**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA,**

**(GAUTENG DIVISION, PRETORIA)**

**Case No: B430/2024**

Reportable: No
Of interest to other Judges: No
Revised: No
Date:

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SIGNATURE

In the matter between:

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|---|---|
| TRUSTEES FOR THE TIME BEING OF AGAPI TRUST (243/2008) being: JOHN BASIL ARSENIOU NO, HELEN LUCIA ARSENOU NO, and LAURINE SAHD NO | 1st Applicant |
| BIZBETH TRADING 30 CC | 2nd Applicant |
| and | |
| THE MINISTER, MINERAL RESOURCES & ENERGY | 1st Respondent |
| THE CONTROLLER OF PETROLEUM PRODUCTS | 2nd Respondent |

CASMATH TRADING (PTY) LTD 3rd Respondent

GRANDWAY PROPERTY INVESTMENTS CC 4th Respondent

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**JUDGEMENT**

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MOOKI J

1 The applicants seek relief in two parts. First, interdicting the Controller of Petroleum Products ("the Controller) in relation to a site and retail licence certificates for a petrol station. Second, reviewing the decision by the Minister of Minerals and Resources and Energy ("the Minister") in relation to an appeal to the Minister by the third and fourth respondents ("the Respondents"). The Court heard the matter on an urgent basis.

2 The applicants sought an undertaking from the Controller that the Controller will not issue licences to Respondents pending a review of the Minister's decision. The Controller did not give the undertaking, resulting in the present application.

3 The applicants are holders of a licence to conduct the business of a fuel filling station ("retail licence"). They also have a licence to house such a station ("site licence"). The Controller issued the licences.

4 The Controller is the official who examines and determines whether the requirements for the grant or otherwise of a retail and site licence pertaining to petroleum products have been met. Decisions by the Controller are appealed to the Minister.

5 The respondents seek to establish a new petrol station in the vicinity of a station controlled and operated by the applicants. The applicants objected. The Controller upheld the objections. The respondents appealed to the Minister, who overruled the Controller and directed that the Controller issue the Respondents with the licences. The applicants seek to interdict the issuing of the licences pending a review of the decision by the Minister.

6 There is a long history to the dispute. The respondents applied for site and retail licences on three occasions. The Controller rejected the applications on each occasion. The Minister overruled the Controller on each occasion.

7 The High Court (Eastern Cape Division, Makhanda) made an order on 2 August 2022 in review proceedings brought by the applicants against the same parties as in this application. The applicants sought, amongst others, the setting aside of the Minister's decision to overrule the Controller's rejection on 9 June 2017 of the applications by the respondents for retail and site licences.

8 The applicants say the Minister was not *bona fide* in overriding determinations by the Controller. The applicants also say the respondents used "political connections" to persuade the Minister to intervene on their behalf in the past by directing the Controller to issue the respondents with licences. The applicants say, in substance, that this is the third occasion that the Controller rejected applications by the respondents and that similarly, this is the third occasion that the Minister overruled the Controller in relation to those applications.

9 The Minister did not file an answering affidavit. The respondents do not, in their answering affidavit, deny using "political connections" to persuade the Minister to intervene on their behalf as averred for the applicants.

10 The substance of the applicant's opposition to issuing Respondents with licences is that competition by the new station will not accord with the requirements of the Petroleum Products Act, 120 of 1977 ("the Act"); including that competition must be verifiable both in relation to the existing station and the proposed station. The applicants contend that the proposed new station will cause irreparable commercial damage to their business.

11 The Controller rejected the application by the respondents in part because issuing the licences would not promote the licensing objectives in section 2B (2) of the Act.

12 The Minister reversed the decision by the Controller for several reasons. Those included that the Controller did not verify the contents of expert reports submitted in the application, as opposed to merely accepting assurances by the applicant. The Minister continued that "The Controller is thus required to conduct their own independent assessment and investigation to which end, amongst others, a site visit is conducted. However, I'm not satisfied that the Controller discharged his duties to verify the information submitted as required of him in terms of the Regulations."

