



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT**

REPORTABLE
CASE NO. 1661/2021

In the matter between:

TOTAL BRITE STAR SERVICE STATION CC

Applicant

and

ENSPA TRADING COMPANY (PTY) LIMITED

First Respondent

SPARGS SELLA YE MOTO (PTY) LIMITED

Second Respondent

THE CONTROLLER OF PETROLEUM PRODUCTS,

EASTERN CAPE

Third Respondent

THE MINISTER OF THE DEPARTMENT OF MINERAL

RESOURCES AND ENERGY

Fourth Respondent

JUDGMENT

LAING J

[1] This is an application that pertains to the development and operation of a filling station at Ngcobo in the Eastern Cape.

[2] The applicant initially launched an application on 3 December 2021 for an order, *inter alia*, staying the first and second respondents' exercise of their rights in terms of the site and retail licences granted to them for erven 224, 226 and 228, Ngcobo, pending the determination of an appeal.

[3] Subsequently, the applicant filed an amended application¹ on 12 August 2022, on an urgent basis, repeating the relief sought under the original application but including a prayer for alternative relief to the effect that the third and fourth respondents' decisions to grant site and retail licences be reviewed and set aside. The applicant also sought final interdictory relief against the first and second respondents. In the alternative, the applicant sought an interim interdict against the first and second respondents, pending the finalisation of a review application to be instituted within 30 days to review and set aside the third and fourth respondents' decisions.

[4] The first and second respondents have opposed the matter.

Background

Applicant's case

[5] It is common cause that the applicant operates a fuel retail business at erf 259, Ngcobo. The applicant asserts that it has done so for more than 25 years. It points out that the fuel retail industry for the Ngcobo area is over-saturated inasmuch as there is a proliferation of fuel retailers for a community beset by a stagnant economy and high unemployment. There are four filling stations within 500 metres of each other, including

¹ It is debatable whether the subsequent application was properly amended, as shall be discussed.

the first respondent's site. To add a further filling station would have a negative impact on the existing fuel retailers and the viability of their businesses.

[6] In 2018, the first respondent applied to the third respondent for a site licence; the second respondent simultaneously applied for a retail licence. The applicant objected to the applications, arguing that they would not promote the transformation of the fuel retail industry, would not be economically viable, and would prejudice existing retailers.

[7] On 13 December 2019, the third respondent notified the first and second respondents that their applications had been unsuccessful. The parties lodged an appeal with the fourth respondent on 14 February 2020 but without informing the applicant. On 16 September 2020, the fourth respondent referred the matter back to the third respondent for re-evaluation as a result of new information that the first and second respondents had supplied on appeal. The third respondent subsequently granted the applications.

[8] The applicant only became aware of the third respondent's decision when it observed, on 17 August 2021, that construction of a filling station had commenced on the first respondent's site. Consequently, the applicant requested copies of the applications from the third and fourth respondents, together with the decisions made in relation thereto. The first and second respondents were uncooperative in this regard.

[9] The attorneys wrote to the first and second respondents' attorneys on 14 September 2021, indicating that the applicant intended to bring a review application, alternatively to lodge an appeal against the third respondent's decision. They requested an undertaking that construction would cease, pending the outcome of such proceedings. The first and second respondents' attorneys refused to provide an undertaking, pointing out that the site development was a substantial project and extended to more than just a filling station.

[10] On 15 October 2021, the applicant lodged its appeal against the third respondent's decision so as to comply with the 60-day period stipulated under section 12A of the Petroleum Products Act 120 of 1977 ('the PPA'). The grounds of appeal upon which the applicant relies are that the third respondent could never have been satisfied that the proposed filling station would be economically viable and that it would promote the licensing objectives listed in terms of section 2B(2) of the PPA. The third respondent failed to take the applicant's objection into account and that the granting of the licences would render the applicant's business (100% black-owned) unsustainable and would detrimentally affect other fuel retailers.

