



**IN THE HIGH COURT OF SOUTH AFRICA  
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

**CASE NO: D7785/2019**

In the matter between:

**METRO SERVICE STATION (PTY) LTD**

**FIRST APPLICANT**

**I MANGAROO PROPERTIES (PTY) LTD**

**SECOND APPLICANT**

**UDS MOTORS CC**

**THIRD APPLICANT**

**HARPERS HILLCREST AUTO CC**

**FOURTH APPLICANT**

and

**CONTROLLER OF PETROLEUM PRODUCTS**

**FIRST RESPONDENT**

**MINISTER OF ENERGY**

**SECOND RESPONDENT**

**OVERROX TRADING 70 CC**

**THIRD RESPONDENT**

**TRAFFORD ROAD CONVENIENCE CENTRE  
(PTY) LTD**

**FOURTH RESPONDENT**

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**ORDER**

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1. The decision of the first respondent dated 9 November 2017 approving the third and fourth respondents' applications for the granting of retail and site licenses to operate a service station at the property at Erf 19 Pinetown at 48 Motala Road,

Pinetown ('the premises') and the second respondent's decision of 16 August 2019 dismissing the applicants' appeal against the first respondent's decision are reviewed and set aside;

2. The second respondent's decision is substituted with an order upholding the applicants' appeal, setting aside the first respondent's decision and dismissing the third and fourth respondents' applications for the approval of retail and site licenses for the premises;

3. The costs of the application, including the costs of senior counsel where employed, as well as all reserved costs and the costs of the application for the adjournment of the opposed application on 12 October 2021, shall be paid by the third and fourth respondents jointly and severally, the one paying the other to be absolved.

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## JUDGMENT

Delivered on:

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**SHAPIRO AJ**

**Introduction**

[1] This is an application for the review of both the decision by the Minister of Minerals and Energy in terms of which he dismissed an appeal against a decision by the Controller of Petroleum Products ('the Controller') to issue site and retail licenses to the third and fourth respondents in terms of the Petroleum Products Act 120 of 1977 ('the Act') and of the Controller's decision itself. The review was brought in terms of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA') and as a legality review.

[2] The application is brought by four competing service stations that are all within a two–three kilometre radius of the site currently operated by the third and fourth respondents, in terms of the approvals that are the subject of this review.

[3] The first and second respondents abide this court's decision but have delivered an affidavit explaining their position and defending their decisions.

[4] The third and fourth respondents opposed the application. Their answering affidavit was already approximately 16 months out of time when they launched an application to adjourn the hearing of the opposed application set down for 12 October 2021 and for further orders directing them to deliver their answering affidavits within 15 days.

[5] The application to adjourn the review was opposed and was argued on 12 October 2021, prior to the hearing of the review. I dismissed the application for an adjournment with costs. My reasons for doing so are set out later in this judgment.

[6] Accordingly, this application has been determined based upon the applicants' founding and supplementary founding affidavits, together with their annexures as well as the first and second respondents' explanatory affidavit and the record delivered by them, running to 478 pages.

### **The Petroleum Products Act 120 of 1977 and the Regulations promulgated thereunder**

[7] The duties imposed on the Controller when considering applications for the issue of licenses under the Act are set out in s 2B, which reads as follows:

#### **'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.'

[8] Given the nature of this review, it is also necessary to set out the relevant Regulations<sup>1</sup> that apply to the consideration of applications for licenses by the Controller.

[9] Regulations 6 and 18 require the Controller, when evaluating an application for a site or retail license, to verify that:

- (a) the information and documents submitted with the application form are true and correct;
- (b) there is a need for a site;
- (c) the site will promote the licensing objectives stipulated in s 2B(2);
- (d) the retailing business is economically viable and, in this regard, the Controller must also be satisfied that the net present value ('NPV') has been correctly calculated and is positive.

[10] Regulations 13 and 15 require the applicant to submit a motivation for the site together with the documents contemplated in Regulation 25(1) and must also provide not only the result of the NPV calculation but all data and assumptions used in the calculation of the NPV. In turn, Regulation 25(1) requires an applicant for a

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<sup>1</sup> Regulations regarding Petroleum Products Site and Retail Licences, published under GNR 286 in GG 28665 of 27 March 2006 as amended by GNR 1061 in GG 35984 of 19 December 2012.

retail license to submit inter alia a motivation for the retailing activity, the NPV calculation including both the result of that calculation and all data and assumptions used in the calculation of the NPV.

### **The third and fourth respondents' applications for the issue of site and retail licenses**

[11] On 20 February 2016, the third respondent applied for the issuing of a site license in order to establish a service station on Erf 19, Pinetown in the Westmead Industrial Area. The fourth respondent applied for the issuing of a retail license in order to operate the service station on that site.

[12] Both applications contained a 'motivation' for the license and the fourth respondent's application included the NPV calculation which is also required in terms of the Regulations. Given the similarities between the two applications, I will refer to them jointly as 'the applications'.

[13] The detail of the planned development was described in the applications to include four pump islands for light motor vehicles, two pump islands for heavy motor vehicles, a convenience store of 400 square meters and a fast-food outlet of 460 square meters. The proposed facility would include 30 light motor vehicle parking bays and would hold four 23 000 litre tanks (three petrol and one diesel) for light motor vehicles and four 60 000 litre tanks and one 46 000 litre tank of diesel for heavy motor vehicles.

[14] The applications contained reports from specialist consultants, including NDA Consulting Engineers CC who undertook a traffic impact assessment report in July 2014 and Environ Edge Environmental Solutions who delivered a final basic assessment report for the proposed service station in September 2015.

[15] In describing the site's potential trading market, the third and fourth respondents identified businesses in the Westmead Industrial Area as well as

surrounding industrial areas, surrounding businesses and trucks passing through Pinetown between Durban and Gauteng because 'provision is being made for trucks to stop overnight'.

[16] The third and fourth respondents estimated that they would attract at least 1 million litres of diesel to the site for heavy vehicles because separate driveways would be 'created for trucks and spaces provided for overnight stop facilities. One of the aims of the business is to create a 24-hour oasis for weary truckers along their long trips, where they will be able to refuel or rest in their rigs overnight in a safe environment'.

[17] The third and fourth respondents estimated that they would maintain a throughput of 320 000 litres of fuel per month from light vehicles alone and that the additional diesel sales to trucks would make the site even more economically viable.

[18] This figure was arrived at by applying the following formula: Monthly fuel sales = (vehicles per day passing the site) x (average fill per vehicle) x (percentage of vehicles, of passer-by traffic, turning into the site) x (average full normal trading days in a month). Thus, an estimated 10 000 vehicles passing per day x 30.8 litres x 4% x 26 days equals 320 000 litres.<sup>2</sup>

[19] In their application form, the third and fourth respondents estimated that 120 000 litres of petrol, 200 000 litres of diesel and 1 million litres of 'EDC' diesel (being diesel sold to trucks forming part of the Engen Diesel Club) would be sold per month.

