IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 80077/2014

10/8/17

DELETE WHICHEVER IS NOT APPLICABLE

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

24/07/17
DATE

Baqwa
SIGNATURE

In the matter between:

**QUICK SERVE PETROL STATION (PTY) LTD** 1st Applicant

**BRAYTON INVESTMENTS CC** 2nd Applicant

and

**THE MINISTER OF ENERGY** 1st Respondent

**THE CONTROLLER OF PETROLEUM PRODUCTS** 2nd Respondent

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**JUDGMENT**

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**Baqwa J**

[1] This is an application for review of decisions by the first and second respondents made on 6 May 2014 and 13 August 2013 respectively and in terms of which the said respondents refused applications for site licence and a retail licence in terms of the Petroleum Products Act 120 of 1977 ("*the Act*").

Background

[2] The first applicant, Quick Serve Petrol Station (Pty) Ltd ("*Quick Serve*") applied to the Controller of Petroleum Products ("*the Controller*") for a retail licence. The second applicant, Brayton Investments CC ("*Brayton*") submitted a corresponding application for a site licence. The Controller considered and refused Quick Serve's retail licence application. He also refused Brayton's application for a site licence.

[3] The applicants then lodged appeals to the Minister of Energy ("*the Minister*"). The Minister considered both applications and refused both.

Grounds for Review

[4] The review is based on the following grounds:

4.1 The Minister's decision that there was no need for Brayton's site seemed to be based on his finding that the existing service stations pumped "*far less*" in 2013 than "*the industry threshold of 350 000 litres per month*". The applicants' case is that in all probability the "*industry threshold*" alleged does not exist. They further submit that the Minister's decision is reviewably flawed for reasons of irrationality, arbitrariness and unreasonableness.

The Law

[5] In order to contextualise the facts of this case it is necessary to make reference to certain pertinent sections of the Petroleum Products Act No. 120 of 1977 (The Act). Section 2A (1) of the Petroleum Products Act provides as follows:

"***2A Prohibition of certain activities***

*(1) A person may not -*

*(a) manufacture petroleum products without a manufacturing licence;*
*(b) wholesale prescribed petroleum products without an applicable wholesale licence;*
*(c) hold or develop a site without there being a site licence for that site;*
*(d) retail prescribed petroleum products without an applicable retail licence, issued by the Controller of Petroleum Products."*

[6] "***2B Licensing***

*(1) The Controller of Petroleum Products must issue licences in accordance with the provisions of this Act.*

*(2) In considering the issuing of any licences in terms of this Act, the Controller of Petroleum Products shall give effect to the provisions of section 2C and the following objectives:*

*(a) Promoting an efficient manufacturing, wholesaling and retailing petroleum industry;*
*(b) facilitating an environment conducive to efficient and commercially justifiable investment;*
*(c) the creation of employment opportunities and the development of small businesses in the petroleum sector;*

*(d) ensuring countrywide availability of petroleum products at competitive prices; and*

*(e) promoting access to affordable petroleum products by low-income consumers for household use.*

*(3) Any licence issued by the Controller of Petroleum Products remains valid for as long as-*

*(a) the licensee complies with the conditions of the licence;*

*(b) the licensed activity remains a going concern, excluding a site; and*

*(c) in the case of a site, there is a corresponding valid retail licence.*

*(4) The Controller of Petroleum Products must issue only one retail licence per site."*

[7] "***2E System for allocation of licences***

*(1) The Minister must prescribe a system for the allocation of site and their corresponding retail licences by which the Controller of Petroleum Products shall be bound: Provided that the Controller of Petroleum Products shall only be bound by the provisions of such a system for the period set out in that regulation or any amendment thereto or any substitution thereof which period may not exceed 10 years from the date of commencement of that regulation.*

*[Sub-s. (1) substituted by s. 4 (a) of Act 2 of 2005.]*

*(2) The Minister shall prior to promulgating a system contemplated in subsection (1) invite public comment thereon by publishing it in the Gazette and duly considering such comments.*

*(3) A system contemplated in subsection (1)-*

*(a) must intend to transform the retail sector into one that has the optimum number of efficient sites;*

*(b) must intend to achieve an equilibrium amongst all participants in the petroleum products industry within the constraints of this Act;*

*(c) must be based on the objectives referred to in section 2B (2) and 2C;*

*(d) must promote efficient investment in the retail sector and the productive use of retail facilities and may in this regard-*