[11] In its supplementary grounds of appeal, the applicant indicated that the third and fourth respondents ought to have considered the draft guidelines for the issuing of new site and retail licences, which included the determination of the need for a new filling station. This should have been based on the volumes of fuel sold by all existing fuel retailers over a three-year period. The applicant contends that the third respondent relied on outdated and limited information. If a proper investigation had been carried out, then the third respondent would never have approved the applications. Furthermore, the applicant asserts that the third respondent's unsubstantiated view that existing fuel retailers would not easily accommodate an increase in demand by reason of the development of a new township with RDP housing² was without merit; the new township was never established because the local community objected thereto. In any event, alleges the applicant, there was no evidence that a new township would have ever improved the local economy. There would be an overall reduction in the volumes sold by existing fuel retailers, to well below the market norm of 300,000 litres per month. In short, argues the applicant, the absence of a fully motivated socio-economic impact study meant that there had been no justifiable basis upon which the applications could have been granted.

² The reference to 'RDP housing' is a reference to the Reconstruction and Development Programme that was initiated by the post-1994 South African government to address various socio-economic problems, including, *inter alia*, the lack of access to suitable housing.

The first and second respondents' case

[12] In their answering papers, the first and second respondents assert that the third respondent issued site and retail licences to them on 21 April 2021. Moreover, the first respondent is the registered owner of erven 224, 226 and 228, Ngcobo, and the local municipality had already approved building plans for the proposed development. The Spargs Group, which included the first and second respondents, had been trading in the former Transkei for at least 50 years and had decided to invest substantially in the Ngcobo area after having assessed market needs. The new development would be situated along the R61, which was the main road between Ngcobo and Komani (Queenstown). It occupied an area of approximately 49,000 m² and consisted of a 24-hour Spar supermarket, a liquor store, a bakery, a tyre fitment centre, a clothing store, as well as a filling station with a truck-stop to accommodate large trucks and their drivers overnight on secure premises. The estimated cost of the project was R 125 million; construction costs incurred to date had already exceeded R 11 million. It was anticipated that the project would create at least 140 permanent jobs. Furthermore, it had the support of the local municipality, taxi associations, and the community in general.

[13] The first and second respondents refer to a socio-economic impact study that was completed on 18 November 2021 and contend that the project will promote the efficient retailing of petroleum products, including diesel, gas and paraffin. By reason of the multi-faceted nature of the project, the development was commercially viable; it did not simply entail the construction and operation of a filling station. Consequently, argue the first and second respondents, the project met the objectives stipulated under section 2B(2) of the PPA.

[14] They go on to assert that the applicant and other objectors were informed of their appeal when their initial applications were refused. No-one opposed the appeal.

[15] The first and second respondents contend that the suspension of the project would result in substantially increased expenditure by reason of claims for the costs of standing time and claims for the extension of time for project completion. The balance of convenience did not favour the applicant.

[16] In response to the applicant, the first and second respondents indicate that if the licences were to be revoked or withdrawn, then they would not trade in fuel or operate a filling station. They confirm that they would not permit trading in fuel from the premises until the outcome of the appeal had been determined.³ However, the applicant would not suffer any irreparable harm were the project, consisting of a multi-faceted development, to be completed.

Recent developments

[17] The applicant filed an 'amended notice of motion' on 12 August 2022. This was done on an urgent basis. The supporting affidavit thereto emphasises that at the time that the applicant first launched its application, on 3 December 2021, the first and second respondents' filling station was still under construction, it was not yet operational. Their answering papers, alleges the applicant, contain the following undertaking:

'[s]ave to state that the First and Second Respondents will not permit any trading in fuel from the premises until the outcome of the present Appeal is determined, the relief claimed is opposed.'

[18] Notwithstanding, the first and second respondents have commenced with the operation of the filling station. This, avers the applicant, renders the application urgent.

³ The first and second respondents later sought to correct this, only to be met with strenuous opposition on the part of the applicant.

The applicant also argues for the amendment of its notice of motion to accommodate review proceedings against the third and fourth respondents.

[19] In response, the first and second respondents indicate that, by 18 July 2022, they had completed the development of the site and had commenced retailing fuel. They raise the point that the amended notice of motion was not preceded by a notice in terms of rule 28 of the Uniform Rules of Court, which led to their delivery of a notice in terms of rule 30.⁴ They also take issue with: the urgency claimed by the applicant; the lack of service on the third and fourth respondents; the failure to have brought the application in accordance with rule 53, such that neither the record of nor the reasons for the decisions in question have been placed before court; non-compliance with the 180-day time limit stipulated under section 7 of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'); and the failure to have exhausted the internal remedy available in terms of the PPA.

[20] The first and second respondents emphasize that they already hold valid site and retail licences, which permit them to trade, and that they have already spent a considerable amount of money to bring the project to fruition. A total of 21 individuals have been employed for the operation of the filling station; in addition, two security officers have been employed. The first and second respondents and the above employees would suffer considerable prejudice if the relief sought by the applicant was granted.

