2005 (4) SA 67 (SCA) at para 28.
[5] Ibid at para 38.
[6] *Ruyobeza and Another v Minister of Home Affairs and Others* 2003 (5) SA 51 (C) (*'Ruyobeza '*).
[7] *Tantoush v Refugee Appeal Board and Others* [2007] ZAGPHC 191; 2008 (1) SA 232 (T).
[8] *Gauteng Gambling Board* fn 4 at para 39.

[31] In the result, I am satisfied that the second part of the appellants' appeal that is directed at the substitution order that was issued by the court *a quo* must succeed. In my view, the just and equitable order is to refer the appellants' applications for the site and retail licences back to the first respondent for reconsideration.

Costs

[32] On the issue of costs, it is of course trite that the costs would ordinarily follow the result. In the present case, this raises the question as to which party, if any, was substantially successful. To answer that question, I think it would be appropriate to adopt as a starting point the two orders appealed against.

[33] Starting with the first order refusing the appellants' application for adjournment ('the adjournment appeal'), my finding that the appellants' appeal against such order was without merit means that the result thereof went in favour of the third to sixth respondents.

[34] As for the second order, in terms of which the court *a quo* substituted its own decision for that of the first respondent ('the substitution order appeal'), the appellants were successful in respect of that part of the appeal, which means that the result thereof went in their favour. However, I do not believe that it would be just and/or equitable for the third to sixth respondents to be held liable for the costs of the substitution order appeal as such an order was not part of the relief they sought in the review application.

[35] Be that as it may, the fact of the matter is that the third to sixth respondents elected to defend the substitution order on appeal, even though they never asked for it. This, in my view, means that neither party was outright successful in the whole appeal. In the circumstances, I think the just and equitable result on the issue of costs would be to order each party to pay its own costs.

[36] In the result, the following order is made:

Order

[37] The appeal against the order refusing with costs the appellants' application for an adjournment is dismissed.

[38] The appeal against the substitution order is upheld, and paragraph 2 of the order of the court *a quo* is set aside.

[39] The appellants' applications for the site and retail licences are referred back to the first respondent for reconsideration.

[40] Paragraphs 1 and 3 of the order of the court a quo are confirmed.

[41] Each party shall pay its own costs of appeal.

M E NKOSI
Judge of the High Court,
KwaZulu-Natal Division

I agree

P J OLSEN
Judge of the High Court,
KwaZulu-Natal Division

I agree

MOODLEY
Judge of the High Court,
KwaZulu-Natal Division

Appearances

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