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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: B430/2024

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

(2) OF INTEREST TO THE JUDGES: ~~YES~~/NO

(3) REVISED: YES/~~NO~~

DATE: 19 August 2025

SIGNATURE:

In the matter between:

**THE TRUSTEES FOR THE TIME BEING OF
AGAPI TRUST (243/2008) being:
JOHN BASIL ARSENIU NO
HELEN LUCIA ARSENIU NO and
LAURINE SAHD NO**

First Applicant

BIZBETH TRADING 30 CC

Second Applicant

and

THE MINISTER, MINERAL RESOURCES AND ENERGY

First Respondent

THE CONTROLLER OF PETROLEUM PRODUCTS

Second Respondent

CASMATH TRADING (PTY) LTD

Third Respondent

GRANDWAY PROPERTY INVESTMENTS CC

Fourth Respondent

JUDGMENT

CRUTCHFIELD J

[1] The applicants seek the review and setting aside of the decision of the first respondent, the Minister of Mineral Resources and Energy, in respect of a site licence and a retail licence for a commercial petrol station in the Eastern Cape. The first applicant is the Trustees for the time being of the Agapi Trust 243/2008) being: John Basil Arseniou NO, Helen Lucia Arseniou NO and Laurine Sahd NO. The second applicant is Bizbeth Trading 30 CC.

[2] The first respondent is the Minister of Mineral Resources and Energy and the second respondent is the Controller of Petroleum Products ("the Controller"). The first and second respondents do not participate in the proceedings. The third respondent is Casmath Trading (Pty) Ltd and the fourth respondent is Grandway Property Investments CC. The third and fourth respondents oppose the application.

[3] This is part B of the application. The applicants seek relief in terms of Part B in the following terms:

- a. That the decision of 12 February 2024 of the first respondent in the appeal by the third respondent and the fourth respondent be reviewed and set aside;
- b. That the decision of the second respondent, dated 31 July 2023, rejecting the retail and site licence applications of the third and fourth respondents be reinstated forthwith;
- c. That any site and retail licence certificates issued by the first respondent in favour of the third and fourth respondents be declared null and void and be returned to the first respondent and cancelled;
- d. That the first, third and fourth respondents jointly and severally pay the costs of the application on the scale as between attorney and client. The reason for the costs order sought against the Minister is that, according to the applicants, the latter was delinquent in overruling the Controller.

[4] The application concerns the Minister's decision to overrule a decision of the Controller denying the issue of petrol and retail licences under the Petroleum Product Act, 1977 (as amended) ("the Act"), and the Minister's instruction to the Controller to issue the licences. The review is based on the principle of legality.

[5] The facts relevant to this application, briefly stated, are set out herein below.

[6] The Controller initially, on or about 31 July 2023, refused the third and fourth respondents' applications for a site and a retail licence in respect of a commercial petrol station to be established in the Eastern Cape town of Komani. Pursuant thereto, the third and fourth respondents proceeded with an internal appeal in terms of s12A(1) of the Act, to the Minister. The latter upheld the appeal and ordered that the Controller grant the licences in favour of the third and the fourth respondents.

[7] The applicants bring this review application in terms of Part B against the ministerial proceedings.

[8] The applicants contend that the Minister's decision dated 12 February 2024, is both legally and factually wrong and insupportable, grossly irreconcilable with the empowering Act as well as baseless and irrational, such that the *bona fides* of the Minister is questionable and the decision stands to be set aside.

[9] The third and fourth respondents applied previously, during 2016, for site and retail licences. The Controller rejected the applications. Thereafter, the Minister, some two years after the time period relevant to an appeal, interceded on behalf of the third and fourth respondents setting aside the Controller's decision, directed the Controller to reconsider his decision. The Controller, having done so, again rejected the third and fourth respondents' applications.

[10] The third and fourth respondents appealed again, and the Minister upheld the appeal.

[11] Thus, this is the third instance of the Minister overruling the Controller's decision. In respect of the previous instance, legal proceedings in the Eastern Cape to review and set aside the Minister's decision were granted upon the third and fourth respondents withdrawing their opposition to those proceedings.