Issues to be decided

[21] The court must decide the following issues: (a) the staying of the first and second respondents' exercise of their rights with regard to the third respondent's granting of site and retail licences, pending determination of the applicant's appeal to the fourth

⁴ Rule 28 deals with amendments to pleadings and documents, rule 30 pertains to irregular proceedings.

respondent; (b) the interdicting of further construction activities; (c) the suspension of the third respondent's decision, pending the determination of the appeal; and (d) the granting of alternative relief to the applicant.

[22] As a starting point, it is necessary to consider the alleged urgency of the application, as well as the applicant's purported amendment of its notice of motion.

Urgency and applicant's amendment

[23] The basis for the applicant's urgent filing of an 'amended notice of motion' was ostensibly its realisation, between the dates of 18 and 27 July 2022,⁵ that the first and second respondents had commenced with the retailing of fuel from the premises, notwithstanding the pending appeal and their previous undertaking.

[24] Reliance on the latter to assert urgency is, however, not entirely reasonable. The first and second respondents indicated, as early as 7 March 2022, that there were errors in their answering papers that they sought to correct; these included the undertaking itself, i.e. that they would not permit any trading in fuel from the premises until the appeal had been determined. They made it clear in a supplementary affidavit (accompanied by their attorney's confirmatory affidavit) that they would indeed trade for as long as they held valid and lawful site and retail licences and that they had instructed their attorney to make the necessary corrections. An interlocutory application to that effect was filed. The applicant opposed the application on 22 March 2022 and gave notice of an irregular step in terms of rule 30(2)(b), arguing that the first and second respondents had not obtained the leave of the court to deliver further affidavits. The first and second respondents consequently withdrew their application a few days later, only to make a further attempt on 23 May 2022. The applicant opposed the application again

⁵ The first and second respondents confirm that they commenced trading on 18 July 2022; the applicant's attorneys issued a letter of demand on 27 July 2022.

on 30 May 2022, delivering a notice in terms of both rules 30A and 30(2)(b) on 23 June 2022. This resulted in the first and second respondents' filing a notice of intention to amend its application on 4 August 2022.

[25] From the above chronology, it would be difficult to dispute that the first and second respondents have consistently demonstrated their intention to correct their answering papers. The applicant would have known, for several months, that the initial undertaking was no longer reliable. It is simply implausible for the applicant to suggest that it only became aware of the true situation at a much later stage. As the first and second respondents have pointed out, the applicant would have understood that construction activities at the premises, situated a mere 500 metres away, had not ceased; the risk of the first and second respondents' commencement of trading was real.

[26] Consequently, if the applicant had been concerned about the impact of the first and second respondents' activities, notwithstanding the appeal, then it would have been incumbent on it to have set down the application for hearing at a much earlier date. There was no proper basis upon which the applicant could have initiated the present proceedings in accordance with such abridged timeframes.

[27] In the absence of the requisite degree of urgency, a court can decline to exercise the powers available in terms of the relevant procedure, i.e. rule 6(12)(a). The matter would not be properly before the court and the appropriate order would be to strike it from the roll. See *Luna Meubel Vervaardigers (Edms) Bpk v Makin (t/a Makin's Furniture Manufacturers)*;⁶ and *Commissioner, South African Revenue Service v Hawker Air Services (Pty) Ltd; Commissioner, South African Revenue Service v Hawker Aviation Partnership*.⁷ The court, nevertheless, has a discretion under rule 6(12)(a), to dispense with the usual forms and service and to dispose of the matter in such manner and in accordance with such procedure as it deems fit, provided that the procedure in

⁶ 1977 (4) SA 135 (W), at 139F-140A.

⁷ 2006 (4) SA 292 (SCA), at 299H-300A.

question 'shall as far as practicable be in terms of these rules'. That obligation must be carried out in accordance with the attitude of the court concerning which deviations it will tolerate in a specific case. If a deviation is to be permitted, then the extent thereof will depend on the circumstances. See *Caledon Street Restaurants CC v D' Aviera*.⁸

[28] Here, the parties have already filed founding, answering, replying, and supplementary papers. Counsel have already submitted heads of argument and the court has already heard full submissions on all the issues. It would serve no purpose to strike the matter from the roll; the court is satisfied that it would not prejudice the first and second respondents for the matter to be adjudicated.