13 The Minister also took issue with the view by the Controller that the proposed new station will have a negative impact on the economic viability of existing service stations. The Minister pointed out that "the fact that the granting of the licence could create some hardship to any of the existing service stations is not a decisive factor and must be weighed against all other relevant considerations." The Minister also

criticised the site visit report in that the report "has a narrow focus and makes no mention of other crucial factors which should equally be considered." The Minister mentioned that the respondents submitted a report by Urban – Eco Development Economists "which concluded that the primary market area reflects an upward trend in population growth and immigration and consequently demand, [which] cannot be made by the existing service stations in the long run."

14 The Minister concluded that there was a need for issuing the Respondents with the licences. The Minister then set aside the decision by the Controller and instructed the Controller to issue the Respondents with the licences.

15 The applicants asked the Controller for an undertaking to stay issuing the licences pending proceedings to review the decision by the Minister. The Controller did not give the undertaking, leading to the present application.

16 The case for the respondents is essentially that a new station will not be adverse to the applicants. The respondents say the area is in fact underserviced, particularly given the anticipated demand for petroleum products in the area.

17 The respondents say the applicants presented the respondents with a proposal which the respondents considered an attempt by the applicants to extort money and immovable assets from the respondents. The respondents say the proposal was "a blatant display of the extent to which the applicant (sic) would go and the extent of the crude tactics he (sic) will apply to obtain an objective…"

18 The respondents say the applicants have not met the requirements for an interim interdict. They rely on considerations as indicated below.

19 The applicants had not identified any right to any relief, be it a clear or a *prima facie* right; the applicants made no attempt to satisfy the requirement regarding irreparable harm, whereas the respondents would suffer that harm.

20 The respondents say they will suffer harm based on several considerations, including that the respondents hired employees whose contracts are to commence on 1 March 2024 and that the respondents took a loan with a bank, with a monthly commitment of R197 478.95. The bank was owed R13 840 862.11 by 22 February 2024.

21 The balance of convenience, according to the respondents, favour not granting the interdict. That is because there is no evidence that the rights of the applicants were under threat; whereas an interdict would delay the ability of the respondents to commence trading activities.

22 The respondents further maintain that the applicants have two available remedies, namely a review of the decision by the Minister and a claim for damages.

23 The applicants deny attempting to extort the respondents. They say their proposal was a business-based proposal to settle the matter.

24 The applicants deny that the balance of convenience favours the respondents. They point out that the respondents continued building their station even after the Eastern Cape High Court gave the order setting aside the Minister's decisions upholding the respondents' licence applications. The station was completed in July 2023. The applicants also say the respondents rushed to sign employment contracts; the Sheriff served the application on the respondents on 19 February 2024, with the respondents signing employment contracts on 20 February 2024.

25 The review proceedings are not before this court. This court, however, considers what the applicants say they intend to raise in review proceedings as part of determining whether the applicants have made-out a case for the relief sought in this application.

26 The Controller is required, when considering applications, to consider various objectives as detailed in the Act, including that an application would facilitate an environment conducive to efficient and commercially justifiable investment.[1] The respondents' station is 300 metres away from the applicants' existing station, on the same side of the street. It is also 400 metres away from another station; also on the same side of the street. The Controller concluded that these facts, together with other considerations, militated against another station.

27 The Respondents say the Urban-Eco report confirms that the area is underserved. The applicants criticised the Urban-Eco report for being self-selective. They say "Urban Eco's motivation is one-sided, prejudiced, is made up of a 'sales pitch' which does not provide a shred of evidence of actual growth or of approved developments that are under way. It is made up of baseless opinions, wishful thinking speculative utterances that have no foundation in fact or reality." The respondents did not meet this criticism in their answering affidavit. For example, the respondents did not seek to establish that there was a foundation to the views expressed in the Urban-Eco report regarding actual growth or approved developments that were under way.