[20] The third and fourth respondents delivered NPV calculations in spreadsheet form that included revenue calculated from the predicted sale of petrol and diesel to light motor vehicles as well as the sale of diesel to EDC truck members.

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<sup>2</sup> On this prediction, 400 vehicles per day would turn into the site to purchase fuel.

[21] According to an explanation of the NPV calculations and assumptions delivered on behalf of the third and fourth respondents and to the first respondent on 27 July 2017, total fuel revenue for the site was predicted to be R199 625 134 calculated as follows:

'MOGAS (LRP & ULP <sup>3</sup> ) -	1 521 900 litres @ R12.46/litre	=	R 18 962 879
GASOIL (LRP & ULP) -	2 536 501 litres @ R10.96/litre	=	R 27 800 047
EDC (LRP & ULP) -	12 682 503 litres @ R10.96/litre	=	R139 038 281
CASH DIESEL -	1 168 250 litres @ R10.96/litre	=	R 13 823 928'

[22] The applicants also predicted non-fuel revenue to be R16 579 681 including:

'QUICK SHOP – (Based on average usage formula – Engen)	R10 695 000
Truck Parking (Based on HD Traffic Assessment and EDC)	R1 826 280
EDC Handling Fees (Calculated at R0.32/litre)	R4 058 401'

[23] I referred briefly to the traffic impact assessment report delivered on behalf of the applicant by NDA Consulting Engineers CC dated July 2014. The introduction to that report described the proposed development in the same way as I have set out above, including the convenience store of 400 square meters and the fast-food outlet of 460 square meters. The engineers recorded that normally between two and four percent of one-way traffic is attracted to a site and has very little influence on the capacity of the road or safety.

[24] According to the traffic counts, 818 vehicles passed the site during the morning peak hour and 1019 vehicles passed the site during the afternoon peak hour. Of this, the engineers anticipated that the service station would attract 32 vehicles during the morning peak hour and 42 vehicles during the afternoon, with a total of between 200 and 250 vehicles a day (of which, in turn, 10 to 20 percent would be non-fuelling customers and would patronise only the convenience shop or the ATM).<sup>4</sup>

<sup>3</sup> Lead Replacement Petrol and Unleaded Petrol

<sup>4</sup> This means a probable maximum of 200 to 225 vehicles per day patronising the service station.

[25] Referring to the proposed 460 square meter fast-food outlet, the engineers anticipated that this would generate 137 trips in the afternoon only.

[26] The applicant also submitted a business plan for the proposed service station which stated the following:

'The entrepreneur, Mr. Kisten, has purchased the land on which the service station will be established and has undertaken to create a modern service station that will offer patrons an extensive range of products and services including the food court and a fully-fledged truck stop.

The service station would operate 24 hours a day, 7 days per week.

...

Trafford Road Convenience Centre Truck Stop will offer the following products and amenities to truck drivers:

- diesel sales
- shower and toilet facilities
- overnight parking
- 24 hour site surveillance and armed response

The 24 hour site will be an oasis for weary truckers along their long trips, where they are able to refuel, refresh or rest in the rigs overnight in a safe environment.'

[27] In the section of the plan described as 'Forecourt Objectives', it was again recorded under a subsection labelled 'Increased Business' that the newly constructed site will incorporate a 24-hour Quick Shop and a food court into the business structure.

[28] The third and fourth respondents identified 'a diverse market with considerable potential for business growth with the introduction of a commercial and/or heavy duty vehicles forecourt and truck stop facilities' as a strength of the

proposed service station and 'the introduction of a branded food court' as an opportunity.

[29] In the 'Pricing' section and in dealing with how the business would respond to competitors, the third and fourth respondents said the following:

'Our product offering is threefold: fuel, convenience store merchandise and a fully-fledged truck stop facility allowing the business to capture a larger market share thanks to a differentiated product offering.'

[30] In identifying the customers that the proposed service station would target, the third and fourth respondents identified:

'- Truckers

- Motorists (who travelled daily on Motala Road and the adjacent Trafford Road and surrounding arterial roads)
- Employees (Employees of the surrounding office box and factories)
- Passers-By (Commuters, traveling by a taxi, bus or pedestrians)
- Businesses in the surrounding area.'

### **The objections to the third and fourth respondents' applications**

[31] On 19 July 2016, the third and fourth applicants delivered a formal notice of objection to the third and fourth respondents' applications, which was submitted by Venn and Muller Attorneys. The objections are lengthy, and I will not repeat all the submissions.

[32] It was asserted that the area was over-traded and did not require another filling station, and that the local market was too small even to ensure that the existing stations maintained their sales volumes. There was therefore no need for the proposed filling station and its business was neither feasible nor viable.

[33] Reference was made to the Independent Annual Margin Determination for the Fuel Retailing Industry which posited that a filling station must pump in excess of 350 000 litres per month to be commercially viable.

[34] The first and second applicants delivered their objection to the applications on 20 July 2016, submitted by their current attorneys of record. They pointed out that the property was being constructed illegally, in the absence of approval from the eThekweni Municipality and that the only approved development was a fuelling and service station and not a truck stop or restaurant.

[35] In this regard, it was pointed out that the site was zoned 'Light Industrial' and that the primary land uses available included 'Fuelling and Service Station' and 'Motor Workshop'. Both a 'Restaurant/Fast-Food Outlet' and a 'Truck Stop' could only be permitted by way of a special consent approval.

[36] A 'Truck Stop' was a different land use and was defined as being premises used primarily for commercial vehicles and which might 'include overnight accommodation and restaurant facilities primarily for the use of truck crews'.

[37] The first and second applicants pointed out that the third and fourth respondents had neither applied for nor had been granted special consent to operate a truck stop or a restaurant/fast-food outlet. Further, the permitted use of the site allowed a convenience shop 'not exceeding 200 square meters' - half the size contemplated by the third and fourth respondents.

[38] The objectors attacked the four percent 'take-off' that was used to calculate potential traffic turning into the proposed service station because the proposed site and the existing sites were located within a single industrial township and were fed by the same network of roads. Further, any vehicle proceeding to or coming from the N3 interchange would pass the objectors' sites first and could either fill up or obtain overnight accommodation there.

[39] It was pointed out that Metro Service Station (the first applicant, "Metro") had been excluded in the third and fourth respondents' analysis of existing service

stations, in circumstances where Metro was only between two and three kilometres away. According to the maps attached, it appeared that trucks would pass Metro when exiting the N3 before passing the proposed site.

[40] It was also recorded that Metro had additional capacity and was not pumping fuel to the extent of its full capacity. The site had not yet achieved a 'mature volume' and the granting of a license to an almost identical facility would negatively affect the objectors' own trade.

### **The third and fourth respondents' response to the objections**

[41] On 4 November 2016, the third and fourth respondents' attorneys delivered their response to the objections. Included in that response was the third and fourth respondents' reply to the complaints that the site lacked Environmental Impact Assessment approval and that there was no town planning consent.