[29] This having been said, it is necessary to emphasise that there are limits to which the court can permit a deviation from the usual forms and service. The extent to which such tolerance extends depends upon the circumstances and is something that remains within the discretion of the court, to be exercised according to the contingencies of the matter at hand. That is the risk that a party takes when invoking urgency. More will be said about this later in relation to the relief sought against the third and fourth respondents.⁹

[30] It is necessary, at this stage, to consider whether the applicant has effectively filed an amended notice of motion. At a practical level, a court will generally allow an amendment unless it is marked by *mala fide* or causes prejudice to the other side which cannot be cured by an appropriate order for costs or cannot place the parties in the position that they were when the pleading was originally filed. See *Moolman v Estate Moolman and another*.¹⁰ The test, as enunciated in *Affordable Medicines Trust and others v Minister of Health of RSA and another*, is what the interests of justice demand.¹¹

⁸ [1998] JOL 1832 (SE), at 7-8.

⁹ The applicant seeks, in terms of its amended notice of motion, the review and setting aside of the decisions made by the third and fourth respondents. Such relief did not form part of the original application.

¹⁰ 1927 CPD 27, at 29.

¹¹ 2005 (6) BCLR 529 (CC), at paragraph [9].

[31] The only basis for the first and second respondents' opposition to the proposed amendment is that the applicant failed to give notice thereof in terms of rule 28, thereby rendering it an irregular step. No clear prejudice has been caused and the point was not pursued vigorously in argument. The amendments sought by the applicant are closely intertwined with the issues that informed the original application and it would be in the interests of justice to allow the amendment so that the matter can be dealt with *in toto* rather than on a piecemeal basis.

[32] The applicant's supplementary affidavit underpins the amended notice of motion and is necessary for the proper consideration of the matter. There is no reason why not to grant the leave required.

[33] Whether the applicant has made a case for the staying of the first and second respondents' rights and the interdicting of further construction activities will be considered next.

Staying of rights and interdicting of construction activities

[34] The applicant seeks an order staying the implementation and exercise of the rights attached to the site and retail licences granted to the first and second respondents, pending the determination of the appeal. It also seeks an order interdicting the development or carrying out of any construction activities on the site for purposes of a fuel retail business.

[35] In effect, the applicant seeks an interim interdict, as evident from its answering papers. The requirements for an interim interdict are well-known and consist of the following: a *prima facie* right; a well-grounded apprehension of irreparable harm if the

interim relief is not granted and the ultimate relief is eventually granted; a balance of convenience in favour of the granting of the interim relief; and the absence of any other satisfactory remedy.¹²

[36] From its founding papers, the applicant asserts that, as a properly licensed fuel retailer, it has a right to prevent unlawful activities on fuel retail sites in proximity to its own site. The difficulty with this, however, is that it is common cause that the first and second respondents already hold site and retail licences. Until such time as the decision to grant such licences is reviewed and set aside, it remains extant and gives rise to legal consequences. In the seminal case of *Oudekraal Estates (Pty) Ltd v City of Cape Town and others*,¹³ Howie P and Nugent JA held, at paragraph [26], that:

‘...until the Administrator’s approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern state would be considerably compromised if all the administrative facts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences or so long as the unlawful act is not set aside.’

[37] Admittedly, whether the applicant’s lodging of an appeal to the fourth respondent triggers the application of the rule of automatic suspension in relation to the effect of the third respondent’s decision to grant the licences is an issue that must still be addressed.

[38] It is, notwithstanding, far from apparent that the applicant has demonstrated a well-grounded apprehension of irreparable harm. It alleges that the first and second respondents’ completion of construction and operation of a filling station will have a direct and detrimental impact on the applicant’s business. To that effect, the applicant asserts that the only means by which the new filling station would survive would be by enticing customers away from neighbouring filling stations; the local economy in the

¹² *Setlogelo v Setlogelo* 1914 AD 221, at 227. The principles have been affirmed in a long line of cases that have followed, including, recently, *Tshwane City v Afriforum* 2016 (6) SA 279 (CC), at 298F-306B; and *National Commissioner of Police v Gun Owners South Africa* 2020 (6) SA 69 (SCA), at paragraph [36].

¹³ [2004] 3 All SA 1 (SCA).

