REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Case Number: 2024-130293

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: NO

DATE: 21/03/2025 SIGNATURE

In the matter between:

FUELS INDUSTRY ASSOCIATION OF SOUTH AFRICA	Applicant
And	
MINISTER OF MINERAL AND PETROLEUM RESOURCES	First Respondent
THE CONTROLLER OF PETROLEUM PRODUCTS	Second Respondent
THE FUEL RETAILERS' ASSOCIATION	Third Respondent
THE RETAIL MOTOR INDUSTRY ORGANISATION	Fourth Respondent
AMISTEC (PTY) LTD t/a LIQUID FUELS WHOLESALES ASSOCIATION	Fifth Respondent

PETROLEUM RETAILERS' ALIGNMENT FORUM	Sixth Respondent
ROYALE ENERGY (PTY) LTD	Seventh Respondent
NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	Eighth Respondent

Constitutional Law – suspension of administrative action as just and equitable remedy under section 172(1)(b) of Constitution -decisions of Minister of Mineral and Petroleum Resources in terms of Petroleum Products Act 120 of 1977 relating to the imposition of interim amendments to Retail Accounting System governing the Fuel Industry taken in contravention of judgment of High Court – inherently unconstitutional - appropriate remedy is suspension of the decisions pending review – no necessity for declaration of invalidity or even for constitutional issue to hinge on such invalidity for section 172(1)(b) to apply.

JUDGMENT

FISHER J

Introduction

[1] This application is the further instalment in a saga involving regulation of the fuel industry in South Africa.

[2] The processes which have unfolded over more than a decade relate to how State regulation of the petroleum industry affects the competing commercial rights of retailers of fuel and other petroleum-based products and the oil companies that own the sites from which the fuel is distributed.

[3] The relief is sought as a matter of urgency by the applicant Association which represents the petroleum industry in South Africa. The applicant brings the application in its own right and on behalf of four of its members: Astron Energy

(Pty) Ltd, BP Southern Africa (Pty) Ltd, Engen Petroleum (Pty) Ltd, and Sasol Limited.

[4] The purpose of the application is to achieve the urgent suspension of two decisions taken by the Minister of Mineral and Petroleum Resources (the Minster) pending the review of those decisions.

[5] The impugned decisions relate to the interim restructuring by the Minister of the system of regulation that has governed the fuel industry and the determination of the petrol price in South Africa for more than a decade.

[6] This restructuring purports to be a response to an order handed down by Opperman J in this court in the matter of *Fuel Retailers Association v Minister of Energy and Others*[1] (*FRA*).

[7] That judgment is central to this application. It involved the review by the Fuel Retailers Association (which is the third respondent in this application) of the system of regulation of the industry that came into effect in 2013.

[8] In terms of *FRA* the court directed that the Minster conduct a review of the decision taken in 2013 which imposed a system of governmental regulation that did not allocate a retail margin.

[9] The Minster was directed to conduct the review contemplated within nine months of the order and according to specified directives of Opperman J.

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[1] *Fuel Retailers Association v Minister of Energy and others* 2023 JDR 3638 (GJ,) [2023] 4 All SA 739 (GJ).

[10] The review ordered by Opperman J has not been undertaken by the Minister. There is no indication that it has even been commenced. Instead, an interim position has been put in place by the Minster which is intended to operate pending the ordered review.

[11] The applicant contends that the interim position that the impugned decisions contemplate is unlawful, inter alia, for being in conflict with the order of Opperman J in *FRA*.

[12] The applicant contends further that the implementation of the decisions on an interim basis will result in irreversible and catastrophic consequences for an industry that is a driver of the South African economy.

[13] The third respondent has represented the retailers in the litigation throughout and continues to represent them in these proceedings. It opposes the application, inter alia, on the basis that it is not urgent. It argues further that, far from being in conflict with the order in *FRA,* it in fact represents compliance therewith.

[14] The government respondents in the form of the Minister, the Controller and the National Energy Regulator (NERSA) abide this court's decision. The other respondents don't directly oppose.

[15] Viewed broadly, then, the case, involves the competing rights and interests entailed in the commercial relationships between the owners of the retail sites, which are, in the main, the oil companies and the retailers that operate the sites under State licence in the fuel industry.

The impugned decisions

[16] The first decision in issue was taken on 22 August 2024 and is to the effect that an interim retail margin would be allocated in the retail sector of the fuel industry

to operate pending a full review of the regulation of the industry. The full review is clearly that contemplated by Opperman J in *FRA.*

[17] The second decision was taken on 04 November 2024 and in terms thereof, the impugned retail margin in issue was put into effect pending the contemplated review.

[18] The creation of this new notional interim margin entails the reduction of an existing margin, in the form of an allowance of a share of the fuel price which was previously allocated to the owners of the retail site. A classic case of borrowing from Peter to pay Paul.