[12] The applicants' opposition to the granting of the site and retail licences ("the licences") relevant to this application, in favour of the third and fourth respondent, is that there are thirteen existing petrol stations servicing an approximately 1 kilometre radius in the town of Komani, Eastern Cape. All major fuel brands are represented within the existing 13 service stations. The grant of the licences in favour of the third and fourth respondents will, according to the applicants, result in the bankruptcy of the applicants' business, a result that is prohibited by the Act.

[13] The Controller's office in the local area undertook a site inspection on 3 November 2022, after which it submitted a site visit report.

[14] The relevant site is described as Erf 1[...], Queenstown, Enoch Mgijima Local Municipality, Province of Eastern Cape and is situated on vacant land on the eastbound side along Komani Street, cornering with Bells Street. It is apparent from the site visit report that the inspector was the Regional Director of the Eastern Cape, Mr Makhosini Mngomezulu, from the office of the second respondent. Mr Mngomezulu ("the inspector"), inspected the site, interviewed the applicants and conducted a competitor analysis in order to assess the need as well as the economic viability of the proposed site in terms of the third and fourth respondents' applications ("the proposed site").

[15] The inspector inspected the existing sites, interviewed the relevant contact persons in respect of those existing sites as well as the contact persons in respect of the proposed site, considered the volumes pumped by each existing sites and the capacity of those sites.

[16] The site visit report lists the criteria and factors considered by the inspector in conducting the site visit and in reaching the outcome of the site visit, as the following: the number of service stations and their proximity to the proposed site; the distance

between the proposed site and the existing licenced filling stations (competitors) to the proposed site; volumes pumped by the competitor sites (period to be determined, growth or declining volumes); road infrastructure, feeder roads, access points to the proposed sites; serviced and sub-serviced traffic flows; municipal plans for new or proposed developments (residential, commercial) or developer confirmation of recent realised developments, or proposed timeline of developments; new markets that the proposed site is targeting; attraction points - points of public interest in the surrounding area linked to the proposed location that attracts traffic; traffic counts supplied by the applicant; business plan from the applicant; design capacity of existing sites (could not obtain confirmation from oil companies in time for the report); expert report - feasibility studies; all other mandatory requirements set out in the Act and Regulations.

[17] The inspector identified eleven existing competitors to the proposed site, the closest being approximately 300 metres from the proposed site, also on Komani Road, westbound. The second competitor is approximately 400 metres from the proposed site, also along Komani Road. The remaining existing competitors identified by the inspector are on roads surrounding Komani Road within an approximately one-kilometre radius of the proposed site. According to the site visit report, there are two existing service stations, both on Komani Road and on the same side of Komani Road as the proposed site, that are in direct competition to the proposed site.

[18] The inspector inspected the eleven competing sites and noted in respect of each location, the type of products offered, the operating hours, staff compliment, verified volumes pumped for 2020, 2021 and 2022, the carrying capacity of each site, the number of pumps and nozzles offered and available at each site, *inter alia*.

[19] Having undertaken what appears to be a comprehensive exercise in considering the location of the proposed site, the road network in the geographical area and the existing fuel stations in the location, the inspector concluded that there is no need for the proposed fuel station at the proposed site.

[20] The inspector also notes that the establishment of the proposed site will impact the existing service stations as at least seven of the existing service stations are all less than 1 kilometre from the proposed site. Accordingly, the outcome of the Controller's decision is that there is no need for the proposed site and that the proposed site together with the existing sites will not be economically viable.

[21] The applicants allege that the granting of the licences in favour of the third and fourth respondents will, in effect, destroy the viability of their existing fuel station, Bizbeth Trading 30 CC trading as Komani Station, located at [...] K[...] Street (eastbound), approximately 300 metres from the proposed site.

[22] The inspector notes that the applicants' site targets the Queenstown market and the shopping mall alongside which the applicants' existing site is situated.

[23] The decision of the Minister dated 12 February 2024, determined that the Controller, in declining the licences, failed to discharge his duty to verify the information submitted to the Controller as required. Other than the expert reports submitted by the third and fourth respondents, referred to specifically by the Minister, it is not apparent what information the Minister alleges the Controller did not verify.

