IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO. 003211/2024

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: ***NO***
(2)	OF INTEREST TO OTHER JUDGES: ***NO***
(3)	REVISED.
(4)	Date: 20 April 2026
Signature: _[redacted]	

In the matter between:

FORSTER PATRICK MHLONGO	Applicant
And	
THE MINISTER, DEPARTMENT OF MINERAL RESOURCES AND ENERGY	First Respondent
THE CONTROLLER OF PETROLEUM PRODUCTS	Second Respondent
THE TRUSTEES FOR THE TIME BEING OF THE PETER NEVES TRUST, BEING PRICILLA FRANCIS	Joint Third Respondent

RAMSBOTTOM and CHRISTOPHER GILBERT NEVES N.N.O

JUDGMENT

NYATHI J

A. Introduction

[1] This is a Rule 53 review in which the Applicant seeks to review and set aside the Controller of Petroleum Products' decision to grant site and retail licences to the Third Respondent in terms of the Petroleum Products Act 120 of 1977 ("the PPA"). Before the merits could be reached, the Third Respondent raised a point *in limine* that the Applicant had failed to exhaust internal remedies prior to launching review proceedings, as contemplated in s 7(2) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), relying in particular on *Koyabe and Others v Minister for Home Affairs* 2010 (4) SA 327 (CC).

[2] The parties were agreed that the narrow issue I must determine at this stage is whether the review is premature for want of exhaustion of internal remedies or, if not exhausted, whether the Applicant should be exempted under s 7(2)(c) of PAJA.

B. Brief background

[3] The Controller approved the Third Respondent's fresh applications for a site and retail licence concerning a filling station at Masibekela, Mpumalanga. The Applicant, who operates a nearby station, had objected to the applications. After the objection was overruled, the Controller indicated that licences would be issued upon satisfaction of limited conditions.

[4] The Applicant lodged an internal appeal to the Minister in terms of s 12A of the PPA within the 60-day period. The appeal was not decided within 90 days, the period stipulated in regulation 33, whereafter the Applicant instituted review proceedings in this Court. These factual averments appear from the Applicant's heads of argument with reference to the indexed Rule 53 record.

C. The point in limine

The Third Respondent's case

[5] The Third Respondent contends that:

(i) an internal remedy—an appeal to the Minister under s 12A of the PPA—was available and has not been exhausted; and

(ii) the Constitutional Court in **Koyabe** held that litigants must ordinarily pursue such remedies before approaching a court; the mere lapse of an internal time period does not amount to "exhaustion".

The Applicant's stance

[6] The Applicant accepts that a section 12A appeal is an internal remedy but argues that:

(i) a timeous appeal was lodged;

(ii) despite regulation 33 prescribing a 90-day period for the Minister to decide appeals, no decision issued; and

(iii) the remedy proved ineffective and inadequate, warranting an exemption under section 7(2)(c) of PAJA. In the alternative, the Applicant contends that, on a proper reading of the PPA and regulations, the internal remedy had been exhausted once the Minister failed to decide within the prescribed period.

D. Legal framework

[7] Section 7(2) of PAJA provides that, subject to paragraph (c), no court shall review an administrative action unless any internal remedy provided for in any

other law has first been exhausted. Paragraph (c) empowers a court, **in exceptional circumstances and in the interests of justice**, to exempt a litigant from the obligation to exhaust internal remedies.

[8] In **Koyabe**, the Constitutional Court explained that the duty to exhaust internal remedies is not absolute; it "must not be used by administrators to frustrate efforts of an aggrieved person or to shield administrative action from judicial scrutiny". Courts consider the availability, effectiveness and adequacy of the internal remedy. Crucially, the Court held that the mere lapsing of the internal time-period does not by itself constitute exhaustion, nor does it automatically qualify as an exceptional circumstance—each case turns on its facts.

[9] The Supreme Court of Appeal has likewise emphasised that the enquiry is remedial and pragmatic. If the so-called "internal remedy" is not a true appeal or is otherwise ineffective or inadequate, it will not preclude access to court; conversely, where an effective internal remedy exists, courts must ordinarily insist on its use unless exemption is justified.

[10] Within the specific petroleum licensing regime, the PPA provides an appeal to the Minister (s 12A), which the Minister is obliged to decide with reasons within the period specified in the regulations (reg 33 prescribes 90 days).