[19] This abrupt change to the system comes in a context where there are existing commercial relationships between the oil companies and the retailers which are based on the system that prevailed before the taking of the impugned decisions – i.e. a regulatory landscape which did not set a margin in the retail sector.

[20] This shift, obviously creates a situation where the contracts which form the basis of these relationship will require renegotiation.

[21] The oil companies argue that these decisions, if implemented, will lead to chaos in the industry.

[22] This relief is sought under part A of the application and pending the determination of the application for the review and the setting aside of the impugned decisions contained in part B.

[23] The application for the suspension of the decisions is brought in terms of section 172(1)(b) of the Constitution predominantly on the basis that the suspension would be just and equitable remedial relief flowing from conduct of the Minister that is in direct defiance of a court order and, as such, constitutionally invalid.

Background

[24] It is helpful to begin with a characterisation of the participants in the Fuel Industry with reference to how their participation dictates the fuel price.

Participants in the fuel industry

[25] The focus of the fuel industry in South Africa is on the refining, storage, transportation, and marketing of imported crude oil. This focus leads to specialist services which include refiners, primary storage, secondary storage, wholesale and retail.

[26] All market activity is closely regulated under licence. Some oil companies hold refining/ manufacturing licences and a wholesale licence while others hold one or the other.

[27] With the exception of a few training sites, liquid fuel manufacturers and wholesalers are prohibited by section 5(a) of the Petroleum Products Act 120 of 1977 (the Act) from holding retail licences for petroleum and liquid fuels. The oil companies are thus reliant on licenced retailers to sell their product. This, in and of itself, is a regulatory provision which protects the retail industry.

[28] The petrol pump price is fully regulated. It comprises a number of price elements, some of which are calculated on the basis of external international factors and others which pertain to the domestic market. The external factors are US Dollar-based, and the internal factors are the subject of the close regulation in issue.

[29] The external factors move constantly and account for most of the movements in the petrol price. Both the world market price of oil and the exchange rate are outside the control of the domestic industry.

[30] The domestic petrol price which is published monthly by the Department of Energy (DoE) takes account of movements in these factors.

[31] At issue in these proceedings is the retail end of the fuel supply chain and more specifically the commercial relationships between retailers and the owners of the retail sites. These owners are for the most part, the oil companies who are also generally the wholesalers.

[32] It is, thus, convenient for present purposes to view the competing camps as the owners or oil companies and the retailers. It is, however, accepted that, within these two camps, there are different ways of the participants doing business with one another.

[33] There are approximately 5600 licensed retail sites in South Africa. The vast majority are owned by the oil Companies who enter into commercial relationships with licensed retailers in relation to the use of the retail site. These relationships include lease agreements, franchising agreements and service level agreements.

[34] A central focus of Opperman J in *FRA* was the differing commercial relationships and forces which operate in these two types of ownership models. The sites owned by the oil companies are known in the industry as Company Owned Retail Operated (CORO) sites; the sites owned by the retailers themselves are known as Retail Owned Retail Operated (RORO) sites.

[35] A key feature of the domestic regulation is the providing of allowable returns or margins along the value chain. In this manner, the petrol pump price is calculable according to set margins and formulae.

[36] This process has the effect of eradicating uncertainty and keeping the fuel price stable. This, in turn, encourages investment by existing and new entrants into the industry.

[37] The calibration of the margins along the chain is intricate and is the product of specialist economic intervention at government level.

[38] The fuel price is pivotal to every aspect of the broader economy. If the fuel price goes up this has a direct effect on the cost of living.

[39] It is helpful to understand the background to the formulation of the system of regulation that maintained prior to the impugned decisions which have now served to change this system.

The advent of the new regulatory system or RAS

[40] Before 2011, the fuel industry was regulated by the Marketing of Petroleum Activities Return system and its guidelines.

[41] In 1996 the government began planning and working towards the institution of a new system which would be purpose designed to regulate the domestic fuel industry in a newly democratic South Africa. This system is known as the Regulatory Accounting System (RAS).

[42] After intensive investigation of the markets over years, the RAS reached its implementation stage in 2011.

[43] The implementation commenced with a two-year transitional phase. This transitional period was necessary to enable market participants to prepare for the full implementation of the RAS as a new petrol price accounting and regulatory system.

[44] This entailed stakeholders, at each stage of the domestic fuel supply chain, bringing about changes in their commercial relationships so as to align these with the new system.

[45] The DoE took the decision finally to implement the RAS in December 2013 (the 2013 decision).

[46] The adoption of the RAS, as one would expect in such a vital sector, had been preceded by an intensive period of research, development, and assessment in relation to the form the regulations should take and the likely impact on the various role players in the industry and the economy as a whole.

[47] This research process spanned nearly a decade and entailed intensive and complex analyses of the fuel price with reference to SA's developing economy, the state of the commercial relationships within the sector, and the effect of constitutional development and changes to the law after 1994.

[48] As part of this process and at great expense, the DoE appointed a cohort of experts to report and make recommendations as to how the regulation could take place in the most efficient and just manner possible.