[24] Furthermore, the Minister alleges that the Controller placed "substantial emphasis" on the effect on the two existing service stations identified as direct competitors to the proposed site, and that the report has a narrow focus, without consideration of crucial factors such as new or proposed developments, expert reports, feasibility reports, traffic flows and accessibility of the site. The report compiled by Urban-Eco Development Economists, submitted by the applicants for the licence, being the third and fourth respondents herein, reflects an increase in the population growth in the area. The Controller, according to the Minister, failed to take such factors into account, including new and proposed commercial and residential developments, growth in migration, new and anticipated developments, and the proposed site and upward trajectory of demand. According to the Minister, the site visit report has a narrow focus and the fact that the granting of the licences in favour of the third and fourth respondents might create some hardship to existing service

stations is not decisive of the issue and stands to be weighed against all relevant considerations.

[25] The Minister concludes that it is apparent from the information available, that all other objectives in s2B(2) of the Act have been satisfied and that there is a need for the proposed site and the retailing business in respect of the proposed site will be economically viable. In addition, the Minister relies on the transformation objectives referred to in s2C of the Act, employment opportunities that will be created by the proposed site as well as opportunities for the development of small business and access to affordable petroleum products to the community to be served by the proposed site.

[26] Accordingly, the Minister set aside the Controller's decision refusing the third and fourth respondents' applications for the licences, granted the licences and instructed the Controller to issue the licences in favour of the third and fourth respondents, subject to compliance with Regulations 14 and 19.

[27] The Minister's decision is notwithstanding that s12 of the Act does not provide for the Minister on appeal to issue a licence or replace the decision of the Controller as the statutory functionary allocated in terms of the Act.

[28] The third and fourth respondents oppose Part B of the application on the grounds that the applicants' criticisms of the Minister's decision are without any basis, without any facts substantiating the allegations and that the applicants do not set out any grounds for the review, other than saying that the Minister's decision is wrong. A review is not concerned with the correctness or otherwise of a decision but with the process by which the decision is reached.

[29] The Act together with the Regulations prescribe the requirements and criteria for the issue of a site and retail licence by the Controller. The latter is the functionary enjoined under the Act to issue the licences.

[30] The Regulations prescribe how applications stand to be evaluated by the Controller. Section 2B of the Act provides that the Controller must issue licences in

accordance with the provisions of the Act. In considering the issue of any licences, the Controller shall give effect to the provisions of s2C and the five objectives listed thereunder, including the transformation of the petroleum industry and the advancement of historically disadvantaged people.

[31] The Controller, in granting a site licence, must verify that the information and documents placed before the Controller are true and correct and that notice of the application has been published. The Controller must verify the information and that the criteria prescribed under the Act are met. The Controller must verify in terms of Regulation 6 that there is a need for the granting of the licence and that the grant will promote the objectives aforementioned.

[32] Regulation 18 in respect of the evaluation of a retail licence is the same. The Controller must verify that the retail business will be economically viable and that the retail operation will promote the objectives aforementioned, in compliance with the Act.

[33] Accordingly, the Controller must verify in respect of a site licence, that there is a need for that site licence, and in respect of the retail operation, that it is economically viable. In respect of both licences, the Controller must verify that they will promote the licencing objectives. Moreover, it is the duty of the applicant for the licences, being the third and fourth respondents, to establish the criteria of a verifiable need for the proposed licence and the economic sustainability thereof.

[34] The Act and the Regulations set out the criteria and the objectives to be met in order for the granting of a licence. The respondents argued that the Minister and the Controller have a discretion in respect of the consideration of the requirements and the granting of the licences. The respondents referred me to a number of cases where the functionary is required in terms of the empowering statute, to "satisfy" himself or herself. That, however, is not the case under s2B of the Act. The

Controller in terms thereof, is required to verify the information that is placed before him and to verify that the criteria under the Act are met prior to granting a licence.¹

[35] There is no reference to or use of the words "is satisfied" in respect of the Controller's functions in accessing and granting or denying the licences. Instead, the words used are that the Controller must "verify" that the criteria under the Act are met. No function by a functionary can however be untrammelled, all must be lawfully, reasonable and procedurally carried out.² Whilst the court in *The Trustees of the Simcha Trust v Da Crus & Others; City of Cape Town v Da Crus & Others* dealt with a discretion and the exercise thereof, the statements therein that a discretion not be untrammelled and all administrative action must be lawfully, reasonably and procedurally fair, applies equally to the circumstances before me.