*(i) limit the total number of site and corresponding retail licences in any period;*

*(ii) link the total number of site and corresponding retail licences in any period, to the total mass or volume of prescribed petroleum products sold by licensed retailers; and*

*(iii) use any other appropriate means;*

*[Para. (d) substituted by s. 4 (b) of Act 2 of 2005.]"*

[8] "***3 Appointment and powers of controllers and inspectors***

*(1) The Minister-*

*(a) shall, subject to the laws governing the public service, appoint any person in the public service as Controller of Petroleum Products and may appoint persons in the public service as regional controllers of petroleum products or as inspectors for the Republic or any part thereof;*

*(b) may on such conditions and at such remuneration as he or she may in consultation with the Minister of Finance determine, appoint or authorise any other person or person belonging to any other category of persons to act as regional controller of petroleum products or as inspector for the Republic or any part thereof.*

*[Sub-s. (1) substituted by s. 4 of Act 58 of 2003.]"*

[9] "***12A Appeal***

*(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.*
*[S. 12A inserted by s. 9 of Act 61 of 1985 and substituted by s. 13 of Act 58 of 2003.]*"

[10] "***12C Regulations***

*(1) The Minister may, without derogating from his or her general regulatory powers, make regulations-*

*(a) regarding manufacturing, wholesale, site or retail licences, including-*

*(i) the form and manner in which an application for a licence or an amendment to an already issued licence shall be made;*
*(ii) procedures to be applied in the evaluation of an application for a licence, and the period within which it shall be considered;*

*(iii) the monies payable for licences;*

*(iv) the form of a licence;*

*(v) conditions of licence which may be imposed by the Controller of Petroleum Products in respect of a particular licence or a category of licences, including-"*

The Regulations

[11] On 29 July 1977 Regulations were promulgated to facilitate the implementation of the provisions of the Act. Regulation 6 provides:

"***6 Evaluation of site licence application***

*(1) In evaluating an application for any site licence, the Controller must, subject to subregulation (2), verify that-*

*(a) the information and the documents submitted with the application form are true and correct; and*
*(b) the notice contemplated in regulation 4(1) was published.*

*(2) In the case of an application for a site licence made by a person in respect of whom section 2D of the Act is not applicable, the Controller must be satisfied that-*

*(a) there is a need for a site; and*
(b) *the site will promote the licensing objectives stipulated in sections 2B(2) of the Act."*

[12] Regulation 18 provides:

"***18 Evaluation of a retail licence application***

*(1) In evaluating an application for any retail licence, the Controller must, subject to subregulation (2), verify that-*

*(a) the information and the documents submitted with the application form are true and correct; and*
*(b) the notice contemplated in regulation 16(1) was published.*

*(2) In the case of an application for a retail licence made by a person in respect of whom section 2D of the Act is not applicable, the Controller must be satisfied that-*

*(a) the retailing business is economically viable; and*
*(b) the retailing business will promote licensing objectives stipulated in section 2B(2) of the Act.*

*(3) In determining the economic viability contemplated in subregulation (2)(a), the Controller must be satisfied that the net present value has been correctly calculated and is positive.*"

[13] This application is based on the provisions of The Promotion of Administrative Justice Act 3 of 2000 (PAJA) section 6 of which provides:

"***6 Judicial review of administrative action***

*(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.*

*(2) A court or tribunal has the power to judicially review an administrative action if—*

*(f) the action itself—*

*(i) contravenes a law or is not authorised by the empowering provision; or*

*(ii) is not rationally connected to -*

*(aa) the purpose for which it was taken;*

*(bb) the purpose of the empowering provision;*

*(cc) the information before the administrator; or*

*(dd) the reasons given for it by the administrator;*

*(g) the action concerned consists of a failure to take a decision;*

*(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or*

*(i) the action is otherwise unconstitutional or unlawful."*

The Minister's Decision

[14] The essence of the Minister's finding was that there was no need for Brayton's site. This determination was reached with reference to a threshold of 350 000 l/m which he applied to volumes pumped in 2013 by three competitor sites adjoining the site applied for.