[42] The third and fourth respondents stated that a 'mistake' had 'crept into [their] motivations and business plan' as those documents referred to 'activities that may resemble a truck stop' but that this was incorrect as the development would not be a truck stop but simply 'a normal filling station with the usual amenities found at a modern filling station' that would have dedicated pumps for large trucks.

[43] The third and fourth respondents stated that, in order to remove any doubt, they would submit 'simultaneously herewith amended site and retail license motivations as well as an amended business plan to the Controller' which would make clear that no truck stop would be constructed or operated, no restaurant would be constructed or operated from the site and the building restriction imposed on the property would be adhered to strictly.

[44] In dealing with the complaint that there was excess capacity available at the objectors' sites, the third and fourth respondents highlighted the interests of consumers and stated that they would demonstrate 'that there will be a vast new

amount of volumes that do not currently form part of the fuel market or that of existing sites volumes’.

[45] Here, the third and fourth respondents were referring to Mr Kisten’s family who were described as owners of major transport and freight logistics companies. It was recorded that the family had decided to centralize their refuelling operations to cut costs and maximize profits and that the proposed new site had been identified as the location where ‘all the freight logistics companies’ fleets’ would refuel in the future.

[46] This was calculated to amount to between 900 000 to 1 million litres per month.

#### **The Controller’s site visit of 18 April 2017**

[47] Ms Xolile Mtwla, the Regional Energy Director for KZN, employed by the second respondent, undertook a site visit at the proposed site and delivered a report on or about 18 April 2017. Ms Mtwla included a benchmark table that set out the closest competitors to the proposed site and then expressed her opinion about whether the competitors were in fact direct competitor’s or were aiming at the same target markets.

[48] Ms Mtwla concluded that the four identified competitors had different target markets to the proposed service station.

[49] Ms Mtwla’s ‘Need Analysis’ is one paragraph and says the following:  
‘The traffic count in this area is a mixture of bakkies, trucks and a small vehicles as the industrial site is adjacent to a residential area. From the traffic count it is evident that this is quite a busy industrial park. This is also indicated by the volumes currently pumped by the competing sites.

As the entrance is on the Trafford rd and will have easy access and visibility of the site is good from both negative traffic and positive traffic.

A number of jobs will be created during the construction and permanent jobs during the operation of the garage.’

[50] After recording that a number of objections had been received, Ms Mtwla recommended that the site and retail applications be approved ‘given at the traffic count and volumes in the area. The area is able to accommodate another site’.

### **The first respondent’s analysis of the third and fourth respondents’ applications**

[51] The Controller provided a copy of its ‘Analysis Procedure’ undertaken in respect of the application. The Analysis referred to the recommendation contained in the site visit report and then briefly set out the objections delivered to the applications. These included that the applications contravened the town planning scheme.

[52] The analyst undertaking the analysis then stated the following:

‘The above objections were responded by the applicant through the legal representative. The response indicated that the objectors were confused in terms of type of business the entity intends to operate. They dismiss the objections based on the fact that they are going to operate a normal filling station instead of truck stop alleges [sic] by objectors.

#### **Recommendation:**

it is recommended that the Controller of Petroleum Products approve the Analyst’s recommendation to grant [the application]. There is a need for a new site retailing petroleum products in Westmead Industrial Area of Pinetown...’

[53] On 9 November 2017, the Controller issued the site and retail licenses to the third and fourth respondents.

### **The applicants’ appeal against the Controller’s decisions**

[54] The applicants delivered a consolidated appeal against the Controller’s decisions. The applicants argued that there had been material amendments to the application, based on the assumption that the third and fourth respondents had

submitted amended motivations and business plans as they had undertaken to do to support their application in respect of a service station and not a truck stop. The applicants alleged that the documents supplied were all aimed at supporting the application for a truck stop and that the NPV explanation provided by the third and fourth respondents as late as July 2017 included income from the truck stop.

[55] Similarly, a letter from the fourth respondent dated 27 July 2017 included income from truck parking of R1,8 million. It was argued that the supporting documentation was unreliable and misleading.

[56] The applicant complained that the Controller had not assessed the viability or need for the site and had not challenged the evidence provided by the first applicant about its underperformance and the fact that it was pumping only half of its mature volumes.

[57] It was argued that the approval did not advance the promotion of an efficient industry or facilitate an environment conducive to efficient and commercially justifiable investment.

[58] The applicants attacked the NPV calculations of the third and fourth respondents and attached a report by a chartered accountant, Mr G Dulcer, who analysed the fourth respondent's projected expenditure and concluded that the amounts in the NPV calculations were not accurate and painted a misleading picture of the viability of the proposed business.

[59] It was argued that for the fourth respondent to achieve its projected fuel sales, the service station would have to service approximately 80 to 100 trucks per day in addition to 275 other vehicles and that there was no case established for this kind of demand (or need) in the area, especially where volumes at the applicants' sites were below capacity.

[60] Regarding the 'arrangement' that the fourth respondent would provide bulk fuel to the fleets of associated companies, it was pointed out that a retail license was not required and that those needs were already provided for. The second respondent was called upon to consider why a new truck facility was required to service the fleet of trucks that already had a source of fuel.

[61] It was argued that it would be reckless to permit a new entrant whose major motivations were the servicing of its own associated fleet or to allow the divergence of other business which would place competitors in jeopardy.

[62] It was submitted that this would create an unstable market, especially as trading volumes were substantially down and the market had allegedly stagnated.

### **The Minister's decision on appeal**

[63] On 4 June 2019, the Director General of the Department of Energy submitted a Decision Memorandum to the second respondent in respect of the appeal.

[64] In response to the complaint that the applicant had not been provided with updated information to support a service station and not a truck stop, the Director General had the following to say:

'From the documents provided by the Controller there is no evidence that the Applicants amended their business plan or motivations for site and retail licenses, therefore there was no duty on the Department to supply the Appellants with documents that did not exist. It is important to note that when an application is received by the Department pertaining to site and retail licenses, the Department does not require specification in terms of whether the filling station will operate as a truck stop or not. It is obviously the case that the manner in which the retail activities are to be conducted is important to the Controller, however the Act and the Regulations do not explicitly require reference to a truck stop and if it is the intended retailing model, therefore the application before the Controller was not misleading in any material respects.'

[65] Turning to the complaint that the third and fourth respondents had not included the Metro Truck Stop in the analysis of existing service stations or the impact of a new site on its business, the Director General opined that:

'There is no evidence to indicate that the Controller did not consider what is regarded by the Appellants as "the underperformance of the Metro Truck Stop". All submissions were evaluated against the need for a further service station in the area and the Controller was satisfied that there is a need for an additional service station. The fact that the proposed site will not be conducting retailing activities primarily as a truck stop is a relevant factor to be taken into account. It is also important to note that a percentage of fuel sales will come from the Applicants own fleet of freight logistic companies.'

[66] The Director General dismissed the applicants' complaints about the NPV calculations, concluding that the Controller 'was satisfied that the net present value was correctly calculated and was positive'.

