IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

REPORTABLE

CASE NO: 12126/2016

In the matter between:

A B M MOTORS	Applicant
and	
THE MINISTER OF MINERALS AND ENERGY	First Respondent
THE CONTROLLER OF PETROLEUM PRODUCTS	Second Respondent
MOVE ON UP 1074 CC AND SEVEN OTHER OBJECTORS	Third to Tenth Respondents

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ORDER

The application is dismissed with costs.

JUDGMENT

Delivered on: 28 May 2018

Ploos van Amstel J

[1] This is an application for the review of a decision by the Minister of Minerals and Energy[1] in terms of which she dismissed an appeal against a decision by the Controller of Petroleum Products not to issue site and retail licenses in terms of the Petroleum Products Act 120 of 1977 ('the Act'). The review was brought in terms of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA').

[2] The applicant is A B M Motors, a partnership which owns the site in question in Newcastle. The first respondent is the Minister of Minerals and Energy, the second respondent is the Controller of Petroleum Products, and the third to the tenth respondents are corporate entities which trade as service stations in Newcastle. I shall refer to the first two respondents as 'the Minister' and 'the Controller' respectively, and to the third to the tenth respondents as 'the respondents'.

[3] During November 2014 the applicant lodged with the Controller applications for a site licence and a retail licence as contemplated in the Act and the regulations promulgated thereunder. Such licences were required for the retail of petroleum products on the site. The respondents filed written objections to the applications.

[4] By letter dated 2 July 2015 the Controller notified the applicant that the applications had been unsuccessful, and set out the reasons for the decision. These were, in summary, that the Controller was of the view that the granting of the licences would not promote an efficient retailing petroleum industry; that there were fifteen existing filling stations that served the target market of the proposed business; that there was no indication of substantial economic growth in the area to warrant a new filling station that would be commercially viable without having a negative impact on the existing filling stations; that there was not enough evidence that the new business would be economically viable; that the site visit and the documents submitted by the applicant did not support the view that the site would contribute towards achieving the objectives of licensing set out in the Act; and that there was no need for another site in the area in question.

[1] I refer to the Minister as she is described in the Petroleum Products Act 120 of 1977. She was incorrectly referred to in the application papers as 'The Minister of the Department of Energy'.

[5] On 28 August 2015 the applicant submitted an appeal to the Minister in terms of section 12A of the Act. The appeal was opposed by the respondents. Their grounds of opposition were set out in a letter by their attorneys, dated 24 November 2015. The applicant responded by making supplementary submissions in a letter dated 1 December 2015.

[6] On 11 May 2016 the applicant was informed that the appeal had been unsuccessful and it was provided with the Minister's written reasons. The application papers for a review of the Minister's decision were issued by the registrar of this court on 28 October 2016. The Minister and the Controller delivered a notice on 22 November 2016, through the State Attorney, of their intention to abide by the decision of the court.

[7] The respondents however contend, by way of a point in limine, that the review proceedings were not instituted within the period of 180 days referred to in section 7(1) of PAJA, as the application papers were only served on them well after the expiry of that period. If this is correct then this court has no power to consider the merits of the review.[2]

[8] Two questions arise with regard to section 7(1). The first is when it can be said that the review proceedings were instituted. The second question is whether the purported service of the papers on the attorneys who had represented the respondents in the appeal to the Minister, constituted good service.

[9] It is not always clear when an application can be said to have been brought, initiated or instituted. This may vary, depending on the context and the statutory provisions that apply.

[10] Section 7(1) provides that any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might

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[2] *Opposition to Urban Tolling Alliance v SANRAL* [2013] 4 All SA 639 (SCA) para 41.

reasonably have been expected to have become aware of the action and the reasons.

[11] Uniform Rule 53, which deals with reviews, provides, in summary, that all review proceedings shall be by way of notice of motion directed and delivered to the decision maker and to all other parties affected.

[12] Uniform Rule 4(1)(a) refers to the service of any process of the court and any document initiating application proceedings. Uniform Rule 6(5)(a) provides that every application other than one brought *ex parte* must be brought on notice of motion and true copies of the notice, and all annexures thereto, must be served upon every party to whom notice thereof is to be given. The wording of the rule suggests that the application cannot be said to have been brought until it has been served. See in this regard *Mame Enterprises (Pty) Ltd v Publications Control Board*[3].