[49] One of the experts that conducted intensive research into the model was Bates White, a firm based in the US. The firm is specialist in providing econometric and economic analysis with respect, inter alia, to fuel pricing across jurisdictions.

Bates White undertook a detailed review of the market and reported and made recommendations toward a new system.

[50] A further key stage in the process was the appointment of an entity called the Institute for Petroleum and Research (IPSR). The expertise of this institute was employed to enable the minister to set the activity-based margins for each part of the industry on an annual basis.

[51] Ultimately, this process yielded the RAS in the form that it took prior to the impugned decisions.

[52] A hallmark of the RAS is that it provides set or determinable recovery margins across the various participants in the industry. This manifests in the cents per litre that accrue to each identified activity along the retail petroleum value chain.

[53] Regulated firms may not increase prices so as to obtain profits in excess of these stipulated margins. This consistency in the market allows for a set and stable petrol price.

[54] The RAS, however, stopped short of regulating the retail industry in this respect. This has been a bone of contention for years and has resulted in the saga of litigation of which this application is the latest development.

[55] The RORO retailers obtain a margin on the basis of their ownership. The CORO retailers previously got no margin.

[56] The CORO retailers represented by their association, which is the third respondent in this application sought to review the decision to implement the 2013 decision without setting a margin for them.

[57] This culminated in the judgment of Opperman J in *FRA.*

[58] The order in this judgment is central to the impugned decisions of the Minster in this case. It deserves a sub- heading of its own.

Fuel Retailers Association v Minister of Energy (FRA)

[59] In *FRA*, the Fuel Retailers Association applied to review and set aside the 2013 decision to implement the RAS on the basis that it did not provide for a margin for retailers. The retailers were successful in their claim for a review of the RAS model as embodied in the then Minister's 2013 decision.

[60] The analysis by Opperman J of the process which had been undertaken by the DoE for the purpose of the determination of the RAS under the 2013 decision is detailed and requires no repetition here. It suffices to state that it is clear from the judgment that the process unfolded over years and was rigorous and required crucial expertise.

[61] The problem, as encapsulated by Opperman J, was as follows:

> " [22] As mentioned, the RAS stipulates a margin for each activity. This application is concerned only with the margin allocated to the retailing sector within the petroleum industry. The retail margin includes a return on the capital for the owner of the assets portion (CAPEX) through which they can achieve a return on their investment or capital expenditure in the assets required along the petroleum value chain (tanks, storage units, pumps, land and the like), and an operating costs portion (OPEX) which is a straight cost-recovery facet to compensate parties for the costs involved in providing the services required along the petroleum value chain. The OPEX recovery is not a profit-making

margin. It covers costs such as labour and overheads incurred by the service station operator (the retailer) in distributing petrol without adding a return or margin.

[23] The RAS does not differentiate between RORO and CORO sites but the margins it provides for are based on and benchmarked against a RORO site.

[24] In theory, both the OPEX recovery and CAPEX return will be recovered by a retailer in a RORO site. In a CORO site, the retailer will recover the OPEX and the oil company the CAPEX return." (Emphasis added)

[62] Opperman J identified that the retail margin contemplated would, in effect, be a component stipulated for CORO retailers in the model which would take the form of an amount that would compensate them for what was referred to as an entrepreneurial compensation (EC). She characterised this compensation as follows:

"An entrepreneurial compensation (EC) allocation (or trading margin) is a portion of the retail margin, over and above the OPEX recovery, that would be allocated to retailers to compensate them for the provision of services associated with operating service stations. They ensure a return on a retailer's risk and investment in providing services."[2]

[63] In summary, the court found that there had been errors in the processes adopted in making the determinations of margins in the retail sector. The central problem identified in the judgment was what Opperman J saw as a failure of the Minister to take cognisance of the fact that CORO sites predominate in the SA retail industry.

[64] The Bates White report had recommended that a benchmarking analysis be embarked upon in order to establish appropriate return on retail assets by the

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[2] Id at para 27.

owners and the viability of service stations. An “efficient benchmark service station model” was proposed in the Bates White report.

[65] Opperman J had a difficulty with the fact that the benchmark service station around which the economic modelling took place was a RORO site.

[66] The mandate of IPSR had been, inter alia, to determine with reference to the Bates White report and other industry data an appropriate rate of return for owners for its assets based on a Capital Asset Pricing or CAPEX margin. Part of the data considered was the benchmark service station contemplated in Bates White report – i.e. a RORO model.

[67] The CAPEX margin allowed to the owners of the sites was ultimately determined based on the reasonable rate of return on investment of the site owners. No retail margin was recommended in that, as the Minister explained, it was considered that it was best for the retail industry to operate on the basis of market forces.

[68] In short, the Minister took the decision not to create a retail margin and the 2013 decision approved the RAS model in this form.

[69] Whilst the process was unfolding a Special Committee was appointed to deal with the implementation of the RAS as the implementation phase approached in 2011. It was known as the RAS Technical Committee (RTC).