Ngcobo area would not sustain a new business. The applicant goes on to assert, without substantiation, that it would suffer a reduction in sales by 120,000 litres per month, below the accepted benchmark of 300,000 litres per month. How the applicant has calculated this is not clear.

[39] Moreover, it contends that a key motivating factor for the granting of the licences was the imperative to cater for the needs of a new township that was to have been developed with RDP housing. This has never materialised. Consequently, argues the applicant, in the absence of any increase in market demand,¹⁴ the first and second respondents' supply of fuel, projected to be 300,000 litres per month, would only be sustainable were the remaining filling stations to experience a reduction in sales by an average of 100,000 litres each per month.¹⁵

[40] What is missing from the applicant's argument, however, is a compelling set of facts upon which to anchor its assertions. These remain speculative at best until the applicant can point to a proper investigation and comparison of existing and likely sales.

[41] Admittedly, the applicant refers to a report prepared by an analyst for the Department of Mineral Resources and Energy, a Ms Onicah Mzolo, to conclude that the operation of the new filling station would result in the decrease in sales for the remaining filling stations to an intolerable level, viz. 267,505 litres per month on average. In its founding papers, however, the applicant criticises Ms Mzolo's report for using outdated and limited figures; they pertain only to a single year, 2017, which was some four years prior to her recommendation to the third respondent that the licences be approved. The applicant cannot, in the same breath, rely on the above figures to support its contentions that it will experience a dramatic reduction in sales.

¹⁴ If the planned township has never been established, then no additional demand for fuel has been created. The anticipation of such demand, argues the applicant, had comprised a central component of the first and second respondents' application for the granting of the site and retail licences.

¹⁵ The addition of 300,000 litres to the overall supply, where demand remained constant, would need to be accommodated by a corresponding reduction in sales by the other three suppliers (including the applicant), i.e. $300,000 / 3 = 100,000$ litres each.

[42] The addition of a multi-faceted development to the Ngcobo market may yet have a beneficial impact on the local economy and the applicant's business by implication. The first and second respondents' project is not limited to a filling station but includes a 24-hour Spar supermarket, a liquor store, a bakery, a tyre fitment centre, a clothing store, as well as a truck-stop. It is not unreasonable to argue that the development would tend to attract consumers from many of the surrounding areas who would, quite feasibly, purchase fuel from the remaining filling stations, situated close to the first and second respondents' site. A rising tide lifts all boats.

[43] Overall, the above scenario has not been adequately addressed by the applicant. It has made statements that are general in nature and not tethered to any careful analysis of the possible effect of the project on its business. The basis for the applicant's apprehension of irreparable harm cannot, in any way, be viewed as well-grounded.

[44] In addition, the applicant initially asserted in its founding papers that the balance of convenience did not favour the first and second respondents inasmuch as construction had only just commenced. That was the position some eleven months ago. It is not disputed that, subsequently, the first and second respondents have made substantial progress with the project and are already trading. A considerable amount of money has been spent and the first and second respondents have employed 21 staff to operate the new filling station, and two security officers. Their continued employment will be placed in jeopardy if interim relief is granted. The applicant has simply failed to deal with this aspect.

[45] The court, ultimately, is not persuaded that the applicant has demonstrated a *prima facie* right,¹⁶ a well-grounded apprehension of irreparable harm, or that the balance of convenience lies in its favour.

¹⁶ This must, however, be qualified by the possible merits of the applicant's argument that the rule of automatic suspension applies to the third respondent's decision to grant the licences, as will be discussed further.

[46] The applicant, notwithstanding, changed tack somewhat in argument. It contends that it was not necessary for it to have applied for the staying of the first and second respondents' rights, asserting that its lodging of the appeal automatically suspended the implementation of the third respondent's decision and the validity of the site and retail licences. This argument will be explored further in the paragraphs that follow.

Suspension of decision and validity of the licences

[47] It is common cause that the applicant has lodged an appeal with the fourth respondent against the third respondent's decision. The fourth respondent has yet to decide the appeal.

[48] The applicant argues that the lodging of an appeal against administrative action automatically suspends the operation of the decision in question. The first and second respondents say that this depends upon the legislation involved. In that regard, section 12A of the PPA stipulates that:

- '(1) Any person directly affected by a decision of the Controller of Petroleum Products may, notwithstanding any other rights that such a person may have, appeal to the Minister against such decision.
- (2) An appeal in terms of paragraph (a) shall be lodged within 60 days after such decision has been made known to the affected person and shall be accompanied by–
 - (a) a written explanation setting out the nature of the appeal;
 - (b) any documentary evidence upon which the appeal is based.
- (3) The Minister shall consider the appeal, and shall give his or her decision thereon, together with written reasons therefor, within the period specified in the regulations.'