[15] The Minister applied the 350 000 l/m threshold to the competitor sites. In a letter dated 6 May 2014 communicating his decision he wrote as follows:

"*I have considered all the information submitted in your appeal including expert reports submitted in support of your client's applications. The need for a new to industry site is not only based on the number of the sites in the area or the services available at those sites; but on the fuel volumes pumped at these existing sites. Information was obtained from the respective oil companies following your appeal for three of the five competitor sites in the vicinity of the proposed site, namely Shell station, Total Lenasia, and Caltex Formiss. The total monthly average of all petroleum products pumped by these three existing competitor sites for the year 2013 is far below the industry threshold of 350 000 per month. The existing service stations are able to cater for the current market and any potential increase in demand. The existing service stations have sufficient residual capacity to cater for any such increase. I am therefore not satisfied that there is a need for the proposed site.*"

[16] Regulation 6 (2) of the Petroleum Regulations read with section 2 B (2) and 2 C of the Act prescribe the criteria for evaluating an application for a site licence. Regulation 6 (2) (a) establishes "*need*" as one of the determinative factors for a site.

[17] The Minister's decision was **inter alia**, based on his finding that the existing service stations pumped "*far less*" in 2013 than "*the industry threshold of 350 000 litres per month*".

[18] In their papers the applicants submit that the probabilities were such that such a threshold did not exist and in support of this submission they proffered a number of reasons including that

18.1 Most petroleum wholesalers and members of the petroleum industry themselves were not aware of the existence of an "*industry threshold*" in the amount of 350 000 litres per month or any other figure.

18.2 The industry itself does not utilise fixed thresholds (for example, to determine the performance of an existing site or the feasibility of a new–to–industry site) since a threshold is, by its very nature, not able to take account of the various factors that must go into any assessment.

18.3 The majority (66% to 79%) of filling stations across the country pump less than 350 000 litres a month. In particular, 68% of all the sites in the geographical area in which the applicants' filling station is located, pump less than 350 000 l/m.

[19] On the basis of the above, the applicants submit that the Minister's decisions were reviewably flawed in that:

19.1 The decisions were not rationally connected to the information before the Minister [PAJA 6 (2) (f) (ii) (cc)]

19.2 The decisions were not rationally connected to the reasons given by the Minister [PAJA 6 (2) (f) (ii) (dd)]

19.3 The decisions were taken arbitrarily or capriciously [PAJA 6 (2) (e) (vi)] and

19.4 The decisions were so unreasonable that no reasonable person could have taken them [PAJA 6 (2) (h)]

[20] It is common course that the Minister did not purport to assess whether Brayton's site was financially or operationally viable against a threshold of 350 000 l/m. Instead the Minister measured the existing competitor sites against a threshold of 350 000 l/m to determine whether there was a need for Brayton's site.

[21] It is also common course that the Minister relied on a document referred to as "*The Appeal Memorandum*". The Memorandum also measured the three existing competitors against an industry threshold of 350 000 l/m or 300 000 to 350 000 l/m. The finding in the Appeal Memorandum was that "*The average of the three existing service stations (calculated by the Department as 262 082 litres per month was... "below" or "far below" the industry threshold.*"

[22] What is apparent also is that whilst according to the respondents, the estimated sales of Brayton's proposed service station was the determinative factor, the Minister makes no reference to the applicants' estimated sales. If he had done so, he would have considered the WSP 2013 Feasibility Study presented by the applicant in the appeal. The study showed that the applicants' site would sell approximately 305 000 l/m in the first year and close to 400 000 l/m when it reached its full volume in its third year of operation.

[23] The respondents produce a letter prepared by WSP for an unrelated licence in Polokwane. This was produced as evidence that there is an industry threshold of 350 000 l/m in determining the feasibility of new-to-industry filling stations. This letter has been referred to as "*WB4*".

[24] It does not appear however that WB4 is of any assistance in considering the respondents' case as it did not appear that the Minister had that letter before him when he decided that licence application. This was the case because the letter was acquired after the appeal.

[25] The letter WB4 would not assist the respondents' case for other reasons also. The Polokwane new-to-industry site was a "*greenfields*" site to be developed from scratch whereas Brayton's site had previously been the site of a previous petrol station. Further, it did not make any sense that existing competitors had to be assessed against a threshold applied to a new-to-industry site.

The Audi Alteram Partem Principle

[26] It appears in the conduct of the Minister during the appeal that he did not apply the **audi alteram** principle (hear the other side) and the applicants raise this point as a reason on the basis of which the review application must succeed.

[27] The term "*industry threshold*" seems to make its appearance against the figure 350 000 l/m for the first time in the Appeal Memorandum even though this is disputed by the respondents (**infra**). The applicants submit that they had sight of the Memorandum for the first time after the Minister had made his decisions.