[70] During the phasing in period between 2011 to 2013, the RTC allowed for an interim informal retail margin to flow to the retailers. This is relevant in that it is this informal position which has been reverted to by the Minister in taking the impugned decisions in issue.

[71] This interim retail allocation employed in the 2011 phasing in period entailed certain components of the CAPEX due to owners being allocated to the retailers.

These components of the CAPEX concerned are those known as: (i) the small stock premium margin and (ii) the marketability adjustment margin.

[72] This phasing in position was universally accepted as a makeshift temporary arrangement which allowed for a bridging between the outgoing system which had involved some return for retailers and the new RAS.

[73] It was cautioned in the report of ISPR that the if the shift of CAPEX margins received by oil companies to retailers was retained this was likely to have an effect on the delicate commercial relationships in the retail space in that such a move would inevitably cause oil companies to extract returns from increased franchise and rental fees.[3] This stands to reason.

[74] After the 2013 decision, the DoE continued to publish a notional EC or retail margin as a guide to the industry. But this figure is part of the CAPEX which goes to the owners of the sites.

[75] It was accepted by Opperman J in *FRA* that the proposal that the CAPEX portion of the retail margin be split between wholesalers and retailers (to accommodate an EC) would require additional expert consultation.[4]The IPSR had stated that this determination was beyond its mandate. The IPSR had also emphasised that such a split would have to be based on 'sound economic logic'[5].

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[3] Id at para 52.

[4] Id at para 63

[5] Id at para 63.

[76] It is important that the two components of the CAPEX which were employed in the determination of the notional retail margin which was routinely published as a guide only bear no relationship to the requirements of the retail industry. This was accepted by Opperman J.[6]

[77] The carving out of these components was nothing more than convenience at a time of transition of commercial relationships from the old system to the RAS.

[78] Under the impugned decisions the Minister has simply reinstated this interim bridging phase of a decade ago without any proper review process as to the viability of this move. These parts of the CAPEX are now abruptly afforded the status of a set margin which owners are obliged to pay to the retailers. I will expand on the effects of this move later.

[79] Opperman J appreciated that difficulties were likely to arise from a move which resulted in the Capex being split between owners and retailers. She stated the following with reference to the carving out of these components from the CAPEX:

> " Even if retailers were in a reasonable position to negotiate with the oil companies that supply them (which they are not), the inevitable outcome of the DoE's decision to allow the EC to be determined by the commercial negotiations is that either the retailers are under-compensated (because they cannot procure an adequate return for their retail activities), or the asset-owners are under-compensated (because they have allowed retailers to take an EC out of the CAPEX that they would otherwise be entitled to). This flaw in the RAS means that it is arbitrary and incapable of giving effect to the objectives that it was designed to achieve."[7]

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[6] Id at para 117.

[7] Id at para 118

[80] This statement appears to acknowledge that this EC or retail margin must be sourced as an extra feature of the RAS. Where this extra feature should be sourced was not expanded upon by the court. It was, however, accepted by the court that the determination of what a regulated split in the CAPEX between owners and retailers would look like would entail a not insubstantial reassessment of the industry.

[81] The court recognised that the reassessment would be required to take into account dynamic economic developments in the retail space of non-petroleum activities such as convenience stores, eateries and the sale of non-controlled products which contribute to the profitability of the retailor.

[82] To my mind the value attributable to the service station assets as drawcard for other enterprises to be conducted by the retailer on site is indeed a relevant consideration. For example, there may be sites where the retail of petrol is not the focal point of the relationship, and the profit is intended to be derived from the retailer's use of the site for the other enterprises. Whether this aspect is likely to be properly served by the implementation of a retail margin is beyond the scope of this judgment. Judges are not economists.

[83] In her brief assessment of the position in the judgment, Opperman J acknowledged that a decision by an oil company to forgo portion of its CAPEX margin would inevitably have the result that it would be unable to fully recover its return on capital investment and that this would have repercussions for the whole industry and for investment in the sector including investment by foreign oil companies[8].

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[8] Id at para 92.

[84] After having framed the commercial relationship between the oil companies and the retailers as one where the fate of retailers "is entirely in the hands of oil companies",[9] the learned judge concluded by stating that "the very structure of the RAS- the framework itself – is the source of the problem."[10]

[85] The oil companies argued that these assumptions were not necessarily founded in evidence before the court. It was argued, there was no evidence to show that the commercial negotiations had failed to provide adequate returns for retailers.

[86] The court found this submission to be unpersuasive. It found that retailers were forced to work within a regulatory scheme that is hostile to their ability to profit from the commercial relationship. This finding was made on the basis of what the court found was an unequal bargaining relationship.

[87] The oil companies and the DoE argued that retail sites as to location, infrastructure, income and expenditure were all individual and thus not necessarily subject to an exercise which was based on uniformity. They emphasised that the spread was between a service station in the heart of Sandton and one in a remote rural area where there was little motor vehicle traffic.