[67] In dealing with the report obtained from Mr Dulcer, the Director General recorded that:

'We have taken note of the report by Mr. Gareth Dulcer and his conclusion that the financial information estimated by [the fourth respondent] is unreasonable. Unfortunately the test pertaining to the net present value is not one of reasonableness. Nowhere does Mr. Gareth Dulcer 's report indicate that the net present value calculation is negative.'

[68] The Director General dismissed any complaints about the overstatement of revenue or that the overwhelming majority of vehicles that passed the proposed site would either have passed or would pass the appellants' stations on the same trip.

[69] The Director General stated that the appellants did not provide any plausible reason why the third and fourth respondents should not have included truck parking revenue in the calculations and concluded that the proposed site would operate as a 'normal' service station catering for both light and large commercial vehicles and would not be a direct competitor of Metro Truck Stop which was largely geared toward operating a truck stop facility.

[70] In conclusion, the Director General opined that the third and fourth respondents had 'well motivated for an additional service station in the area' and that the 'Controller assessed the applications properly and came to the conclusion that there is a need for an additional service in this area and this view is supported'.

[71] The Director General recommended that the Controller's decisions be confirmed and that the appeals be dismissed. The second respondent dismissed the appeals on or about 16 August 2019.

### **The applicants' grounds of review**

[72] The applicants' grounds of review largely are consistent with the objections that I have set out above.

[73] I do not propose to repeat these grounds in the judgment, save to record that the applicants assert that the failure of the first and second respondents to properly consider the applications and to analyse them was fatal to the approval process.

[74] The applicants complained that the first and second respondents acted irrationally, failed to apply the peremptory provisions of the Act, and arrived at decisions that offended against the provisions of ss 6(2)(d), 6(2)(e)(iii) and 6(2)(f)(ii) or 6(2)(h) of PAJA or the doctrine of legality.

[75] In their supplementary affidavit filed in response to the delivery of the Record, the applicant's expanded their complaints and averred that the first and second respondents completely misunderstood the nature of the license applications, the nature of the applicants' objections and the consequences for NPV calculations once the possibility of a truck stop was or should have been eliminated from the equation.

[76] The applicant asserted that the first and second respondents failed to undertake a proper or meaningful investigation as required by the Act and could not properly have satisfied themselves that the applications accorded with the

requirements and purport of the Act.

### **The first and second respondents' explanatory affidavit**

[77] Although the first and second respondents did not oppose the application, they delivered an explanatory affidavit. In the main, the affidavit sets out the process to be followed when applications for site and retail licenses are lodged, and the way the applications will be assessed.

[78] Certain of the allegations made by the first and second respondents are relevant, namely that:

(a) the Controller will issue a retail license once it is evidenced that the retailing of petroleum products from the site will be economically viable and that the proposed business will promote the licensing objectives as stipulated in s 2B of the Act;

(b) the Controller and the Minister are entrusted with finding a balance between the rights of existing retailers on the one hand, and new entrants into the market on the other, which is established by ensuring that there is a need for the new site and that the proposed activity will be economically viable. If new entrants do not meet these objectives, the licenses will not be granted;

(c) the Controller is obliged to evaluate the application, which must be accompanied by the statutorily required documents and a zoning certificate, confirming that the premises is appropriately zoned for the proposed business by the competent local authority;

(d) the Controller will issue a site license on application, once he finds evidence persuading him that there is a need for the filling station;

(e) the Regional Director conducts a site visit to get the evidence indicating the need for the proposed site and will then embark on a fact-finding mission in order to establish such facts pertaining to the applications which may influence the consideration thereof by the Controller

(f) the Regional Director will establish what filling stations are conducting business in the immediate and/or close vicinity of the site and will visit same taking note of the state and appearance, the products sold and the volume of the product sold over the past two to three years preceding the application, the available facilities and their design capacity, all with a view to establish the market demand or projected market demand for petroleum products in the area in which the proposed site is to conduct business;

(g) the objectives of the Act will not ordinarily be met if the target market for the proposed site is simply premised on a redistribution of the existing market, and it is required of an applicant to indicate either growth in the market or an insufficient supply in the existing market providing for the proposed site to be sustainable;

(h) subsequent to the application and together with the site visit report and any objections, all the information is forwarded to the Controller where an analyst will analyse the application, all the evidence, all the information collected and consider any objections;

(i) in the application for a retail license, there needs to be sufficient evidence to indicate that the information attached to the application form was true and correct and that the retailing process would be economically viable (including that the NPV was correctly calculated positive).

[79] Neither the first nor the second respondent dispute the applicants' contention that the industry norm requires a service station to pump in excess of 350 000 litres of fuel per month to be commercially viable.<sup>5</sup>

### **The Controller's obligation to 'verify' and 'be satisfied'**

[80] In evaluating the third and fourth respondents' applications, the Controller was obliged to *verify* that the information and documents submitted with the application form were true and correct.

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<sup>5</sup> Obviously, this is also undisputed by the third and fourth respondents who did not deliver an answering affidavit.

[81] 'Verify' is defined<sup>6</sup> as 'make sure or demonstrate that (something) is true, accurate or justified'. It has been held that "“verify” has, generally speaking, a much stronger meaning than “confirm”".<sup>7</sup>

[82] To my mind, it imposed an obligation on the Controller to make sure that the information submitted by an applicant for a license was true and accurate. That obligation could not be discharged by accepting the assurance of that applicant that this was so. It required independent assessment and investigation.<sup>8</sup>

[83] Similarly, the Controller was required to 'be satisfied' that there was a need for a site and that the business was viable. 'Satisfied' has been defined to mean being furnished with sufficient proof or information.<sup>9</sup> The equivalent Afrikaans word for 'satisfied' has been held to be 'oortuig'— meaning convinced.<sup>10</sup>

[84] In the context of the legislation, this definition makes sense – especially given its purpose (to ensure an efficient and sustainable industry) and the grave responsibility placed by the Legislature on the Controller not only to evaluate applications for licenses but to grant those with merit.

[85] As with the obligation to verify, the Controller was required to do far more than accept information that was provided at face value. This conclusion is reinforced by the use of the word 'must' in s 2B(1), meaning that it was peremptory or obligatory for the Controller to 'satisfy' him or herself.

[86] In my view, the Controller could only conclude there was a need for a new site and that the business to be run from there would be viable if:

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<sup>6</sup> In the Oxford South African Concise Dictionary.

<sup>7</sup> *Buttertum Property Letting (Pty) Ltd v Dihlabeng Local Municipality* [2016] ZAFSHC 157; [2016] 4 All SA 895 (FB) para 43.

<sup>8</sup> The first and second respondents appear to accept this in their explanatory affidavit.

<sup>9</sup> Shorter Oxford English Dictionary

<sup>10</sup> *Law Society, Transvaal v Behrman* 1981 (4) SA 538 (A) at 555H-556E.