E. Application to the facts

[11] It is common cause that an internal appeal under section 12A was lodged within the 60-day period. The dispute concerns the legal consequence of the Minister's inaction beyond 90 days and whether, on these facts, the internal remedy remained *effective and adequate*.

[12] I accept that **Koyabe** cautions that the mere lapse of an internal period does not equal exhaustion, and that litigants cannot bypass internal procedures simply because time has passed. But Koyabe also instructs courts to interrogate effectiveness and adequacy: where an internal remedy is illusory in practice, or administration is supine such that the remedy cannot realistically provide timely redress, **exceptional circumstances** may arise to **exempt** the litigant.

[13] Three features persuade me that this is such a case:

(a) A timeous appeal plus prolonged administrative inaction contrary to the regulatory framework. The record shows that the Applicant lodged the appeal and that no decision issued within the 90-day period contemplated by regulation 33. That period is not a mere internal aspiration; it reflects a legislative judgment that appeals in this sector demand prompt resolution. The Minister's non-compliance rendered the remedy ineffective for the purpose it was designed to serve.

(b) Concrete prejudice from delay in a fast-moving commercial and regulatory setting. The papers show that the Controller's decision clears the way for an operational filling station with significant sunken costs, and that the dispute concerns **market entry** in a confined geographic area. Delay risks either entrenching an unlawful *status quo* (if the review ultimately succeeds) or stifling legitimate competition (if it does not). An internal appeal that is not decided with regulatory promptitude cannot give adequate redress.

(c) The purpose of the exhaustion rule. Exhaustion serves to allow the administration to correct its own errors and to promote administrative efficiency. Here, the Minister had the opportunity but failed to act timeously. To insist, now, that the Applicant remain in administrative limbo would convert exhaustion into a shield against judicial scrutiny—the very misuse cautioned against in **Koyabe**.

[14] I therefore find that, although the internal appeal existed and was invoked, the internal remedy was **ineffective and inadequate** in the particular circumstances. These constitute exceptional circumstances justifying an exemption under section 7(2)(c) of PAJA.

F. Conclusion on the point in limine

[15] The point *in limine* fails. Either the Applicant exhausted the internal remedy to the extent reasonably possible, or—more precisely—the Applicant is **exempted** from further pursuit of an **ineffective** remedy under section 7(2)(c). The review is therefore properly before this Court.

G. Introduction to the merits

[16] As already stated above, this is an opposed review in terms of Rule 53. The Applicant, **Mr Forster Patrick Mhlongo**, seeks to review and set aside administrative decisions under the Petroleum Products Act 120 of 1977 ("PPA"), taken by or under the authority of the **Controller of Petroleum Products** (the Second Respondent), which culminated in the grant of **site** and **retail** licences to the **Peter Neves Trust** (the Third Respondent) for a filling station at Masibekela, Mpumalanga.

[17] The Third Respondent opposes, contending that the review is misconceived, that it amounts to an attempt to revisit matters already dealt with in urgent motion proceedings, and that the record reveals no basis to interfere with the Controller's decisions. The Third Respondent further raises process-related objections (including allegations of satellite skirmishes and the Applicant's litigation conduct).

[18] The parties agreed that the Court should determine the **review on the merits**, **without** deciding questions of **urgency**. I proceed accordingly.

H. Procedural history and the Pretoria urgent interdict

[19] Before this review, the Applicant brought an urgent application to interdict utilisation of the Trust's licences pending internal appeal and review. On 1 September 2023, DAVIS J dismissed the application for interim relief, holding *inter alia* that the Applicant had not shown a *prima facie* right nor irreparable harm on the motion record then before him. The judgment did not determine the merits of any review; it refused interim protection pending further processes.

[20] It is common cause that the urgent court judgment stands; but it does not bar adjudication of a Rule 53 review on the administrative record. I accordingly treat it as relevant background and not as *res judicata* of the review grounds.

I. Statutory and regulatory framework (abridged)

[21] Under section 2A of the PPA, the Controller issues site and retail licences. Sections 2B and 2C set the licensing objectives and require that decisions give effect to transformation and sustainability considerations. The Regulations

specify evaluation duties: for site licences, the Controller must verify the application, publication and that “there is a need for a site” and that the site “will promote the licensing objectives” (Reg 6); for retail licences, the Controller must verify publication and be satisfied that the business is economically viable and that it will promote the statutory objectives, including that the net present value (NPV) is correctly calculated and positive (Reg 18). These were summarised in the parties’ heads.