[88] It was argued on behalf of the oil companies that without evidence of the market data the court should be hard pressed to conclude that the lack of regulation led to a lack of viability.

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[9] Id at para 93.

[10] Id at para 97.

[89] The court rejected this argument and held that the mere fact of unequal bargaining power in the relationship between owner and retailer makes for the necessity of regulation in this sphere.[11]

[90] The thrust of the judgment appeared to be to the effect that any system that did not contain a regulated margin for the retail sector was objectionable per se.

[91] The order reads as follows:

> "The original decision of the first respondent or her delegates [the Minister], taken in November 2013, to implement the RAS without providing for a ring-fenced Entrepreneurial Compensation (EC) to be claimed exclusively by the retailers in Company Owned Retailer Operated (CORO) sites and/or specifying the items to be claimed under the EC by retailers in CORO sites, is reviewed and set aside.
>
> 3. The determination of the treatment and calculation of the EC for retailers in CORO sites as an allocation within the retail margin of the RAS (the determination) is referred back to the first respondent [the Minister] to decide in accordance with this Court's judgment, within a period of 9 months from the date of this order.
>
> 4. Pending the determination, the 2020 RAS Benchmark Service Station Matrix and any subsequently issued (or yet to be issued) Matrices are to remain in force and effect.
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> 5. Pending the determination, the status quo of the outcome of each CORO site fuel retailer's negotiation with its fuel supplier/landlord is to be maintained and all new agreements still to be concluded between CORO site retailer's and fuel suppliers/landlords are to be on the basis that the Minister's decision has not been reviewed or set aside." (Emphasis Added)

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[11] Id at para 114.

[92] The order thus appeared, on the face of it, to suggest that the Minister had not in 2013 been and was not then at liberty to deny the retailers a margin.

[93] The oil companies sought leave to appeal the judgment to the SCA on the basis, inter alia, that it sought, impermissibly, to dictate to the Minister as to the exercise of his executive powers.

[94] They raised also that there was no evidence before the court that the unregulated retail space was fundamentally non-viable and that the assumptions made in this regard had not been open to the court to make.

[95] One would think the proliferation of CORO sites in the sector in and of itself may suggest some viability in the industry. However, the ordered review may indeed uncover problems of the nature identified in the judgment. This process has, however, not yet been undertaken.

[96] In her judgment in the application for leave to appeal, Opperman J clarified that her judgment did not intend to dictate that the Minister was not entitled to approve a RAS which did not allow for a set margin. She stated that it was merely required in terms of her judgment that there be further consideration of the model in its entirety as it relates to CORO sites. The court stated that there was, in fact, no prescription from the court which infringed against the doctrine of separation of powers.

[97] The application for leave to appeal by the applicants was, on this basis, dismissed with costs.

[98] What is of some significance to this application is that there is no indication in the judgment that any information was placed before Opperman J in relation to the timeframe and budget considerations which would be required for the Minister to undertake the further consideration of the RAS model in its entirety.

[99] The judge, however, expressed herself to be acutely aware of the fact that there had to be a viable interim position in place pending the reconsideration of the RAS. This position was held to be the status quo, and this is reflected in the terms of the order.[12]

[100] In fact, the Minister is precluded by the order from allowing a position other than the status quo pending the reconsideration which the judgment contemplates.

[101] The court said the following in regard to the ordered interim position.

> "Clearly such a holding pattern [the retention of the status quo] while the DoE reconsiders the position is preferable as it will ensure contractual stability and will eliminate commercial uncertainty. This is what I seek to achieve in the order that I intend making."[13]

[102] It is important that the process contemplated by the court was that an expert assessment of the RAS based on an economic modelling around CORO sites be obtained and that recommendations flowing from such a process would "have to be traversed with all stakeholders and the Minister [would] have to decide whether the RAS in its amended form is to be implemented."[14]

[103] The date of the order in *RAF* was 22 September 2023, and the nine months allowed to the process was thus set to expire before the end of May 2024.

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[12] Id at para 140.

[13] Id at para 138.

[14] Id at para 139.

The Ministers response to the order in *FRA*

[104] The Minister did not embark on the process contemplated in the order - i.e. an expert review of the RAS which used the CORO site as its benchmark and entailed consultation with stakeholders.

[105] There has been no consultation with stakeholders and no expert consideration of the complex economic inquiries that such a process expressly called for.

[106] The Minister abides this court's decision and has provided no information in relation to why this process has not been undertaken in accordance with the order in *FRA*.

[107] There may, however, be a clue in the fact that a set time period of only nine months was allowed for this process.

[108] It appears that nine months may have been insufficient. This could be for a number of possible reasons including the complexity of the ordered assessment and budget constraints. Regardless, the Minister clearly understood himself by the terms of the order to be immutably bound to act within this time limit.

[109] It seems to me that this understanding has led to him taking the precipitous step in issue.