- (a) the information provided by an applicant objectively was accurate and was cogent and convincing;
- (b) there was sufficient proof to sustain that conclusion;
- (c) he or she had undertaken a proper investigation as well as an independent assessment and analysis of the information provided.

[87] For the reasons that follow, I conclude that the Controller failed to discharge her obligations as she was required to do.

**Were the required documents submitted with the applications for the site and retail licenses?**

[88] Both the Controller and the Minister concluded that the third and fourth respondents intended to operate a 'normal' service station. In this they were clearly persuaded by the comments made by the third and fourth respondents' attorneys in reply to the objections delivered.

[89] According to both the Record and the Department's responses to the appeal, neither the third nor the fourth respondents submitted the amended motivation and/or business plan that they had undertaken to deliver. If in fact it was delivered, it did not come to the attention of the relevant people and was not before them when their decisions were made.<sup>11</sup>

[90] Applicants for a site license were obliged to submit a motivation for the site. Similarly, applicants for a retail license were obliged to submit a motivation for retailing activity. These are peremptory requirements, and the Controller was obliged

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<sup>11</sup> As the third and fourth respondents did not deliver any affidavits, there is no evidence before me that an amended motivation or business plan was submitted. However, in the interests of fairness, I considered the third and fourth respondents' affidavit opposing the granting of an interdict restraining them from operating a service station on the site pending the determination of this review. In that affidavit, the third and fourth respondents alleged that an amended motivation and plan were submitted and they annexed what was described as a waybill proving delivery of these documents on 30 January 2017. There is no proof that the documents were delivered to or received by the Controller and – as the Record demonstrates – these documents neither formed part of the record nor were before the Controller or the Minister when they made their decisions.

to ensure that the documents submitted with the respective application forms were correct.

[91] I do not agree that references to a truck stop 'crept' into the applications by accident. The business models upon which the third and fourth respondents relied included not only repeated references to the truck stop and to the income which it could generate, but also to the utility and profitability of a 400 square meter convenience store and a 460 square meter fast-food outlet. These were all part of one proposed development with each part complementing the other.

[92] It was this integrated proposal that the third and fourth respondent sought to advance in their respective motivations. The 'retailing activity' included the truck stop, the convenience store and the fast-food outlet. The third and fourth respondents recognized that it was necessary to amend both the motivation for the site and the retail activity. Conversely, the third and fourth respondents recognized that the motivations as submitted did not comply with the Regulations.

[93] Without expressing a view on whether the applications could be amended at the objection stage, the Record demonstrates that the Controller:

(a) was presented with motivations for the approval of a truck stop and the retailing activities that accompanied it, including NPV calculations and a traffic impact assessment that related to a truck stop with extended retailing activities;

(b) was not presented with motivations for the approval of a normal service station site or the more limited retailing activities that would occur there, or either NPV calculations or a traffic impact assessment in respect of a normal service station;

(c) neither sought nor required amended motivations and documents to be submitted when considering the application for approval of a 'normal' service station site and retail license.

[94] The Controller was entitled only to consider a compliant application. Before being satisfied that there was either a need for a site or that the retailing business would be economically viable, the Controller was obliged to verify that the information and documents submitted were true and correct.

[95] Perforce, if the documents were not true or were incorrect or did not comply with the Regulations, the Controller could not then proceed to evaluate that application.

[96] The documents both motivating for and seeking to support the operation of a truck stop with a food court and large convenience store were not 'correct' if the application was in fact for a normal service station with different retailing activities.

[97] Similarly, the documents motivated for retailing activity that was contrary to the site's zoning restrictions and that would have been unlawful had they been undertaken.

[98] Conversely, the correct zoning certificates that would have permitted the operation of a truck stop, a fast-food restaurant or a convenience store larger than 200 square metres were not submitted together with the application.

**Was the information provided by the third and fourth respondents correct and accurate?**

[99] Factually, neither the third nor the fourth respondent delivered a motivation for the approval of a site or retail license for the operation of a 'normal' service station. Therefore, the third and fourth respondents failed to comply with the peremptory provisions of Regulations 13 and 25. The Controller could not then have verified that the documents submitted together with the application form were correct.

[100] The supporting documents and expert reports submitted by the third and fourth respondents supported an application for a license to operate a truck stop, a large convenience store and a fast-food outlet.<sup>12</sup>

[101] I have already referred to the findings of the traffic impact assessment report submitted by the third and fourth respondents in which, inter alia, the most significant draw card for the site in terms of vehicles accessing it was found to be the proposed fast-food outlet. In the absence of this, the number of vehicles drawn to the site was predicted to be modest.

[102] The site was predicted to attract between 200 and 250 vehicles per day, of which between ten and twenty percent (ie between 50 and 62 vehicles out of a maximum of 250) would be non-fuelling customers using the convenience store or the ATM only.

[103] This contradicted the prediction that 400 vehicles per day would turn into the site, upon which the third and fourth respondents calculated their ability to sell approximately 320 000 litres of fuel per month to light vehicles alone.

[104] Furthermore, it was inaccurate to base any calculation on a figure of 10 000 vehicles per day passing the site. The traffic impact assessment report demonstrated that a large number of vehicles would turn left or go straight at the Trafford Road intersection and would not turn right, passing the proposed site. Therefore, there was not accurate information provided to the first and second respondents about how many vehicles would reasonably be expected to access the site or what effect this would have on the site's viability.

[105] If a maximum of 200 vehicles per day accessed the site to purchase fuel and applying an average fill of 30.8 litres per vehicle per day for 26 days of the month,

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<sup>12</sup> The applicants were not 'confused' about the proposed business to be operated on the site – the submitted motivation and business plan made clear that a truck stop was to be operated on the site.

the predicted volume of sales was 160 160 litres of fuel per month – half of what was predicted by the third and fourth respondents.<sup>13</sup>

[106] The NPV calculations submitted also dealt with the third and fourth respondents' initial plan and not a smaller, 'normal' petrol station.

[107] Apart from letters submitted by associated companies of the third and fourth respondents in support of the claim that the proposed site would be used to refuel the associated companies' fleets of trucks to the tune of one million litres per month, no objective or corroborated information was provided about the number of trucks involved or how much diesel they were consuming on a monthly basis, or where that diesel was purchased.

[108] There was no information about how many trucks per day would access the site or the effect that this would have on traffic flow in the area.

[109] In any event, being the in-house location for the refuelling of these alleged fleets of trucks did not mean that there was an independent market for the consumption of such large volumes of diesel or a demand for this in the area.

### **Was the proposed site viable?**

[110] This is not a question that I am required to answer definitively. Rather, the question is whether, on the information before the Controller, she was able to conclude that the proposed site was viable. As I have set out above, the application and supporting documents that served before the Controller was neither correct nor accurate.

[111] I do not see how the Controller could reasonably have been persuaded or satisfied that the proposed site was viable based on the incorrect, inaccurate and defective documents that served before her.

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<sup>13</sup> This is significantly below the industry norm for viability.