[49] The first and second respondents assert that the appeal contemplated under the PPA is an internal remedy and amounts to the reconsideration of the matter by the fourth respondent; he may take into account additional information that did not form part of the initial application. This would constitute a 'wide' (as opposed to 'narrow') appeal. In the absence of any provision in the PPA to the effect that the operation of the decision is suspended, pending the outcome of the appeal, the first and second respondents contend that there is no merit in the applicant's argument.

[50] There does not appear to be any settled authority on the subject, no definitive pronouncement has been made by either the Constitutional Court or the Supreme Court of Appeal. Nevertheless, an investigation of the case law reveals that the courts have adopted an approach that seems to support the application of the common law rule of automatic suspension unless the legislation in question indicates the opposite.

[51] In *Dennis v Garment Workers' Union, Cape Peninsula*,¹⁷ the court held that the decision of a domestic tribunal in a disciplinary matter had to be given effect, pending an appeal, where the constitution of the trade union that made provision for such matters did not stipulate otherwise. Some years later, in *Leburu en andere v Voorsitter, Nasionale Vervoerkommissie, en andere*,¹⁸ the court found that the provisions of the Road Transportation Act 74 of 1977 clearly indicated that the mere noting of an appeal against an act, instruction or decision of a local road transportation board did not result in the automatic suspension thereof; the applicable legislation conferred a discretion on the National Transport Commission to grant or refuse an application for such suspension. At about the same time, the court in *Marinpine Transport (Pty) Ltd v Local Road Transportation Board, Pietermaritzburg, and another*¹⁹ observed that execution before appeal was seldom permitted; it was a time-honoured principle that, in the absence of extraordinary circumstances, a court would always maintain the *status quo* until the last word had been spoken by the final court of appeal.

¹⁷ [1955] 1 All SA 68 (C), at 73.

¹⁸ 1983 (4) SA 89 (T); at the headnote thereto, 89.

¹⁹ 1984 (1) SA 230 (N), at 232.

[52] The principle found relevance, post-1994, in *Metcash Trading Ltd v Commissioner for the South African Revenue Service and another*,²⁰ where the Constitutional Court dealt with the provisions of the Value-Added Tax Act 89 of 1991. The court upheld section 36(1), which expressly stipulated that the obligation to pay tax was not suspended, pending an appeal, unless the Commissioner directed as much.²¹ The same approach was followed in *De Beer v Raad van Gesondheidsberoepe van Suid-Afrika*,²² concerning the provisions of the Health Professions Act 56 of 1974. The court upheld section 42(1A) thereof, to the effect that the decision to remove a medical practitioner's name from the roll or to suspend him or her from practice remained effective until any appeal lodged in relation thereto had been heard.

[53] The principle was subjected to careful scrutiny by the court in *Max v Independent Democrats and others*.²³ To that effect, the court found that there were good reasons why the rule of automatic suspension ought to apply; *inter alia*, there was nothing in the applicable legislation or the code of conduct for the political party involved that reversed the rule or suggested that it should not be applied. The decision was cited with approval in *Morrison v City of Johannesburg and others*,²⁴ where the court held that:

'[i]t is trite that in judicial proceedings the noting of an appeal has the effect of suspending the order appealed against pending the outcome of the appeal before a court of appeal. The rationale of the common law rule is that the status quo between the parties should be maintained until the adjudication process is complete and a final decision reached. The law hopes in this way to avoid the potentiality of prejudice caused by giving effect to an order or decision that may be reversed. However, in administrative proceedings there is no similar rule of the common law which suspends any administrative decision once an administrative appeal has been noted. Whether the noting of an administrative appeal has the effect of suspending the administrative decision depends upon the interpretation of the provision bestowing the statutory right of appeal. According to Baxter, *Administrative Law* (Juta) 381, the common-law principle of suspension can

²⁰ 2001 (1) BCLR 1 (CC), at paragraphs [36] – [38].

²¹ In doing so, the Constitutional Court gave recognition to the 'pay now, argue later' approach adopted in many other jurisdictions.