[28] The fact of the matter is that the figure 350 000 l/m was never suggested to or put to the applicants on appeal. It is true that the applicants were aware of the figure 300 000 l/m as WSP's estimate was that the site would attain that figure in its third year of operation. More precisely, WSP 2012 report projected third-year sales at 358 271 l/m and its updated 2013 report projected 396 910 l/m.

[29] The applicants submit that neither an industry threshold, nor the threshold of 350 000 l/m ever arose during the course of the Controller's decision, despite the Controller having specifically enquired into the financial or economic viability of the proposed filling station. The "*industry threshold*" was consequently not a feature on appeal.

[30] The applicants submit and I accept that if the use of the threshold had been put to them, be it for purposes of benchmarking existing competitors to determine the need for the site (as the Minister did) or for purposes of benchmarking the site's "*financial and operational viability*", the applicants would in all probability not have submitted the facts that they did in a replying affidavit. They had suffered a double jeopardy of being denied the benefits of the **audi alteram partem** principle and losing the opportunity to make an input before the matter was decided by the Minister. They were also put in a position of making their inputs after the proverbial horse had bolted.

[31] It is on this basis that the applicants submit that the decision was so unreasonable that no reasonable person could have taken it [PAJA 6 (2) (h)].

The Respondents' Case

[32] The Minister confirms having dismissed the appeal in terms of regulation 6 (2) as no need was indicated for it. It is further submitted on behalf of the respondents that he simultaneously considered the appeals of both the site and retail licences.

[33] The respondents deny that the applicants were improperly denied the **audi alteram partem** and they submit that the applications submitted were not sufficiently persuasive to merit favourable consideration.

[34] In reference to the evidence presented by the applicants they mention the fact that the Minister was called upon to consider, **inter alia** the business plan which contained a TOWS analysis which compared the strengths and weaknesses apropos the proposed business and that the first threat discussed therein was a "*saturated market*". The site report made reference to five filling stations in close proximity of 1 km, 900 m, 800 m, 550 m from the proposed business site.

[35] It is submitted that with this physical reality, the applicant still intended to convince the regulatory authorities that within a confined commercial space there would still be a need for a sixth filling station and that they failed to convince even the Controller that there were special circumstances justifying such an approach.

[36] Further, the applicants made the following submission in a feasibility study conducted by WSP SA Civil and Structural Engineers (Pty) Ltd (WSP) issued under the hand of Harm Schreurs, an engineer who stated as follows:

"*The proposed site will take approximately 290 000 litres of fuel per month from existing local sites....*"

[37] The respondents submit that even on the applicants' own version there was no need indicated for another filling station and that a new entrant would merely scramble the existing market and redistribute fuel sales.

[38] The respondents submit that in these circumstances and bearing in mind, the guidelines in the Act and the Regulations an award of the licences was not feasible.

[39] The respondents make reference to the general guidelines provided in sections 2 B and 2 C and the more specific guidelines contained in section 2 E and regulations 6 (2) and 18 (2). In section 2 E the Minister has the following responsibilities:

39.1 To transform the retail sector to consist of the optimum number of efficient sites

39.2 To guard the rights of all participants in the sector to ensure equilibrium amongst all

39.3 To provide investments in the retail sector

39.4 To promote productive use of retail facilities

39.5 He may resort to the following in order to accomplish the above, namely:

39.5.1 The total number of site and retail licences may be limited in any period of time

39.5.2 He may link the total number of site and retail licences to the total mass of volume of prescribed petroleum products sold in any period; and

39.5.3 He may link new licences to the transfer and termination of the existing ones.

[40] The respondents submit that in adherence to the stipulations and given the concentration of filling stations in close proximity, the Minister had to take note of the number of sites and link same to the quantity of petroleum products sold which in turn led to the conclusion that there was no need for another filling station, alternatively that an additional filling station would not be economically viable.

[41] The respondent submits that in these circumstances, the benchmark did not play a decisive role in the consideration of the appeal and that reference to a threshold should be regarded to be superfluous as it did not take the matter any further.