[13] In *Tladi v Guardian National Insurance Co Ltd*[4] the applicant brought an application in terms of the Motor Vehicle Accidents Act 84 of 1986 for leave to bring his claim after it had become prescribed. In terms of that Act he was obliged to make such application within 90 days of his claim having become prescribed. The application papers were issued by the Registrar within the period of 90 days but only served on the respondent some three weeks after the expiry of that period. Botha J said it was therefore crucial to establish whether an application can be considered to have been made if it had merely been issued but not served. Having considered a number of reported cases he held that the application had not been made within the requisite 90 days. He said he did not think that it is too onerous to require of an applicant not only to issue his application and file it with the Registrar but also to serve it. He added that another reason why service should be regarded to be the minimum requirement for the making of an application of the kind in question is that from that stage on it is in the power of the respondent to prevent any undue protraction. Also see *Mbatha v Lyster & others*[5] and *Taboo Trading 232 (Pty) Ltd v Pro Wreck Scrap Metal CC & others*.[6]

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[3] *Mame Enterprises (Pty) Ltd v Publications Control Board* 1974 (4) SA 217 (W) 219H-220D
[4] *Tladi v Guardian National Insurance Co Ltd* 1992 (1) SA 76 (T)
[5] *Mbatha v Lyster & others* [2001] JOL 7868 (LAC)
[6] *Taboo Trading 232 (Pty) Ltd v Pro Wreck Scrap Metal CC & others* 2013 (6) SA 141 (KZP)

[14] In *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd & others*[7] a judge had granted a temporary interdict pending the final determination of review proceedings, on condition that the review proceedings had to be initiated by a specified date. The application papers were issued timeously but served one day late. It was therefore contended in subsequent proceedings that the temporary interdict had lapsed and that it did not prevent the granting of certain prospecting rights which occurred after the specified date. The question that then arose for determination was whether, in the absence of service, the review proceedings had been initiated by the specified date. The court below held that the lodging, filing and the issue of the application papers by the registrar had to be regarded as the initiation of the proceedings envisaged in the order. It held that the service of such process was a further step to get the respondent involved in the litigation.

[15] On appeal Mhlantla JA said, in interpreting the order, that there could be no doubt that the judge intended that the review should effectively proceed by the specified date. He said the judge could never have intended for the review papers to be issued and the case number allocated by the registrar and thereafter remain supine. The learned judge referred with approval to *Mame* and *Tladi* and held that the intention of the order was that notice of the application had to be given to the registrar and the application had to be served on the affected parties by the specified date. He held that the finding of the court below that the issue of the application papers had to be regarded as the initiation of proceedings could not be sustained.

[16] It was not contended by the applicant in the present matter that the mere issue of the review papers by the registrar was sufficient for the review proceedings to be instituted. This accords with the decisions in *Tladi* and *Finishing Touch*.

[17] Counsel for the applicant however submitted that the service of the review papers on the Minister and the Controller occurred within the period of 180 days, that service on the decision makers sufficed and that the review proceedings were instituted timeously.

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[7] *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd & others* 2013 (2) SA 204 (SCA)

[18] The respondents had been involved in the matter from the outset – they opposed the application for the issue of the licences and they opposed the appeal to the Minister. They were interested parties in the review proceedings, as is demonstrated by the fact that they were cited as respondents. It makes no sense to me to hold that service of the review papers on the decision maker, but not on the other parties affected, suffices for the review proceedings to be instituted. In many cases, as in the present one, it is not the decision maker who opposes the review, but a third party who was involved in the administrative action and who has a direct and substantial interest in the outcome of the review. This is why Uniform Rule 6, which prescribes how an application must be brought, provides in sub-rule (2) that when relief is claimed against any person, or where it is necessary or proper to give any person notice of such application, the notice of motion must be addressed to both the registrar and such person, and why sub-rule (5)(a) provides that every application other than one brought *ex parte* must be brought on notice of motion and must be served upon every party to whom notice thereof is to be given. In *Finishing Touch*, at para 20, Mhlantla JA said notice of the application had to be 'given to the registrar and the application served on *the affected parties'*[8]. This means all the affected parties, not only the decision makers.

[19] I do not consider that this approach will place an undue burden on applicants for judicial review in terms of PAJA. In a case where the review papers were issued and served timeously, with the exception of, say, one affected party, the court may in terms of section 9 extend the period of 180 days where the interests of justice so require.

[20] Counsel for the applicant sought to overcome this difficulty by relying on Uniform Rule 4(1)(aA), which provides that where the person to be served with any document initiating application proceedings is already represented by an attorney of record, such document may be served upon such attorney by the party initiating such proceedings. The context here is as follows.

[21] The application papers for the review were issued on 28 October 2016. On 31 October 2016 the applicant's attorney wrote to the attorney who represented the

[8] My emphasis.

respondents in their opposition to the application for the licences and the appeal to the Minister. The applicant's attorney stated that he had made an application for the review of the Minister's decision and that the respondents had been cited in the review application. He asked to be advised whether the respondents' attorney would be willing to accept service of a notice of motion and supporting documents per courier or whether he wanted the documents served by the sheriff.

[22] The respondents' attorney replied that his involvement in the matter pertained to the 'internal objection' and the appeal process, that he held no further instructions in the matter and that he was not mandated to accept service of any further legal processes in the matter. He said the applicant was required to comply with the provisions of Uniform Rule 4 and effect service on the respondents directly. He said that in the event that he was subsequently instructed in the proposed review application he would deliver a notice of appointment as attorney of record.