28 The respondents relied heavily on the decision in *Nine Ninety Nine Projects (Pty) Ltd and Another v Minister: Department of Energy and Others*[2] as supporting their view that the applicants may not raise hardship or proximity as bases to object to a new station. That decision does not say that hardship and proximity in relation to

[1] Section 2B(2)(b), Petroleum Products Act
[2] (A543/12) [2014] ZAGPPHC 335 (30 April 2014)

an existing station are irrelevant. Those are some of the factors which the Controller is required to consider in relation to an application for a licence.[3] The respondents do not show that the Controller's decision in this instance was based exclusively on proximity and hardship that may befall the applicants.

29 I disagree that the applicants have not identified a right to be protected by an interdict. The applicants say they are entitled to protect their business from illegal and unlawful or unauthorised competition.

30 The balance of convenience favours the applicants. They cannot be expected to endure a competitor who, on three different occasions, has been shown as not conducting operations as required by the Act. The respondents also knew that their application could be objected to, which would include aggrieved competitors taking decisions by the relevant authority on review.

31 The respondents assumed what may befall them when they continued constructing their petrol station on the face, among others, of repeated refusal of their applications by the Controller. The respondents also continued to build their station notwithstanding the order by the High Court in the Eastern Cape Division. There is force in the applicants' contention that the respondents seemingly rushed to sign contracts of employment a day after the respondents were served with process in this application.

32 The applicants contend that they cannot recover damages that they will suffer should the interdict not be granted. The respondents do not address this in their answer, stating only that the applicants have other redress in the form of damages. The fact that the applicants can institute review proceedings does not constitute substantial redress that warrant not granting the interdict. That would lose sight of the real world consequences on the applicants. On the issues as currently pleaded, the applicants have made a strong case that their business operations will fail should the respondents commence operations. The law does not require that the applicants be subjected to the vagaries of the outcome of review proceedings. It is also doubtful that the applicants would be able to recover damages. It being uncertain as to the person or persons whom the applicants would look to for any such damages.

33 I do not accept that the applicants sought to extort the respondents. The proposal referenced by the respondents is clearly a business proposal. To this end, the applicants proposed the following to the respondents:

[…]

3. In lieu of the R10m plus R5m, you transfer your site Erven over to Agapi Trust at no cost to Agapi Trust. Agapi Trust being the owner of land of both sites is the only

[3] See *Nine Ninety Nine Projects*, para 68

way the Controller will ever entertain a site license (sic) transfer together with the fact we would be closing down our Komani fuels. Only now will there be a need for your fuel station as your site will replace our site and patrons would need to be serviced.

[…]

34 The proposal shows that the applicants still maintained that there was no scope for the presence of both operations. The proposal was a commercial view taken by the applicants. It is important to note that the applicants did not change their view that a new station would be detrimental to their operations.

35 The applicants succeed. I make the following order:

35.1 The matter is enrolled and is heard on an urgent basis in terms of Rule 6(12).

35.2 Pending finalisation of the relief sought in Part B of the notice of motion:

35.2.1 The second respondent is interdicted from issuing a site and/or a retail licence certificates to the third respondent and the fourth respondent, respectively, pertaining to a site at Erven 1273 and 1274 Komani (Queenstown), being addresses No 2 and No 4 Komani Street, Komani, Eastern Cape.

35.2.2 The third and fourth respondents are interdicted from conducting and operating a fuel filling station at Erven 1273 and 1274 Komani (Queenstown), being addresses No 2 and No 4 Komani Street, Komani (Queenstown).

35.2.3 The decision of the first respondent dated 12 February 2024, on appeal to the first respondent, is suspended.

35.2.4 The 12-month period stipulated in Regulation 24 of the Regulations for Site and Retail Licences is suspended as from 12 February 2024.

35.3 Costs are reserved for determination by a Court deciding the relief sought in Part B of the notice of motion.

Omphemetse Mooki

Judge of the High Court

Heard: 5 March 2024

Decided: 11 March 2024

For the applicants: BG Savvas

Instructed by: Murray Kotze & Associates

For the third and fourth respondents: L Mnqandi

Instructed by: Kaplan Blumberg Attorneys