Discussion

[42] I have considered the submissions by both parties regarding the role of the benchmark in the decision-making process by the Minister. I note in particular the attempt to downplay the significance of the "*industry threshold*" in that process. The fact of the matter is that the Minister would not have given the industry threshold the prominence accorded it in the communication of his decision if it had been insignificant in his decision-making process. In particular the portion of his letter that bears repeating is where he states:

"*Information was obtained from the respective oil companies following your appeal for three of the five competitive sites in the vicinity of the proposed site, namely Shell Station, Total Lenasia and Caltex Formiss. The total monthly average of all petroleum products pumped by these three existing competitor sites for the year 2013 is far below the industry threshold of 350 000 litres per month.*"

[43] I make two observations arising from the Minister's letter. Firstly, if the so-called benchmark was of no significance or of secondary importance, it is rather uncanny that it should find pride of place in the Minister's most important communication to the applicants. In my view, the Minister had to make reference to it because his decision turned around the benchmark. Secondly, the information regarding the three competitors was obtained "*following your appeal*". It is trite that the process being conducted by the Minister was a wide appeal and in that sense the process had to involve all the concerned parties. Having obtained information which he considered critical to his decision and which the applicants were not aware of, he had to bring it to their attention in order to obtain their inputs. This was not done and consequently, an important principle of natural justice was ignored, the **audi alteram partem**.

[44] The respondents seek to defend the failure to bring the benchmark information to the applicants by referring to a WSP report submitted on behalf of the applicants in which WSP stated as follows:

"*General conclusions:*
*The forecasted fuel sales are adequate for operating a financially feasible filling station. As a general industry guideline, filling stations are considered feasible when sales are forecasted in excess of 300 000 litres per month.*"

[45] **In casu**, the more pertinent significance of the so-called benchmark is the manner in which it was used in the decision-making process. Quite clearly a feasibility threshold for filling stations is subject to a variety of factors depending on whether a particular filling station is new-to-industry, a greenfields project, or renewal of a previously existing filling station, etc. This brings me to the next point raised by the applicants in this application for review.

The Methodology used to determine the Licence Applications

[46] The Appeal Memorandum states that certain criteria are utilized to determine "*economic viability*" under regulation 18, namely the volumes pumped by other sites, sites the Controller considers to be servicing the same traffic flow as the proposed site; and the use of the "*industry threshold*" against which existing competitors are benchmarked. In this context, the Appeal Memorandum stated that the Controller "*uses a consistent methodology to determine the need for and the economic viability of a proposed filling station.*"

[47] Contrary to the respondents, the applicants submit that none of these supplementary criteria have been published for public comment or have been

promulgated as required by section 2E (2). Yet the respondents have used the supplementary criteria to determine licence applications including in respect of the Quick Serve and Brayton applications. The applicants submit that the applications are reviewable on this ground also.

[48] The question of promulgation of a system for allocating site licences and their corresponding retail licences in terms of section 2E (1) and (2) of the Act has been examined by our courts on a number of occasions.

[49] The issue is considered in **Nine Ninety Nine Projects (Pty) Ltd and Another v Minister: Department of Energy and Others**, a judgment of the Full Bench of the North Gauteng High Court handed down on 30 April 2014 under appeal case number A543/2012 and I wish to refer to paragraph 76 to 78 thereof in which the court stated as follows:

"*[76] Mr Davis correctly submitted that the issues in this matter are of a technical nature and require relevant expertise. I may add that as I have stated above, there is a need for proper assessment of the various reports submitted for purposes of assessing exactly the issues referred to in section 2 B and Regulation 16.*

*[77] It is common cause that the Minister has not yet prescribed a "system" in terms of section 2 E of the Act. However, the reasons given for the decision (hardship or impact on the third respondent) seems to be a backdoor implementation of the system that does not exist because it seeks to limit the number of filling stations in a certain radius. The appellants have raised issues such as section 23 of the Constitution of the Republic of South Africa that guarantees each person a right to choose his/her trade. They also raised issues of lawful competition amongst retailers.*

*[78] The Minister is entitled to take as long as he/she wants or to prescribe "a system" however, in the interim, there are sufficient safeguards in the Act and the Regulations. All that is required is implementation of the relevant provisions by advising applicants how to achieve the objectives of the Act, which, in all fairness are policy statements that are capable of several meanings."*

[50] **In casu**, and contrary to the finding in the Nine Ninety Nine decision referred to above Counsel for the respondents submits that a "*system*" was published as required in section 2 E by the department. More specifically Counsel makes reference to Regulations regarding Petroleum Products Site and Retail Licences published under Government notice R286 in Government Gazette 28665, dated 27 March 2006, commencement date 27 March 2006, headlined by the following commentary: "*The Minister of Minerals and Energy has under sections 2 A, 2 C, 2 E, 2 F and 12 C of the Petroleum Products Act, 1977 (Act No. 120 of 1977), made of the regulations in the schedule*".