[112] In addition, the Controller did not consider the proximity of inter alia the first applicant to the proposed site or its ability to service the passing traffic in trucks or the fact that the first applicant had excess capacity to service that trade. The first applicant was also closer to the turnoff from the N3 highway than the proposed site and it already provided truck stop facilities. Therefore, there was real doubt about whether any or anywhere enough numbers of trucks would have patronized the proposed site.

[113] The reduced number of light motor vehicles (absent the large convenience store and fast-food outlet) immediately reduced the viability of the site<sup>14</sup> - something that the Controller did not appear to consider and certainly was in no position to consider based on the information before her.

[114] Even if I am wrong in how I calculated the amount of fuel that would probably be sold at the site, the originally predicted amount of fuel that was going to be sold (320 000 litres) was below the stated industry norm for commercial viability – a point that was ignored both by the Controller and by the Minister.

[115] Whilst I accept the possibility that the site was viable as a normal service station, this was not a conclusion that the Controller could reach based on the documents before her. The third and fourth respondents appear to have accepted that the application as it stood was defective and required amendment. Whatever the reason, the application either was not amended, or the Controller did not consider the amended application when concluding that the proposed site was viable.

[116] In the same vein, the Controller was obliged to be satisfied that the site would promote the licensing objectives stipulated in s 2B(2) of the Act. I fail to see how the Controller could have been so satisfied when the documents before her were neither correct nor accurate and in fact raised questions about whether the site was viable and would in fact promote an efficient industry or an environment conducive to efficient and commercially justifiable investment.

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<sup>14</sup> Reducing significantly the amount of fuel to be sold at the site.

[117] It is so that the Controller concluded that any impact on proximate sites such as the applicants was not so severe as to militate against the approval of the third and fourth respondent's application and that the approval accorded with the s 2(B)(2) requirements.

[118] Given what is set out above, it is difficult to discern the Controller's reasoning that it was appropriate or viable to introduce a new service station into that underutilized market.

[119] As the first and second respondents stated in their Explanatory Affidavit,<sup>15</sup> the objectives of the Act will ordinarily not be met if the target market for the proposed site is simply premised on a redistribution of the existing market, and it was required of the third and fourth respondents to indicate either growth in the market<sup>16</sup> or an insufficient supply in the existing market. They did neither, which the Controller failed to consider.

[120] This was not a question of the Controller exercising her discretion in favour of the third and fourth respondents based on facts that were before her<sup>17</sup> – there were no facts (or no accurate and cogent facts) upon which a decision could be made, or a discretion could be exercised.

[121] Therefore, and contrary to the Minister's conduct in *ABM Motors v Minister of Minerals and Energy and Others*,<sup>18</sup> neither the first nor the second respondents placed sufficient emphasis on the status quo or the risk to the economic viability of the existing service stations if a new service station was introduced at their expense.

**Does either the Act or Regulations require specification that a site is to be operated as a truck stop?**

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<sup>15</sup> Correctly, in my view.

<sup>16</sup> Which could not be shown by the site servicing the fleets of associated companies, which did not require a service station at all.

<sup>17</sup> In which case a court would have been loath to intervene - *Sightfull 115 CC t/a Daxina Motors v Controller of Petroleum Products and Others* [2020] ZAGPPHC 790 paras 23-26.

<sup>18</sup> *ABM Motors v Minister of Minerals and Energy and Others* 2018 (5) SA 540 (KZP) para 29.

[122] The second respondent's reasoning in dismissing the applicants' appeal has been set out above.

[123] In my view, this reasoning constitutes a material misdirection by the second respondent. The question is not whether the Act or Regulations require specification about whether the filling station will operate as a truck stop – the question is whether a truck stop (and fast-food outlet for that matter) could lawfully be operated from the site.

[124] In this case, neither a truck stop nor a fast-food outlet could lawfully have been operated from the site – and the application for the approval of one should have been rejected on that basis alone. The application before the Controller was not simply misleading – it was wrong and unlawful. This should have been obvious to both the first and second respondents.

### **Should the decisions of the first and second respondents be reviewed and set aside?**

[125] An administrative decision can be set aside, inter alia, if a mandatory and material procedure or condition prescribed by an empowering provision was not complied with or if it was materially influenced by an error of law or if irrelevant considerations were taken into account or relevant considerations were not considered.<sup>19</sup>

[126] Similarly, if the decision is not rationally connected to the information before the administrator it can be set aside.<sup>20</sup>

[127] If the decision is not supported by the evidence and information before an administrator, the decision is not rational – and rationality is the first element of reasonable administrative action.<sup>21</sup>

[128] Although dealing with a legality review, Unterhalter J had the following to say

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<sup>19</sup> Sections 6(2)(b), (d) and (e)(iii) of PAJA.

<sup>20</sup> Section 6(2)(f)(ii)(cc) of PAJA.

<sup>21</sup> *Maleka v Health Professionals Council of South Africa and Others* [2019] ZAGPPHC 319 paras 36-38.

about the test for rationality in *Airports Company South Africa v Tswelokgotso Trading Enterprises CC*:<sup>22</sup>

'Rationality is determined under a three-part test.

"The first is whether the factors ignored are relevant; the second requires us to consider whether the failure to consider the material concerned (the means) is rationally related to the purpose for which the power was conferred; and the third, which arises only if the answer to the second stage of the enquiry is negative, is whether ignoring relevant facts is of a kind that colours the entire process with irrationality and thus renders the final decision irrational."

[129] The Controller did not verify (and could not have verified) that the information and documents submitted by the third and fourth respondents with their application forms were true and correct or that the applications complied with the peremptory provisions of the Regulations.

[130] As I have set out above, the information was incorrect in material respects, and the application was for the approval of a truck stop with a large convenience store and a fast-food outlet which would have been unlawful. At the time that the application finally was considered, the supporting information did not apply to an application for a 'normal' service station with a small convenience store and no fast-food outlet.

[131] The first respondent therefore failed to comply with the peremptory provisions and procedures contemplated in the Regulations.

[132] The decision of the Controller therefore falls to be set aside in terms of s 6(2) (b) of PAJA.

[133] The second respondent should have upheld the applicants' appeal on this basis alone, and its failure to do so likewise is reviewable.

[134] Once it had been accepted by the third and fourth respondents that the

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<sup>22</sup> *Airports Company South Africa v Tswelokgotso Trading Enterprises CC* 2019 (1) SA 204 (GJ) para 13.

operation of a truck stop and fast-food outlet would have been unlawful, their application stood or fell by their belated reference to the site being nominated by their associated companies for the refuelling of their fleets of trucks.

[135] As Mr *Stokes* SC for the applicants correctly submitted, neither the third nor the fourth respondents required a retail license to supply fuel to these fleets. They required a wholesale<sup>23</sup> license to sell fuel in bulk.

[136] Further, this contemplated supply had nothing to do with the market in the area or the demand for fuel. Notwithstanding the assertions about the size of the associated fleets and the predicted 'sale' of one million litres per month, this somewhat convenient development was irrelevant to the third and fourth respondents' application.