²² 2004 (3) BCLR 284 (T), at 290-1.

²³ 2006 (3) SA 112 (C), at 119-20.

²⁴ [2014] 2 All SA 100 (GNP), at paragraph [28].

constitute no more than a presumption in the case of administrative decisions, and this presumption may be negated by the implications of the statute. He adds though that the presumption appears nevertheless to be a strong one.'

[54] The court went on to find that section 139(1) of the Town-Planning and Townships Ordinance 15 of 1986 conferred upon an aggrieved party a right of reconsideration of a decision taken by a local authority about building within a restricted area. The right would be rendered nugatory where an appeal against such a decision had no suspensive effect.

[55] More recently, the subject received attention in *Cotty and others v Registrar of the Council for Medical Schemes and others*.²⁵ The court dealt with the section 50 of the Medical Schemes Act 131 of 1998, which provided for a 'wide' administrative appeal in relation to a decision made by the registrar; however, the provisions in question did not expressly indicate whether the lodging of an appeal suspended any such decision. After considering the case law, the court stated that:

'...there is a common law principle which provides that, subject always to the applicable legislation concerned, an administrative appeal suspends the decision which is the subject of the appeal.'

[56] The courts in *Max, Morrison*, and *Cotty*, referred extensively to academic texts. In that regard, reliance was placed upon Baxter, who writes:

'[i]n the case of private disputes the effect at common law of noting an appeal is to suspend the operation of the decision appealed against. But the right of appeal against decisions taken in terms of statutory powers is dependent upon the enabling statute. The common-law principle can constitute no more than a presumption in the case of administrative decisions, and this presumption may well be negated by the implications of the statute. Take the Road Transportation Act, for example. A dissatisfied party may appeal to the NTC against the decision of a local road transportation board. Application may also be made to the chairman of the NTC

²⁵ [2021] 2 All SA 793 (GP), at paragraph [64].

who has the power to suspend the decision of the local board pending the outcome of the appeal. The fact that such power was conferred on the chairman has led a court to the conclusion that the common-law principle (that a decision appealed against is automatically suspended) could not have been intended to apply in cases where such a suspension order is not made- for otherwise there would be no necessity for conferring the suspending power on the chairman.²⁶

[57] The courts also quote De Ville, who writes:

'[w]here an appeal is allowed against an administrative decision the decision appealed against will (unless the statute in question provides otherwise) take effect only once the period for appeal has expired (and the person affected has not made use of the opportunity) or the decision has been confirmed on appeal (where the person affected makes use of the opportunity to appeal).²⁷

[58] From the above case law and academic texts, it can be said that there is a rebuttable presumption that the common law rule of automatic suspension applies when an appeal is lodged against an administrative decision. The presumption can be rebutted to the extent that the empowering legislation indicates otherwise.

[59] The principle must inform the adjudication of the present dispute. It is not disputed by the first and second respondents that the applicant lodged its appeal on 15 October 2021 in accordance with the provisions of section 12A of the PPA. The legislation in question is silent, however, about whether the third respondent's decision is suspended, pending the determination of an appeal. Viewed as a whole, the PPA provides no indication at all about the effect of an appeal on the decision. There is nothing to rebut the presumption that the common law rule of automatic suspension should not be applied.

[60] The outcome of the above analysis is that the effect of the third respondent's decision to grant site and retail licences to the first and second respondents must be

²⁶ LG Baxter, *Administrative Law* (Juta, 1984), at 381.

²⁷ J de Ville, *Judicial Review of Administrative Action in South Africa* (LexisNexis Butterworths, 2003), at 331.

regarded as having been suspended when the applicant lodged its appeal. At a practical level, this means that the first and second respondents are unable to exercise their rights until the appeal has run its course. There was, ultimately, no need for the applicant to have sought interdictory relief.

[61] Having said that, it is important to observe that the fourth respondent was afforded 90 days within which to decide the appeal, i.e. by 14 January 2022.²⁸ It is unacceptable that this has yet to be accomplished. The delay creates obvious prejudice for the parties and there may indeed be remedies available under the provisions of PAJA; nevertheless, the parties' own dilatoriness in not challenging the fourth respondent's failure to take a decision will need to be addressed. That is not before this court.

[62] The validity of the site and retail licences remains intact, subject of course to any findings that a court may yet make with regard to the possible review and setting aside of the decision taken by the third respondent. The suspension of the effect thereof does not affect the validity of the licences in question.