[51] Counsel for the respondents submits further that the regulations constitute the system and that all the factors mentioned therein were considered by the Minister.

[52] Counsel seeks support for the submission in the judgment of my sister Madam Justice Kubushi in **Westvaal Holdings (Pty) Ltd and Another v The Minister of Energy and The Controller of Petroleum Products** handed down on 9 February 2016 in the case number 62131/2013.

[53] I wish to refer to paragraph 31 to 41 of the Kubushi judgment in which she stated as follows:

"*[31] It follows, therefore, that there must be two approvals for the same site. Firstly, a competent authority, for example a Local Authority or a Municipality, must zone and approve the site for retailing of prescribed petroleum products. Secondly, before the person can proceed with the retail of such products, the controller must approve a licence, that is, 'site licence', for that site. Section 2A (1) (c) of the Act prohibits a person to hold or develop a site without there being a 'site licence' for that site.*

*[32] The first respondent is empowered in terms of the Act, firstly, to regulate in such manner as she or he deem fit or prohibit, the establishment or creation of an outlet for the sale of any petroleum product for the purposes of ensuring an economy in the cost of distribution of petroleum products or the rendering of service of a particular kind or of services of a particular standard.*

*[33] Secondly, without derogating from her or his general regulatory powers, the Minister is empowered to regulate manufacturing, wholesale, site or retail licences in general, including but not limited to the form and manner in which an application for a licence shall be made as well as the procedures to be applied in the evaluation of an application for a licence. The regulatory framework for the evaluation of licences, in particular 'site licences', is set out in regulation 6 of the Regulations. Sub-regulation (2)(a) thereof, provides that in case of an application for a 'site licence' made by a person in respect of whom s 2D of the Act is not applicable, the controller must be satisfied that 'there is a need for a site'.*

*[34]* *The Act also empowers the Minister to prescribe a system to be used by the controller for the allocation of site and their corresponding retail licences. The controller is bound by the system. A system contemplated herein must, amongst others, promote efficient investment in the retail sector and the productive use of the retail facilities and may in that regard – (i) limit total number of site and corresponding retail licences in any period; (ii) link the total number of site and corresponding retail licences in any period to the total mass or volume of prescribed petroleum products sold by licenced retailers. The system may also link the issuing of a new licence and the corresponding retail licences to the termination or transfer of ownership of one or more existing site licences and the corresponding retail licences.*

*[35]* *The applicants' contend that by requiring in terms of regulation 6 (2) (a) of the Regulations that the second respondent be satisfied that 'there is a need' for a site, the first respondent has placed an additional duty on the applicants for a site licence that is not envisaged in the Act. In so doing, so it is argued, the first respondent has exceeded her or his powers and has, therefore, acted ultra vires the Act. I, however, do not think so.*

*[36]* *It is not correct, as submitted by the applicants, that the Minister has acted ultra vires the Act in promulgating regulation 6 (2) (a) on the Regulations.*

*[37]* *It is clear from the provisions of ss 2 (1) (b) (ii) and 12C (1) (a) (ii) of the Act that the first respondent is authorised and empowered to regulate the establishment or creation of an outlet for the sale of petroleum products, and to amongst others, make regulations regarding site licences, including procedure to be applied in the evaluation of such a licence. Regulation (6) (2) (a) has thus been promulgated in pursuance of the obligations placed upon the first respondent in accordance with*

*the Act. In this regard, the first respondent is entrusted with a very wide sweeping powers to regulate as she or he deem fit.*

*[38]* *The applicants may be correct to argue that regulation 6 (2) (a) of the Regulations places a more onerous duty upon the applicants. But, in my opinion, the applicants are wrong to say that such duty is not envisaged in the Act.*

*[39]* *Firstly, I am of the opinion that the requirement that the controller must be satisfied that there is a need for a site falls within the ministerial powers set out in s 2 (1) (b) (ii) of the Act and serves the purpose of ensuring an economy in the cost of distribution of petroleum products. It should be kept in mind that the first respondent is not only empowered to regulate but also to prohibit the establishment or creation of an outlet. I am therefore of the opinion that in order for the controller to decide whether or not to prohibit the establishment or creation of a site she or he should be satisfied that there is no need for such a site.*