[137] Firstly, this belated arrangement did not form part of the third and fourth respondents' application or motivation. Secondly, the arrangement had nothing to do with a determination of supply and demand *in the area* that would justify the establishment of another service station.

[138] The Controller therefore based her decision on irrelevant considerations.

[139] Equally, relevant considerations were ignored: the site would attract small numbers of light motor vehicles according to the third and fourth respondents' own experts. The major attraction of the site (137 vehicles per day going to the fast-food outlet) was absent and between ten and twenty percent of the vehicles that would access the site would not be making use of the service station but rather the convenience store or the ATM.

[140] In the same vein, there was a substantially smaller amount of vehicles passing the site and the formula upon which the third and fourth respondents relied

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<sup>23</sup> 'Wholesale' being defined in s 1 of the Act to mean the purchase and sale in bulk of petroleum products by a licensed wholesaler to or from another licensed wholesaler, or to or from a licensed manufacturer, or sale to a licensed retailer or to an end-consumer for own consumption and '**wholesaler**' is interpreted accordingly. Wholesale licenses are distinct from manufacturing, site or retail licenses.

presaged a modest amount of fuel being sold per month.

[141] The Controller did not consider whether fuel sales of between 160 000 and 200 000 litres per month rendered the proposed site viable - a question of supervening importance and relevance. Therefore, the Controller did not consider material and relevant considerations in coming to her decision.

[142] The Controller ignored that the NPV calculation that had been submitted was based on the operation of a truck stop which included the sale of one million litres of diesel per month to EDC members. The calculations were not in respect of the operation of a 'normal' service station and therefore, in my view, were not correctly calculated.

[143] I pause to mention that the submission of a spreadsheet did not comply with the peremptory provisions of Regulation 25 in that whilst the spreadsheet contained 'the result of the net present value calculation', it did not include all data and assumptions used in that calculation.<sup>24</sup>

[144] The Controller did not consider that there was already an over-supply of service stations in the area, especially when considering a 'normal' service station being operated at the site. The Controller's decision therefore is reviewable in terms of s 6(2)(e)(iv) of PAJA.

[145] On the same basis, I conclude that there was no rational connection between the information before the Controller and the decision taken.

[146] The Controller's failure to consider relevant material as described above is 'a failure constituting part of the means to achieve the purpose for which the power was conferred'<sup>25</sup> and therefore was irrational.

[147] The decision therefore offends against the provisions of s 6(2)(f)(ii)(cc) of

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<sup>24</sup> As required by Regulation 25(1)(e)(ii).

<sup>25</sup> *Airports Company South Africa v Tswelokgotso Trading Enterprises CC* 2019 (1) SA 204 (GJ) para 13.

PAJA. It follows, therefore, that the first respondent's decision to approve the application of the third and fourth respondents fall to be reviewed and set aside.

[148] In circumstances where the Controller's decision was fatally flawed and failed to comply with the peremptory provisions of the Act and Regulations, the applicants' appeal should have been successful, and the second respondent's decision likewise falls to be reviewed and set aside.

[149] For the reasons set out above, the second respondent's dismissal of the appeal was irrational.

### **Remedy**

[150] Ordinarily, an order setting aside the decisions of the first and second respondents would be accompanied by an order remitting the matter back to them for reconsideration. It is only in exceptional cases that I would be entitled to substitute or vary the decision.<sup>26</sup> Exceptional circumstances would exist where I was in as good a position as the first or second respondent to make the decision and where the substituted decision was a foregone conclusion or where the outcome was inevitable.<sup>27</sup>

[151] For the reasons that follow, I am of the view that this is not a case where the setting aside of the first and second respondents' decisions should lead to a remittal back to them to reconsider the matter.<sup>28</sup>

[152] I say this because the third and fourth respondents' application was so flawed and deficient that no reasonable decision maker could have granted the application based on the applications as submitted or the information that was provided.

[153] Therefore, any decision maker called upon to consider the applications afresh

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<sup>26</sup> Sections 8(1)(c)(i) and (ii) of PAJA.

<sup>27</sup> *Westinghouse Electric Belgium SA v Eskom Holdings (SOC) Ltd and Another* 2016 (3) SA 1 (SCA) paras 72 to 74.

<sup>28</sup> As opposed to the decision in *Nine Nine Ninety Nine Projects (Pty) Ltd and Another v Minister: Department of Energy and Others* [2014] ZAGPPHC 335.

would be confronted with an application for the approval of an illegal truck stop, including an unlawful fast-food outlet and an impermissible convenience store and documents and reports supporting that application.

[154] Further, the applications for the retail and site licenses do not comply with the peremptory provisions of the Regulations and do not contain the required documentation that must be submitted.

[155] The first and second respondents have made it clear that there are no motivations or business plans submitted in respect of the operation of a 'normal' service station at the site.

[156] It seems to me that the most appropriate order to be made in the circumstances is to set aside the approval of the retail and the site licenses and the second respondent's decision dismissing the applicants' appeal and substituting it with a decision upholding the appeal and dismissing the third and fourth respondents' applications for the approval of retail and site licences for the site.

[157] I accept that such an order means that the third and fourth respondents may no longer operate the service station at the site. However, they developed the site and operated it at their peril and have not taken any steps in the intervening years to regularize their position. In short, their applications should have been dismissed by the Controller for the reasons set out above, and it is unfortunate that it has taken so long for the process to be completed.

### **The third and fourth respondents' application for an adjournment**

[158] On 1 October 2021, seven court days before the hearing of the opposed application on 12 October 2021, the third and fourth respondents launched a substantive application to adjourn the opposed review application and to grant them leave to deliver the answering affidavits within 15 days. The applicants opposed the application.

[159] After hearing argument, I dismissed the application with costs and indicated that I would provide my reasons for doing so in this judgment.

[160] Without repeating the allegations in the founding affidavit, the gravamen of the third and fourth respondents' application was that their erstwhile attorney, Ms Sue Moodley passed away from Covid-19 complications in January 2021. Ms Moodley's tragic death was a massive shock to her family and to her young son, who was nominated as the executor of her estate. Out of compassion for the late Mr Moodley's family, the third and fourth respondents' representative, Mr Robert Kisten, did not press the family for Ms Moodley's files or copies of the application papers in the review.

[161] It was only on 12 August 2021 that several boxes of documents were delivered to Mr Kisten, which were in a chaotic state. He alleged that he anticipated discovering an answering affidavit that had been delivered on behalf of the third and fourth respondents as they had consulted with counsel previously.

[162] On 16 August 2021, the third and fourth respondents' legal advisor, Mr Reg Thomas, corresponded with the applicants' attorneys requesting copies of the indices in the application which were provided the following day.

[163] Almost a month later, and on 15 September 2021, the third and fourth respondents instructed new attorneys who discovered that no answering affidavits had been delivered and who requested an adjournment of the main application on 23 September 2021. This request was rejected on 28 September 2021.