[110] What he should properly have done was place before a court the fact that the time limit in the order had been set by Opperman J without any apparent evidential assessment of the time it would actually take for the process to be undertaken.

[111] On a proper assessment of what the process ordered by Opperman J would entail based on evidence, one would think that a condonation of a failure to meet

the deadline imposed and a proper determination of a structural mandamus going forward would have substantial prospects of success.

The aftermath of the Minster's impugned decisions

[112] In response to a complaint from the oil companies on 02 September 2024 to the effect, inter alia, that they had not been consulted on these precipitous decisions either as to content or to date of implementation, the Minister sent a notice in terms of which he suddenly required that the oil companies individually provide detailed submissions of the implementation challenges and their earliest proposed implementation date. Such submissions were to reach the Minister by 16h00 on that same day.

[113] Thus, a matter of hours was allowed for submissions from the oil companies. It was not clear whether the date for implementation which the decision set at 04 September 2024 would possibly be moved on the basis of these submissions.

[114] As it happened, there was no extension despite some hurried submissions by some oil companies.

[115] The applicant alleges for the purposes of the review that this conduct of the Minster amounts to procedural unfairness. It seems to me, prima facie, that this ground of complaint has prospects of being upheld.

[116] There was, in tandem, an internal appeal process being conducted by the applicants. The appeal failed on the basis that the Minister had made the determination and could not sit in appeal of his own decision.

The competing arguments which are raised against this background

[117] As indicated above, the applicant bases its case on section 172(1)(b) of the Constitution. It argues that the decisions of the Minister are in direct contravention of the court order of Opperman J and specifically the orders to: (i) implement a comprehensive review of the RAS with the accent on a CORO benchmark and including consultation with industry stakeholders; (ii) to make whatever changes to the RAS that are rationally recommended by that review process; (iii) to implement such changes in a rational manner; and (iv) to maintain the prevailing status quo in the industry pending the determination.

[118] The applicant characterises the impugned decisions as a cynical attempt by the Minister to portray the decisions as compliance with the order when they are, in fact, a patent contravention. The conduct, furthermore, it argues, countermands the interim facility put in place by Opperman J pending the contemplated review.

[119] This conduct, it argues, strikes at the heart of the rule of law. It thus argues that, once it is accepted that the decisions are in contravention of the court order, this is determinative of the matter; the decisions must be suspended, and there need be no further consideration of any other aspects relating to justice and equity.

[120] In short, the argument of the applicant is that it is axiomatically the case that it is just and fair under section 172(1)(b) to suspend an administrative decision taken in direct contravention of a court order.

[121] The third respondent argues, on the other hand, that the decisions represent compliance with the court order and that the interim position required in the order, thus, no longer has any application.

[122] It is not disputed on behalf of the third respondent that, to the extent that the decisions represent non-compliance with the judgment, this would be actionable.

[123] The third respondent, however, takes issue with the cause of action under section 172 (1)(b). The argument goes that the only cause of action available to the applicant would have been an interdict against the implementation of the decisions. This, it reasons, is because the case does not involve a constitutional inquiry. It thus argues that section 172 (1)(b) has been, impermissibly, invoked in a bid to circumvent having to establish the requirements for an interim interdict against the Minister – which, it is argued, the applicant is unable to do.

[124] I move now to consider these arguments.

Are the decisions in compliance with or in conflict with the order of Opperman J ?

[125] The inquiry begins with a determination of the meaning of the judgment. Once this is established, it can be assessed whether there has been compliance.

[126] The proper approach to interpreting court orders was set out by the Appellate Division in *Firestone*[15] and more recently by the Constitutional Court in *Eke*.[16]

[127] Essentially, the inquiry is purposive and is to be determined primarily from the language of the judgement and order read as a whole.

[128] To my mind, there can be no doubt, on a reading of the judgment, that the court required an intensive expert reconsideration and a final determination of how the

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[15] *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) at 304D-H.

[16] *Eke v Parsons* 2016 (3) SA 37 (CC) at para 29.

RAS should operate. It is, furthermore, abundantly clear that the court found that, in the interim to this final determination, there could be no change to the RAS.

[129] It is not seriously disputed that the contemplated process has not been undertaken. As I have said, there is no indication that it has even been commenced.

[130] The order made it clear that, until a determination in accordance with the judgment is made by the Minister, the interim position which would be most just and fair was for the status quo to remain – i.e. the RAS in its then form to remain in place.

[131] Either the Minster is obtuse or creating a pretext of compliance with the order. It matters not what the explanation is. The objective fact is the decisions do not constitute compliance with the order.

[132] The Minister's attempt to impose an interim order devised by him in the stead of the court imposed interim position is patently incompetent.

[133] Where there is, prima facie, an indication that an order handed down by a court is being circumvented, this is an affront to the rule of law and cannot be tolerated.

[134] The actions of the Minister, if left, unchecked threaten to undermine public trust and respect for the court and their orders.