*[40]* *I am further of the view that in the process of evaluating an application for a 'site licence', the controller is bound by the system prescribed by the Minister in terms of s 2E (1) of the Act. In applying this system, the controller is called upon to promote efficient investment in the retail sector and the productive use of retail facilities. It is envisaged that in promoting efficient investment and productive use of retail facilities the controller may limit the total number of site and corresponding retail licences in any period or link the total number of site and their corresponding retail licences in any period to the total mass or volume of prescribed petroleum products sold by the licenced retailers. The controller may also link the issuing of a new site licence and the corresponding retail licence to the termination or transfer of ownership of one or more existing site licences and the corresponding retail licences. To maintain this equilibrium, the controller must be satisfied that 'there is a need for a site'. This the controller must do even though*

*a local authority might have already satisfied itself of the need for a site for the retailing of prescribed petroleum products. The approval of a site by a Local Authority or a Municipality to retail petroleum products does not automatically entitles the owner of the site to sell petroleum product on that site without the issuance of a 'site licence' by the controller. This is as explained in para [31] of this judgment.*

*[41] It is thus evident from the aforesaid that it is necessary for the controller when assessing an application for a site licence to be satisfied that 'there is a need for site'. I have to conclude that the first respondent acted intra vires when prescribing in regulation 6 (2) (a) of the Regulations that, for the type of licence in question, that is, a 'site licence', the controller must be satisfied that there is a need for a site."*

[54] I have considered the judgment of Madam Justice Kubushi and I concur therewith.

[55] Regarding the present application therefore, I find that the Minister acted **intra vires** his powers in considering whether there was a need for a site. However, the manner in which he sought to do so was procedurally flawed in that he failed to assess whether Brayton's site was financially and operationally viable by measuring its estimated sales. Instead, he measured the existing competitor sites against a threshold of 350 000 l/m in order to determine whether there was a need for Brayton's site.

[56] Quite evidently therefore the decisions taken by the Minister may be said to be not rationally connected to the information before the Minister [PAJA 6 (2)(f)(ii)(c)] and that the decisions were not rationally connected to the reasons given by the Minister [PAJA 6 (2)(f)(ii)(dd)].

[57] I also find that the Minister, having obtained information relevant to the application and to the appeal, failed to notify the applicants of same and obtain their input thereby depriving them of their rights in accordance with the **audi alteram** principle.

[58] I find the dictum in **AllPay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others** (CCT 48/13) [2013] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) (29 November 2013) relevant to the present case here it was stated as follows:

> *"[25] Once a ground of review under PAJA has been established there is no room for shying away from it. Section 172(1)(a) of the Constitution requires the decision to be declared unlawful. The consequences of the declaration of unlawfulness must then be dealt with in a just and equitable order under section 172(1)(b)."*

[59] In the result I make the following order:

59.1 The Minister's decisions on 6 May 2014 made under the Petroleum Products Act to refuse the first applicant's licence application for a retail licence and the second applicant's application for a site licence are reviewed and set aside.

59.2 The Minister is ordered to reconsider the applicants' licence applications, such reconsideration to take place in the following manner:

59.2.1 Within 30 days of the date of this order, the Minister shall inform the applicants of the criteria by which their licence applications will be evaluated and shall permit the applicants to supplement their licence applications to the extent necessary to comply with such criteria.

59.2.2 The applicants shall, in addition, be permitted to supplement their licence applications with such new information as may have become relevant since the decisions of 6 May 2014.

59.2.3 The Minister shall investigate the applicants' licence applications, or cause the same to be investigated by persons with relevant expertise.

59.2.4 The Minister shall provide a copy of the findings of the investigations to the applicants and solicit their responses.

59.2.5 The Minister shall decide the applications, and shall give her decision within a reasonable time.

59.3 The first and second respondents shall pay the costs of this review, jointly and severally, such costs to include the costs of two counsel.

**S. A. M. BAQWA**
**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**
**(GAUTENG DIVISION, PRETORIA)**

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| Heard on: | 17 May 2017 |
| Delivered on: | |
| For the Applicant: | Advocate A. P. Joubert SC<br>Advocate M. N. Augustine |
| Instructed by: | Cliffe Dekker Hofmeyr Incorporated |
| For the First Respondent: | Advocate C. A. Kriel |
| Instructed by: | The State Attorney |