[164] The applicants delivered their supplementary founding affidavit in the review on 26 May 2020, and the third and fourth respondents' answering affidavit was due 15 days thereafter.

[165] Before analysing the third and fourth respondents' explanation for their failure to deliver an answering affidavit and seeking condonation, it would be useful to recall the remarks of Heher JA at paragraph 6 of *Uitenhage Transitional Local Council v SA Revenue Services*.<sup>29</sup>

'One would have hoped that the many admonitions concerning what is required of an applicant in a condonation application would be trite knowledge among practitioners who are entrusted with the preparation of appeals to this Court: condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.'

[166] I am also reminded that in *Blumenthal and Another v Thomson NO and Another*<sup>30</sup>, Joubert JA said the following:

'This Court has often said that in cases of flagrant breaches of the Rules, especially where there is no acceptable explanation therefor, the indulgence of condonation may be refused whatever the merits of the appeal are; this applies even when the blame lies solely with the attorney (*Tshivhase Royal Council and Another v Tshivhase and Another; Tshivhase and Another v Tshivhase and Another* 1992 (4) SA 852 (A) at 859 E-F).'

[167] To my mind, the third and fourth respondents' explanation did not pass muster. Firstly, there was no explanation for the failure either to deliver an answering affidavit or a compliant Rule 35(12) notice between 26 May 2020 and the eventual delivery of a notice on 5 October 2020. For reasons not germane to this judgment, that Notice did not comply with the provisions of Rule 35(12) and the third and fourth respondents were not entitled to the records that they sought.

[168] On 6 October 2020, Ms Moodley addressed a letter to the applicants' attorneys stating that the legal team needed more time and that an affidavit would be delivered within 15 days of receipt of the information contemplated in the Notice.

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<sup>29</sup> *Uitenhage Transitional Local Council v SA Revenue Services* 2004 (1) SA 292 (SCA) para 6.

<sup>30</sup> *Blumenthal and Another v Thomson NO and Another* 1994 (2) SA 118 (A) at 121H-I.

[169] Yet, on 12 October 2020 (and after being advised that the Notice was irregular) Ms Moodley again wrote to the applicants' attorneys stating that her clients were in the process of retrieving information that ostensibly was in the possession of the applicant and would 'endeavour to file papers' when they were in receipt of this information. There was no explanation about how the process of retrieving this apparently relevant information was undertaken or what stage it had reached when the Notice of Set Down for the main application was delivered on 9 December 2020 (two months later). The third and fourth respondents did not allege that they were unaware of the set down being served.

[170] During argument, I raised with Mr *Choudree* SC (who appeared for the third and fourth respondents together with Ms Rasool) my difficulty in understanding the allegation that counsel had been briefed and consulted with and had drafted opposing affidavits in light of Ms Moodley's correspondence which indicated that papers could not be drafted in the absence of the information.

[171] Mr *Choudhree* SC could not assist me in harmonizing these apparently conflicting elements, nor could he explain why there was no information in the founding affidavit about the identity of counsel or when counsel was briefed and consulted with or how Mr Kisten believed that an answering affidavit had been delivered.

[172] It is not without relevance that in the third and fourth respondents' opposing affidavit in the interdict proceedings that preceded the review, Mr Kisten alleged that an answering affidavit would be delivered once full reasons had been provided by those persons whose decisions formed the subject matter of the review. The first and second respondents delivered their explanatory affidavit in January 2020. On any calculation, the third and fourth respondents were in possession not only of the 'full reasons' but also the applicants' supplementary founding affidavit by the end of May 2020. Therefore, and even before turning to the events of 2021, there was simply no

explanation for the delay in delivering an affidavit during the period between May and December 2020.

[173] Mr Kisten's compassion for the family of the late Ms Moodley is commendable. However, it only goes so far.

[174] It is undisputed that the applicant's attorneys went to great lengths to ensure that the third and fourth respondents were aware of the rapidly looming opposed date. Not only were emails sent to Mr Kisten but the Sheriff served a letter on him on 16 April 2021, which he acknowledged receiving.

[175] The failure of the third and fourth respondents to engage constructively with the applicants' attorneys is not explained adequately, if at all. The third and fourth respondents were encouraged to appoint attorneys as early as May 2021. Yet months went by before they did so. They were told that the application would proceed on 12 October 2020 and yet waited until 15 September 2020 to instruct their current attorneys.

[176] In their defence, Mr *Choudree* SC argued that Mr Kisten is a layperson and his failure to engage with the opposing attorneys in circumstances where they were seeking to strike down his company's petrol site license is understandable. Put differently, it was submitted that it was reasonable for Mr Kisten to be reluctant to trust 'the enemy'.

[177] Whilst I accept that Mr Kisten is a layperson, he was in no doubt about the seriousness of the application or its consequences. He had already deposed to affidavits resisting the applicants' attempt to interdict the operation of the petrol station pending the final determination of this review. His businesses were on the line. Furthermore, the third and fourth respondents employ a legal advisor who, as I understand it, is a practicing attorney. Even if he is not, it would have been clear to Mr Thomas not only that the matter required immediate attention but that urgent

steps had to be taken to ensure that the third and fourth respondents' rights and interests were protected. It would have been a simple matter either to approach the applicants' attorneys for copies of the papers or to make arrangements to do so at court.

[178] The adjournment of the application was by no means a certainty, and, in my view, there was more than enough time for the third and fourth respondents to take the necessary steps that they now seek to take.

[179] It is for these reasons that I concluded that the third and fourth respondents had neither provided 'a full, detailed and accurate account of the causes of the delay and their effects' nor had they spelled out 'the date, duration and extent of any obstacle on which' they placed reliance.

[180] Therefore, there was no acceptable explanation for the third and fourth respondents' failure to timeously deliver their answering affidavit and no case for condonation was made out.

[181] I accordingly dismissed the application for an adjournment with costs, including the costs consequent upon the employment of senior counsel.

## **Order**

[182] I make the following order:

1. The decision of the first respondent dated 9 November 2017 approving the third and fourth respondents' applications for the granting of retail and site licenses to operate a service station at the property at Erf 19 Pinetown at 48 Motala Road, Pinetown ('the premises') and the second respondent's decision of 16 August 2019 dismissing the applicants' appeal against the first respondent's decision are reviewed and set aside;

2. The second respondent's decision is substituted with an order upholding the applicants' appeal, setting aside the first respondent's decision and dismissing the third and fourth respondents' applications for the approval of retail and site licenses for the premises;

3. The costs of the application, including the costs of senior counsel where employed, as well as all reserved costs and the costs of the application for the adjournment of the opposed application on 12 October 2021, shall be paid by the third and fourth respondents jointly and severally, the one paying the other to be absolved.



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**SHAPIRO AJ**

**Appearances**

Counsel for Applicants : A Stokes SC

Instructed by : Norman Brauteseth & Associates Attorneys

Counsel for Third and Fourth

Respondents :R B G Choudree SC

Z Rasool

Instructed by : Veni Moodley & Associates