[36] The respondents contend that the appeal before the Minister is a wide appeal, the Minister considers the appeal *de novo* and the Minister exercises the same discretion as the Controller. Whilst the Minister in terms of s12 can have regard to new information placed before him, there is no indication that such new information or documents were in fact placed before the Minister on behalf of the third and fourth respondents in this matter.

[37] The third and fourth respondents allege, not incorrectly, that the questions raised before me are whether the Minister exercised his discretion, having considered the relevant factors required, and whether the decision taken by the Minister was reasonable in the circumstances.

[38] These questions stand to be considered in the context of it being the third and fourth respondents, being the applicants for the relevant licences, which must demonstrate their entitlement to the licences.

¹ *Nine Ninety-Nine Projects (Pty) Ltd & Another v Minister of Energy & Others* (A543/12) [2014] ZAGPPHC335.

² *The Trustees of the Simcha Trust v Da Crus & Others; City of Cape Town v Da Crus & Others* 2019 (3) SA 78 (CC) at [76].

[39] The applicants, in dealing with the decision of the Minister and the legal basis as to why that decision cannot be upheld, deal with the material paragraphs of the Minister's reasons in the founding affidavit and in the supplementary affidavit deposed to after the record became available.

[40] The third and fourth respondents' averments that the applicants do not set out the grounds on which the Minister's decision is reviewable, is not correct and cannot be supported.

[41] Whilst the applicants may not use the strict language of a review, the content of their criticism of the relevant paragraphs of the Minister's decision and the reasons therefor, is sufficient to grant a review of decision.

[42] It is so that the Controller considered and relied on the proximity of the proposed site to the existing sites, particularly the proximity to the applicants' site, situated some 300 metres from the proposed site on the same side of Komani Road as the proposed site, and one other existing site. However, proximity was not the only consideration brought to bear by the Controller in reaching the decision.

[43] The Controller, in addition, undertook a competitor analysis and considered the need in the marketplace for the proposed site. It stands to reason that the proximity of the proposed site to the various existing sites identified by the Controller is a relevant factor in the analysis of the need in the marketplace for the proposed site.

[44] The Controller, however, considered, in addition, the location of the proposed site, the environment surrounding the proposed site, including that there is a shopping mall next to the proposed site, the road network in the area and other filling stations in the geographical area. The Controller concluded that having taken the various factors into account, there was no need for the proposed site at the proposed location.

[45] It is noteworthy that in undertaking the competitive analysis of the eleven existing service stations in the one kilometre proximity to the proposed site, the

existing service stations identified by the Controller, the latter noted the volumes pumped by each existing service station, the carrying capacity, products sold, the number of pumps and nozzles offered by each station, the hours that each service station operates and the number of employees employed by each service station.

[46] According to the applicants, the industry uses a litreage of 350 000 litres per month as a sustainability measure. The Minister uses a lower monthly litreage. In the light of the 350 000 litres per month sustainability measure utilised by the industry, and a consideration of the litres pumped by the various existing sites referred to and analysed in the site visit report, demonstrate that the marketplace does not need the proposed site and that the proposed site, if permitted, as well as the existing sites cannot together be economically viable in the light of the litres pumped. In the circumstances, the applicants contend that the third and fourth respondents' intention is to corner the entire market in the area and bring about the demise of the applicants' site, an outcome that cannot be permitted under the Act.

[47] Furthermore, the Controller concludes that the proposed site will negatively impact the existing sites. This is due to the existing number of service stations within a limited radius of less than 1 kilometre from the proposed site. It is evident from the above-mentioned that whilst proximity is a material consideration in this matter as a result of the facts on the ground, so to speak, it is not the sole factor upon which the Controller relied, and in the context of the facts set out above, the issue of proximity was not substantially emphasised or overemphasised by the Controller as stated by the Minister. Given the content of the site visit report, including the competitive analysis of the material factors in respect of each of the existing sites, the site report does not focus solely on proximity as stated by the Minister.