[63] What remains to be considered is the alternative relief sought by the applicant, to be discussed below.

Alternative relief

[64] The applicant seeks the review and setting aside of the third respondent's decision to grant site and retail licences, and the fourth respondent's decision to remit the matter back to the third respondent. Numerous points have been taken by the first and second respondent, including the applicant's failure to have complied with the 180-

²⁸ See regulation 33, published in terms of GNR 286 on 27 March 2006: Regulations regarding Petroleum Products Site and Retail Licences.

day time limit stipulated under section 7 of PAJA and the failure to have exhausted the internal remedy available in terms of the PPA, i.e. the appeal. There is merit in these.

[65] However, the most serious shortcoming for immediate purposes is the applicant's failure to have brought the application in accordance with rule 53. The extreme haste with which the applicant proceeded in bringing the matter to court meant that neither the record of the third and fourth respondents' decisions nor the reasons therefor have been placed before court. The applicant's conduct with regard to the alleged urgency of the matter has already been discussed and criticised. It cannot reasonably have been expected of the third and fourth respondents to have compiled a record and their reasons for the decisions upon merely a few days' notice, especially in light of the history of the dispute. The timeframes laid down in rule 53 are there to allow the parties (and the court) to understand properly the basis upon which an administrative decision was taken; they also provide an opportunity to establish the ambit of the review and to identify the key issues involved.

[66] In the present matter, there is no record. There are no reasons. It cannot be expected of the court to piece these together from the not inconsiderable bundle of papers filed by the parties, especially where the application was brought in such undue haste. No basis exists upon which the court can embark upon the review sought by the applicant.

[67] The applicant also seeks final interdictory relief as a consequence of the review and setting aside of the decisions in question. Patently, this relief is not available in the circumstances.

[68] Finally, the applicant seeks interim relief, preventing the first and second respondents from exercising any rights in terms of the site and retail licences, pending the finalisation of a review application to be launched within 30 days for the review and

setting aside of the decisions of the third and fourth respondents. The court has already dealt with the question of interim relief and held that the applicant has failed to satisfy the requirements therefor. In any event, the finding that the applicant's lodging of its appeal has resulted in the suspension of the third respondent's decision to grant the licences obviates the need for any such relief.

Relief and order

[69] The court has considered the facts placed before it and the arguments made in relation to the staying of the first and second respondents' exercise of their rights and the interdicting of further construction activities. The applicant has not satisfied the requirements for the granting of either interim or final relief. Furthermore, the applicant has not persuaded the court that it can embark upon the review and setting aside of the decisions in question without a proper record and reasons, as envisaged under rule 53.

[70] Notwithstanding, the court accepts that the nature of the matter entails the application of the rule of automatic suspension with regard to the effect of the third respondent's decision. This will hold practical implications for the first and second respondents' business activities, which will need to be managed.

[71] The only aspect still to be considered is that of costs. At the end of the matter, the applicant could be said to have been successful in its application to halt the first and second respondents' operation of a filling station, pending the outcome of the appeal. It has, however, been substantially unsuccessful in its efforts to obtain the interdictory or alternative relief set out in its amended notice of motion. Moreover, its reliance on the alleged urgency of the matter and its stipulation of a wholly unreasonable timeframe for the respondents' filing of answering papers verges on the abuse of the process available in terms of rule 6(12). It has also failed to adopt the procedure prescribed under rule 53 for the review application that was envisaged. The question must be

raised, too, about why the applicant has not, to all intent and purposes, taken decisive steps to call the fourth respondent to account. More than a year has passed since the lodging of the appeal. It would be inappropriate, overall, for costs to be awarded to the applicant.

[72] In the circumstances, the following order is made:

- (a) the effect of the decision of the third respondent to grant site and retail licences to the first and second respondents, in relation to erven 224, 226, and 228, Ngcobo, is declared to have been suspended, pending the determination of the applicant's appeal to the fourth respondent; and
- (b) no order is made in relation to costs.

JGA LAING
JUDGE OF THE HIGH COURT

APPEARANCE

For the applicant: Adv Venter with Adv Kotzé, instructed by IC Clark Inc., East London.

For the 1st and 2nd respondents: Adv Watt, instructed by Drake Flemmer & Orsmond Inc, East London.

Date of hearing: 23 August 2022

Date of delivery of judgment: 01 November 2022