[22] The Applicant’s heads emphasise that the two licences are inter-dependent, must be evaluated in tandem, and that the Controller’s function is constrained by the empowering provisions and the Regulations; in brief, **need/sustainability** and **economic viability** are the core factual jurisdictional criteria. [emphasis added].

J. The record and the parties’ submissions

[23] The Applicant’s central attack arises from the Rule 53 record, which he says shows material misdirections and factual errors by the decision-makers:

23.1 A Site Visit Report recorded “There are no competitor filing stations within approximately 15 km radius”, whilst on any version the Applicant’s station is ±1.7 km away. The Applicant contends this is false, repeated in internal memoranda, and infected the decision-making process.

23.2 The Applicant further submits the record fails to demonstrate a rational assessment of need and viability against the licensing objectives, as required by the Regulations; bare assertions and conclusory statements are said to predominate.

[24] The Third Respondent argues, in essence, that:

24.1 The Applicant's conduct has been dilatory and opportunistic; his interim bid was refused, and he now attempts to re-argue the merits through review.

24.2 The licences were lawfully granted, publication occurred, objections were dealt with, and the Controller considered the Applicant's proximity and business. The attack amounts to disagreement with the outcome, not a reviewable irregularity.

24.3 Relief should be refused and punitive costs considered.

[25] Both parties traversed broader themes of ***lis pendens/*****forum shopping** in relation to proceedings in Mpumalanga and Gauteng. For present purposes, those contentions go to costs and abuse; they do not displace the Court's duty

to decide the lawfulness or otherwise of the impugned administrative action on the record.

K. Issues

[26] The review raises four principal questions:

(i) Was the Controller's decision materially influenced by errors of fact apparent on the record (notably, the Site Visit Report's "no competitor within 15 km")?
(ii) Did the decision-makers properly apply the licensing criteria in ss 2B–2C and Regs 6 & 18 to the facts placed before them?
(iii) What is the legal effect of the Pretoria urgent judgment on this review?
(iv) Remedy and costs.

L. Analysis

(1) The Pretoria urgent court judgment

[27] The urgent interdict was refused because the Applicant failed to meet the interim interdict thresholds on the motion material then before the Court. DAVIS J

explicitly assessed the *Setlogelo*[1] factors and concluded that a prima facie right and apprehension of irreparable harm were not made out, *inter alia* noting the Trust's disclosure of the Applicant's business and the absence of quantified harm to the Applicant's operations. That outcome does not determine whether the administrative decisions, on their record, withstand review. I therefore treat the earlier judgment as neutral to the review merits.

(2) Material error of fact / failure to consider a relevant consideration

[28] A material error of fact that is objectively verifiable and that played a role in the decision-making process is a recognised ground of review under the umbrella of lawfulness/rationality (and under PAJA[2] where applicable). The Site Visit Report forms part of the Controller's evaluative corpus. On the Applicant's case (not persuasively rebutted on the papers before me), it states there are no competitor stations within ~15 km, whereas the Applicant's station lies about 1.7 km away. The Applicant has consistently maintained this distance; and on any common-sense view, the existence of an adjacent competitor is highly relevant to need and viability.

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[1] 1914 AD 221.

[2] Promotion of Administrative Justice Act, Act 3 of 2000 ("PAJA").

[29] The Third Respondent answers that the Controller was aware of the Applicant's business, and that the Applicant himself placed nothing concrete before Davis J at the urgent stage. But this review turns on the Rule 53 record, not on the Applicant's prior affidavit *lacunae*; and if the record contains an express, repeated error denying the existence of any competitor within 15 km, and that error is not obviously corrected elsewhere in the reasons chain, the risk of material misdirection is self-evident. The record-based complaint is therefore qualitatively different from the urgent motion footing.

[30] I accept that licensing is **polycentric** and that the Controller is not bound to a single metric or a fixed radius. But **Reg 6(2)** <u>(site)</u> and **Reg 18(2) - (3)** <u>(retail)</u> require the Controller to be **satisfied**, on **verified** material, regarding **need** and **economic viability** (including a positive and correctly calculated Net Present Value ["**NPV"**]). That exercise cannot be rationally performed on an evaluative premise that **erases a direct competitor** in the immediate market. The **existence** and **proximity** of a competing retail site are textbook **relevant considerations**. A positive NPV calculated on a false assumption as to competitive landscape is vulnerable to challenge.