[135] This stands as its own prejudice and, to my mind, is determinative.

[136] I am thus in agreement with Mr Snyckers SC, for the applicant, that the patent unlawfulness of the decisions suffices, in and of itself, to satisfy the requirement of justice and equity under section 172(1)(b).

[137] The decision by the Minister to substitute what is in effect a structural mandamus in the order with a decision that stands in direct circumvention of such structural mandamus is obviously in conflict with the terms of the judgment.

[138] This brings me to the consideration of whether the remedial provisions of section 172(1)(b) can be invoked on these facts .

Can section 172(1)(b) be competently invoked?

[139] Section 172 (1) of the Constitution reads as follows in relevant part:

"**172. Powers of courts in constitutional matters**

(1.) When deciding a constitutional matter within its power, a court

a. must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

b. may make any order that is just and equitable …"

[140] Thus, provided there is a constitutional issue involved in the determination of the matter at hand, section 172 remedial power is available to an applicant for relief. The third respondent argues that there is not such an issue at stake. This is akin to the taking of an exception.

[141] The third respondent argues further that, even if it is accepted that there is a constitutional issue at stake in the matter, section 172(1)(b) does not empower

this court to grant the remedial relief in the form of the suspensive order sought because the constitutional matter in question must involve a declaration of constitutional invalidity.

[142] Thus, in sum, the argument of the third respondent is that the case is not a constitutional matter and that section 172(1) remedial powers cannot be invoked for this reason and in any event these remedial powers can only be invoked in the context of a declaration of inconsistency with the Constitution.

[143] As to the question of whether a constitutional issue is at stake, The Constitutional Court in *Jiba* stated that "for a constitutional issue to arise the claim advanced must require the consideration and application of some constitutional rule or principle in the process of deciding the matter.[17] "

[144] The decisions are manifestly against the purpose of the judgment of Opperman J. The reconsideration of the margin was patently meant to be one which allowed for finality and clarity in the sector.

[145] The judgment considered what the position interim to this finality should be and stated that the least disruptive interim position would be to maintain the status quo being the industry being left to market forces and negotiation.

[146] Properly construed, the judgment means that pending the final determination of the position a court ordered interim position will prevail.

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[17] *General Council of the Bar of South Africa v Jiba [*2019] ZACC 23; 2019 JDR 1194 (CC); 2019 (8) BCLR 919 (CC) at para 38.

[147] In *EFF v Gordhan* [18]the Constitutional Court held that courts have a general power to suspend administrative action in constitutional matters and that such power is sourced in section 172(1)(b) of the Constitution.

[148] As to the question of whether the issue must involve a declaration of invalidity, this issue was comprehensively addressed by the Constitutional Court in *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another*[19], where it was held that the Court's power to make a just and equitable order within its jurisdiction did not depend on first declaring law or conduct invalid or even on the dispute hinging on constitutional invalidity.

[149] Moseneke DCJ writing for the majority had the following to say on this issue:

> "It is clear that section 172(1)(b) confers wide remedial powers on a competent court adjudicating a constitutional matter. The remedial power envisaged in section 172(1)(b) is not only available when a court makes an order of constitutional invalidity of a law or conduct under section 172(1)(a). A just and equitable order may be made even in instances where the outcome of a constitutional dispute does not hinge on constitutional invalidity of legislation or conduct. This ample and flexible remedial jurisdiction in constitutional disputes permits a court to forge an order that would place substance above mere form by identifying the actual underlying dispute between the parties and

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[18] *Economic Freedom Fighters v Gordhan and Others; Public Protector and Another v Gordhan and Others* (CCT 232/19; CCT 233/19) [2020] ZACC 10; 2020 (8) BCLR 916 (CC); 2020 (6) SA 325 (CC) (29 May 2020) at para 114

[19] *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC).

by requiring the parties to take steps directed at resolving the dispute in a manner consistent with constitutional requirements."[20]

[150] On the application of these principles, it is clear that the constitutional authority of the judiciary is at issue. Thus, section 172(1)(b) is properly invoked.

[151] Thus, the argument that the applicant has not established a cause of action is rejected. It is also accepted that the mere fact of the non-compliance in the circumstances serves to establish that the suspension is just and fair.

[152] But, even if this were not the case, an evaluation of what is just and fair on the facts of this case, regardless of the inherent unlawfulness for breach of the order must also clearly favour the applicant. For the sake of completeness, I turn to this separate evaluation.

[153] It is clear that, even if the applicant had sought to interdict the implementation of the decisions, which would have been an unnecessarily cumbersome and less direct approach, the applicant would have succeeded. A consideration of the balance of convenience would have served to keep the court-ordered interim position in place pending in this context pending the review.

[154] To my mind, considerations of justice and fairness in the weighing up of the considerations in both matters would result in similar outcomes.

[155] The assertion on behalf of the third respondent that the applicant has sought, by way of resort to suspension, to obtain a less rigorous evaluation of justice and fairness is without any merit.