[48] Insofar as the Minister criticises the report for being "narrow" and having a narrow focus, that criticism is unjustifiable and unreasonable regard being had to the facts aforementioned. The Minister fails to articulate what other "considerations" or "crucial factors" ought to have been considered by the Controller but were not so considered.

[49] In respect of the Minister's reliance on the third and fourth respondents' expert report, the report of Urban-Echo, the site visit report states that the expert reports of the applicants (being the third and fourth respondents herein), and the feasibility studies were considered. The inspector states in terms of the criteria and facts considered in the site visit and application, that the expert report - feasibility studies were taken into account.

[50] Furthermore, the report of Urban-Echo does not reflect evidence, facts, of approved developments, be they commercial or residential, that are in the process of development. Nor does the report reflect evidence of growth in the population or the number of households.

[51] Furthermore, there is no requirement that the Controller must deal paragraph by paragraph with the content of the expert reports. The Controller is required to deal with relevant fact-based data, not speculative considerations as set out in the report of Urban-Echo. The expert report does not contain and is not premised on actual fact-based data.

[52] Insofar as the site visit report refers to the existing local population and those making use of the shopping centre situated alongside the proposed site, the Controller found that the market is adequately serviced by the existing sites.

[53] The Minister does not articulate the alleged "information available" demonstrating that the objectives of s2B(2) of the Act have been satisfied.

[54] In respect of the transformation objectives referred to by the Minister with reference to the case of *Somai v National Minister: Department of Energy*³, relied on by the Minister, there is no requirement that the licence be granted solely because an applicant is historically disadvantaged.

[55] The provisions for the advancement of previously disadvantaged South Africans are to be given effect by the Controller in considering the licence

³ *Somai v National Minister: Department of Energy* 2019 JDR 0291 (KZD)

applications in terms of the Act, the requirements in respect of which are set out in s2B(2). Accordingly, the status of an applicant as previously disadvantaged is one factor for consideration in a licence application and not the sole factor or even the overriding factor in the determination as the Minister contends.

[56] In circumstances where the Controller determines that there is no need for the proposed site and that the proposed site together with the existing sites will not all be economically viable, there is no justifiable basis to award the licences on the ground that the applicant for the licence is a historically disadvantaged person.

[57] As to the Minister's statement that the licencing of the proposed site will create employment opportunities, the Minister does not take into account the conclusion of the Controller that the proposed site will negatively impact the existing sites, be it that of the applicant or any other. It is probable that such a negative impact will result in the loss of job opportunities to employees employed at those existing sites, a fact that the Minister does not consider. In the circumstances, the Minister's reliance on the proposed job opportunities to be created, is misconceived in that it does not take into account the negative effect on the existing employees employed at the existing sites.

[58] It is noteworthy that although the Minister determined that the Controller reached a decision in the absence of the relevant investigations, the Minister himself relied on the same material as was before the Controller to reverse the decision of the Controller and instruct the Controller to issue the licences.

[59] In the circumstances set out above, I am of the view that the proceedings by the Controller took into account and considered the relevant factors and circumstances necessary to reach a decision. The Controller's decision relates directly, reasonably and rationally to the facts on the ground, so to speak, before him.

[60] There is no justifiable basis for the invention of the Minister in respect of the decision of the Controller and the reasons for that decision.

[61] Furthermore, the memorandum and the reasons for the Minister's decision are incorrect in various respects including that the Controller failed to consider the third and fourth respondents' expert reports.

[62] Moreover, whilst the Minister criticises the site visit report, the Minister does not analyse and apply the relevant facts and necessary criteria itself justifying the instruction to the Controller to grant the licences in terms of the appeal.