[31] On the totality of the record portions cited to me in the heads, the Site Visit Report's 15 km statement was echoed in later internal summaries. The Applicant has demonstrated that the Controller's process, as reflected in the record, was tainted by an objective factual error that goes to the heart of need and viability.

The decision accordingly falls to be set aside for material error of fact and failure to consider a plainly relevant consideration.

(3) The legal platform

[32] The Applicant pleaded both **legality** and **PAJA** review grounds in his heads. As the point is ultimately not dispositive on the present facts (given the objective error), I proceed on the basis that **either** platform suffices on the record before me. In any event, the impugned decisions are administrative action in the PAJA sense, and a legality challenge lies in the alternative; on the Court's finding of a **material factual misdirection** and **failure to engage relevant criteria**, the decisions cannot stand.

(4) Forum shopping / lis pendens

[33] The Third Respondent's heads contain serious allegations of forum shopping and duplicative proceedings. The Pretoria urgent judgment pre-dated the Mbombela application. Whatever may have occurred elsewhere does not, on this record, constitute a bar to the present review. It may, however, have a bearing upon costs.

M. Remedy

[34] The ordinary remedy in review is to set aside and remit to the decision-maker, unless exceptional circumstances justify substitution. On the present record, the Court does not have a full contemporaneous evidentiary matrix on need, NPV and the licensing objectives shorn of the identified misdirection. Remittal is therefore appropriate, with directions to ensure a proper, updated and rational evaluation.

[35] It follows that the validity and operation of the Trust's licences must be suspended pending the reconsideration, with appropriate safeguards to protect the public interest and to avoid undue prejudice to third parties. Any trading pending licence, if applicable, must be regulated by the Controller in terms of the PPA on reconsideration.

N. Costs

[36] It is trite that costs are in the discretion of the Court. The point *in limine* taken by the Respondents was neither frivolous nor contrived. Koyabe is a strong authority for insisting on internal remedies. However, the Applicant has succeeded. Accordingly, costs of the point *in limine* shall follow the result.

[37] The Applicant succeeds on the core review as well. The **Controller** bears primary responsibility for the decisions under review and should bear costs. The **Trust**, having opposed on the merits, is jointly liable for costs to the extent of its opposition. I see no basis for punitive costs on the papers; **party-and-party costs** will suffice.

O. Order

[38] On the **point *in limine***:

i. The point in limine is dismissed.

ii. The Applicant is exempted from the obligation to exhaust internal remedies in terms of section 7(2)(c) of PAJA. The costs of the point *in limine* are to be paid by the Respondents jointly and severally, on a party and party scale, the one paying, the other to be absolved.

[39] On the **review application**: The following order is made:

39.1 The decisions of the Controller of Petroleum Products to grant the site licence and retail licence to the Trustees for the time being of the Peter Neves Trust MT 1266/1966 in respect of the

Masibekela site (as reflected in the Rule 53 record) are reviewed and set aside.

39.2 The matter is remitted to the Controller for reconsideration *de novo* within **90 (ninety) days** of this order, on a complete and updated evidentiary record, and in accordance with ss 2B–2C of the PPA and Regulations 6 and 18; the Controller must, inter alia:

(a) Correctly identify and assess existing competitor filling stations and their proximity;

(b) Properly evaluate need, sustainability and economic viability, including a correctly calculated NPV; and

(c) Demonstrate in the written outcome the Controller's verification and reasoned engagement with relevant considerations.

39.3 Pending the reconsideration in para 38.2, the operation of the impugned site and retail licences is suspended. This does not preclude the Controller from issuing any interim regulatory directions permitted by the PPA and Regulations in the public interest, provided such directions are reasoned and communicated to the affected parties.

39.4 Nothing in this order determines or pre-judges any future appeal or review that may arise from the Controller's fresh decision.

39.5 **Costs:** The Second Respondent (Controller) shall pay the Applicant's costs, including the costs of counsel; the Third Respondent (the Trust) shall be jointly and severally liable for such costs to the extent of its opposition on the review record, the one paying the other to be absolved.

[redacted]

J.S. NYATHI

Judge of the High Court

Gauteng Division, Pretoria

Appearances

For the Applicant: Adv B G Savvas; instructed by Murray Kotze & Associates Attorneys.

For the Third Respondent (the Trust): Adv D J Sibuyi (Trust Account Advocate); instructed by Mthunzi Chambers.

Date of hearing: 19 August 2025

Date of Judgment: 20 April 2026

Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploaded on the CaseLines electronic platform. The date for hand-down is deemed to be 20 April 2026.