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[20] Id at para 97.

[156] A determination of a just and equitable order, of necessity, requires a careful consideration of the interests of parties on both sides of the litigation[21].

[157] The oil companies raise that the industry at large is based on long standing and carefully crafted commercial relationships. There are, they say, back-to-back agreements that sit like dominoes behind the relationships with the retailers.

[158] This government intervention which has come suddenly and with no consultation and no warning puts these relationships in jeopardy. This, the applicants argue, has the potential to bring about immediate closures of retail businesses. This, they say is especially true of the more marginal retailers who are being managed by many of the oil-companies on the basis of the extending of loan finance and other support structures which are designed to allow for their long-term viability.

[159] If these symbiotic commercial structures are to be dismantled, this will also have a knock-on effect on the relationships which the retailers have with others – for example persons who run convenience stores on the sites.

[160] The interim feature of the relief is a further problem for the industry. It stands to reason that the suspension or cancellation of these pivotal relationships in this sector will make it impossible for projections and business policies to be set along the fuel chain.

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[21] *Hoërskool Ermelo* - above n 10 supra at para 96.

[161] This has negative implications for business confidence and foreign investment in this sector.

[162] The uncertainty that this brings is prejudicial to all parties, including the retailers. Recall, the warning of IPSR when the RAS was considered in the first instance to the effect that the likely result of the imposition of a margin which takes from the owners will be a raising of the cost of the use of the services for the retailers.

[163] The point made by the applicant is that these leases, supply contracts, and service contracts which are currently in place as a natural incident of market forces serve to balance risk and return.

[164] A renegotiation of these contracts would be costly and time consuming for all parties. The scope for legal disputes to arise is wide.

[165] The applicant makes a compelling case to the effect that the disruption to the retailer industry will hit retailers who may be operating on slim profit margins hardest. Closures of retail sites will lead to significant job losses across the value chain.

[166] These sites often serve as economic and social hubs in their communities. This is particularly relevant in rural areas. The closure of these sites would reduce local economic activity and create insecurity in marginal areas.

[167] The applicants raise that many marginal sites are operated by historically disadvantaged individuals and if these decisions are not suspended this will affect the drive towards economic empowerment.

[168] The lack of certainty in such a vital sector which is dominated by international companies has the potential to deter investment across the board and not only in the fuel industry.

[169] Furthermore, on a prima facie assessment of the review grounds, there are substantial prospects of success for the applicant with respect to the Part B relief.

Urgency

[170] The weighing up of the justice and equity consideration reveal also that these decisions must be suspended urgently. The rule of law prejudice also dictates that the matter be treated as one of urgency.

Costs

[171] To my mind there is no reason why the costs should not follow the result. The only respondent that joined issue with the applicant was the third respondent. The other respondents sensibly did not put in opposition.

[172] I agree with Mr Snyckers that the matter is sufficiently complex and important to warrant a cost award on scale C.

Order

[173] In the circumstances, I grant the following order.

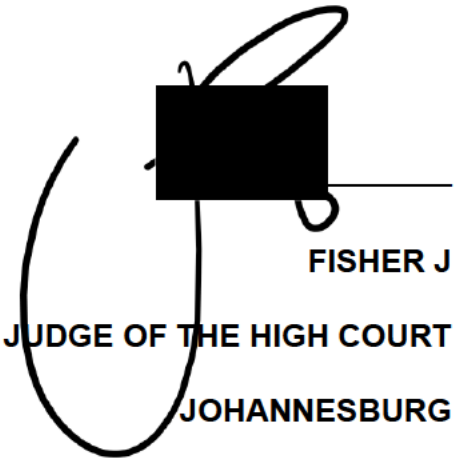
1. The applicant's non-compliance with the Uniform Rules of Court relating to forms, service and time periods is condoned, and this application is dealt with as a matter of urgency under Uniform Rule 6(12).

2. Pending the final adjudication of the relief that will be sought in Part B of this application:

2.1. the decision by the Minister of Mineral and Petroleum Resources ("the Minister") on 4 November 2024 to ringfence the Entrepreneurial Compensation ("EC") as implemented and calculated in the current Regulatory Accounting System ("RAS") model and Benchmark Service Station ("BSS") matrix as in interim measure, pending the review of the RAS ("the 4 November 2024 decision") is suspended; and

2.2. the decision by the Minister on 22 August 2024 that the EC component within the retail margin should be ring-fenced exclusively for retailers as calculated in the current RAS model and BSS matrix as an interim measure, pending the full review of RAS ("the 22 August 2024 decision") is suspended.

3. The costs of Part A of this application are to be paid by the third respondent, such costs to be determined on scale C and to include the costs of two counsel where employed.



FISHER J

JUDGE OF THE HIGH COURT

JOHANNESBURG

This Judgment was handed down electronically by circulation to the parties/their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be 21 March 2025.

Heard:	24 February 2025
Delivered:	21 March 2025

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