[23] On 7 November 2016 the applicant's attorney responded and said he drew his counterpart's attention to Rule 4(aA) (sic) which provides that the documents could be served at his offices. The response by the respondents' attorney on 11 November 2016 was that he was well aware of the contents of Rule 4(1)(aA) and did not agree that the review application could be served at his offices. He said he once again recorded that, as at that date, his offices were not the attorneys of record in the review application nor had he been mandated to accept service of any process in the review application.

[24] Undeterred, the applicant's attorney wrote again on 18 November 2016 and recorded that as far as he was concerned the respondents' attorney had been properly served.

[25] In argument before me counsel was hard pressed to explain on what basis the attorney concerned could be said to have been the respondents' attorney of record in November 2016. He submitted that as the attorney represented the respondents in opposing the applications for the licences and the appeal to the Minister, he remained on record provided that his mandate had not been terminated.

[26] Firstly, there is nothing on the papers to suggest that after the Minister dismissed the appeal the respondents' attorney remained 'on record' to deal with any review that may be instituted. Secondly, this is not what 'attorney of record' means in the context of Uniform Rule 4(1)(aA). In the context of the Uniform Rules an attorney of record is one who has formally placed himself on record as representing a party in legal proceedings before the court. In *BHP Billiton Energy Coal South Africa Ltd v Minister of Mineral Resources & others*[9] the court said, with reference to Herbstein & Van Winsen[10], that it is apparent that Uniform Rule 4(1)(aA) applies to proceedings already instituted, so that it in effect applies to ancillary and interlocutory applications.

[27] The delivery of the review papers on the respondents' attorney in November 2016 was therefore of no effect. It follows that the review proceedings were not instituted within the period of 180 days referred to in section 7(1)(b) of PAJA. There was no application by the applicant for an extension of the period in terms of section 9, with the result that I have no power to consider the merits of the review.

[28] In case another court takes a different view regarding the point in limine, I record that I would have dismissed the application on the merits. In argument before me counsel for the applicant emphasised two of the grounds relied upon for the review. He said he did not abandon the other grounds mentioned in the founding affidavit, but did not wish to elaborate on them in argument.

[29] The first point was a submission that the Minister had overemphasised the status quo, which was that there were already fifteen filling stations in the area concerned, that there was no need for another one, and that their economic viability would be jeopardised if another one were allowed. I am not satisfied that the Minister erred in taking these considerations into account, or that she overemphasised them. In terms of section 2B of the Act the objectives which have to be given effect to in considering the issuing of any licences in terms of the Act, include the promotion of an efficient retailing petroleum industry and facilitating an environment conducive to

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[9] *BHP Billiton Energy Coal South Africa Ltd v Minister of Mineral Resources* & others 2011 (2) SA 536 (GNP) 542F-543C. Approved, on this point, on appeal in *Finishing Touch*.
[10] Herbstein & Van Winsen *The Civil Practice of the High Courts of South Africa* (5 ed) vol 1 at 343 and 359.

efficient and commercially justifiable investment. In addition, Regulation 18(2)[11] provides that in the case of an application for a retail licence the Controller must be satisfied that the retailing business is economically viable and that it will promote licensing objectives stipulated in section 2B(2) of the Act.

[30] The second point was that the Minister had taken into account information which was not available to the applicant. This was a reference to the volume of fuel which had been pumped in 2014 by the other filling stations in the area. This information was obtained from the fuel companies which supplied the filling stations, and formed part of the documentation which was placed before the Controller when he considered the applications for the licences. The information is also contained in the record which was made available in terms of Uniform Rule 53. I see no irregularity here and there is no suggestion that the applicant requested this information and that it was withheld.

[31] The other grounds of review mentioned in the application papers were that the Minister did not consider afresh the merits of the applications; that she misconstrued the considerations that the Controller was obliged to take into account in considering the applications; that she disregarded the evidence that had been put up in respect of vehicle traffic counts; and that she disregarded the fact that when the applicant bought the site it was zoned for use as a garage or service station. None of these grounds is supported by the evidence.

[32] It follows that the application for a review cannot succeed. It is dismissed with costs.

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Ploos van Amstel J

[11] Regulation 18(2) of the Regulations regarding Petroleum Products Site and Retail Licences, GN R286, *GG* 28665, 27 March 2006 (as amended).

Appearances:

For the Applicant	:	D Crampton
Instructed by	:	Singh & Gharbaharan. c/o Mastross Incorporated Pietermaritzburg
For the 3rd, 5th, 7th and 8th Respondent:		U Lottering
Instructed by	:	Gildenhuys Malatji Incorporated Pretoria
Date Judgment Reserved	:	15 May 2018
Date of Judgment	:	28 May 2018