[63] Irregularities by the Controller, actual or alleged, do not justify the granting of the licences in terms of the Minister's instruction to the Controller, on appeal. The Minister is obliged to justify the granting of the licences in terms of the Act and its requirements and criteria. Moreover, the Minister is not authorised in terms of s12 to grant licences, only the Controller can do so. Whilst the Minister considers an appeal *de novo* including fresh information, the same criteria that govern the consideration of the appeal govern the grant of licences by the Controller and ought to have been given consideration by the Minister. The latter, the Minister, does not demonstrate the criteria in terms of which the Minister determined that the Controller should grant the licences.

[64] There is no justification by the Minister for the instruction to the Controller to grant the licences. Nor are there grounds set out by the Minister for the instruction to the Controller. The conditions for the issue of the licences were not met, the Minister had no reason, no basis and no justification to order that the Controller issue the licences. There is nothing by the Minister that reflects that the criteria in terms of the Act were met by the decision of the Minister.

[65] The question before me according to the applicants, is whether the Minister or the body under review, being the Minister's decision, was legally permitted to take the decision to order the Controller to issue the licences in the manner in which the Minister did so. The answer is no. This is because the licencing criteria in terms of the Act are not considered by the Minister.⁴ In *Esau & Others v Minister of Cooperative Governance and Traditional Affairs & Others*, the SCA relied on *R v*

⁴ *Esau & Others v Minister of Cooperative Governance and Traditional Affairs & Others* 2021 (3) SA 593 (SCA) at para [7].

Somerset County Council, ex parte Fewings & Others.⁵ The SCA quoted "the only question for the Judges (is) whether the decision taken by the body under review was one which it was legally permitted to take in the way that it did". The answer in the context of this application, is no.

[66] In the circumstances, I intend to set aside the decision of the Minister. As to the remedy, special circumstances are required in order for this Court to decline to send the matter back to the Minister for reconsideration.

[67] This matter has travelled back and forth between the Controller and the Minister on two previous occasions, with the Minister interceding consistently on behalf of the third and fourth respondents without justification.

[68] In the circumstances it is probable that if I remit the matter back to the Minister for reconsideration, the current position will simply be repeated with no finality being brought to the issues or to the parties and additional legal costs being incurred. In the circumstances, I am minded to substitute the Minister's decision with that of this Court and to grant an order in terms of the applicants' notice of motion.

[69] In respect of the costs of the application, there is no reason why they should not follow the order on the merits. As to the scale of costs, the matter is complex and of importance to the parties. In the circumstances, I intend to grant costs on scale C.

[70] One further issue stands to be addressed and that is the delay in delivering the judgment. I regret the delay and I apologise to the litigants in respect of that delay. Regrettably, I was faced with an untenable workload during the week of 17 February 2025. As a result, it was not possible to deliver this judgment within the three-month period considered best practice for the delivery of judgments.

[71] In the circumstances, I grant the following order:

⁵ *R v Somerset County Council, ex parte Fewings & Others* [1995] 1 ER 513 (QB) at 515 D-G.

1. The decision of 12 February 2024 of the first respondent (the Minister of Mineral Resources and Energy) in the appeal by the third and fourth respondents, is reviewed and set aside.
2. The decision of the Controller of Petroleum Products (the second respondent) dated 31 July 2023, to reject the retail and site licence applications of the third and fourth respondents are reinstated forthwith.
3. Consequent on the above, any site and retail licence certificates issued by the first respondent to the third and fourth respondents are declared to be null and void and are to be returned to the first respondent and cancelled.
applications of the third and fourth respondents are reinstated forthwith.
3. Consequent on the above, any site and retail licence certificates issued by the first respondent to the third and fourth respondents are declared to be null and void and are to be returned to the first respondent and cancelled.
4. The first, third and fourth respondents, jointly and severally, the one paying the other to be absolved are ordered to pay the applicants' costs of the application on scale C.
5. The costs referred to above include the reserved costs of the interdict proceedings before Mooki J and delivered in terms of Part A of this application.

I hand down the judgment.

CRUTCHFIELD J
JUDGE OF THE HIGH COURT
PRETORIA

For the Applicant:

Adv BG Savvas instructed by MKA
Attorneys.

For the Third and Fourth Respondents: Adv P Lazarus instructed by Kaplan
Blumberg Attorneys

Date of the hearing: 17 February 2025

Date of the judgment: 19 August 2025