



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

Case No: 7320/2021P

In the matter between:

**SIYABONGA CYRIL LEWIS MALANDA
MALANDA SERVICE STATION (PTY) LTD
and
UMZIMKHULU MUNICIPALITY**

**FIRST APPLICANT
SECOND APPLICANT

RESPONDENT**

ORDER

The following order is granted:

1. The decision of the respondent to refuse to approve the applicants' building plans for the refurbishment of the petrol service station situated at Erf 726, uMzimkhulu, is reviewed and set aside;
2. The matter is remitted to the respondent to reconsider the applicants' application;
3. In reconsidering the applicants' application, it is directed in terms of the provisions of section 8(1)(c)(i) of the Promotion of Administrative Justice Act 3 of 2000, that the respondent is:
 - (a) Not to regard the proposed refurbishment of the second applicant's petrol service station as an extension as contemplated by section 11 of the uMzimkhulu Town Planning Scheme; and
 - (b) Not to decline to approve the applicants' plans by virtue of the fact that the petrol service station enjoys bi-directional access to the R56; and
 - (c) To render its decision within 21 days of the date of this order;
4. The respondent shall pay the applicants' costs on the party and party scale.

JUDGMENT

MOSSOP J:

[1] The R56 is a provincial road that winds its way through, inter alia, the towns of Ixopo, uMzimkhulu and Kokstad in KwaZulu-Natal.¹ The events in this application relate to the town of uMzimkhulu, which is positioned between the two other towns just mentioned. To the north of uMzimkhulu is Ixopo and to the south lies Kokstad. As the R56 progresses through the town of uMzimkhulu, it bends slightly eastwards and receives a junction with a local road known as O.R. Tambo Drive.² This creates a triangular shaped piece of land. That triangular shaped piece of land, bearing the formal description of Erf 726, uMzimkhulu ('the property'), is owned by the first applicant, and the second respondent conducts the business of a petrol service station on the property.

[2] The property was acquired by the first applicant in 1985 and previously had been utilised as a bus and taxi rank. The first applicant caused the petrol service station to be constructed upon the property. It is constituted by a building, which is utilised for administrative and commercial purposes, a forecourt, underground fuel tanks, petrol pumps, and a canopy erected over the forecourt. The authorities existing at the time of its construction granted the necessary approval for its erection.

[3] Presently, the property is accessible from both the R56 and O. R. Tambo Drive, which border the property on its western and eastern sides respectively. Such access has not always been the case. In 2014, the provincial Minister of Transport ('the Minister') decreed that access to the property would no longer be possible for vehicles driving northwards on the R56.³ The property was, however, still accessible

¹ The R56 is apparently also known as Main Road 416 but shall be referred to herein as the R56.

² It appears that O. R. Tambo Drive is also known, or was previously known, as Court House Road.

³ In terms of section 4(1) of the KwaZulu-Natal Provincial Roads Act 4 of 2001, '[t]he control, establishment, administration and management of all provincial roads vests in the Minister'. In terms of section 10(1)(a) of that Act, a person may not 'gain access to a main road or district road except at an entrance or exit authorised by the Minister and provided for that purpose'. A main road is defined in section 1 to include a provincial road.

from the R56 for vehicles driving southwards from Ixopo in the direction of Kokstad. To stop vehicles travelling northwards on the R56 from Kokstad from being able to access the property, a solid concrete median was constructed in the middle of the R56.

[4] According to the first applicant, the construction of the concrete median negatively affected the second applicant's business and they commenced lobbying the KwaZulu-Natal Department of Transport to restore access to the property for vehicles travelling northwards along the R56 from Kokstad. Ultimately, he was successful, and in 2019 the Minister consented to restoring the original bi-directional access to the property from the R56.

[5] Since the initial construction of the petrol service station, not much in the way of maintenance of its facilities appears to have been done. It has consequently aged and become degraded in its appearance. It is now some 35 years since it was first constructed, and the applicants concluded that it needed to be refurbished. To this end, an architect specialising in petrol service stations was instructed to consider how best the contemplated refurbishment could be executed. He is Mr Will van der Watt (Mr van der Watt). Mr van der Watt applied his mind to the issue and came up with a proposal for the refurbishment which met with the approval of the applicants. The petrol service station is operated under the franchise of a major international fuel supplier. The franchisor also considered the refurbishment plans proposed by Mr van der Watt and gave its approval to them.

[6] The refurbishment proposal focuses only on four components of the petrol service station. Firstly, the canopy that presently covers the petrol pumps on the forecourt, which is an open sided structure, is positioned so that it, more or less, runs parallel to the R56. Mr van der Watt determined that it ought to be repositioned so that it runs at a right angle to the R56. Secondly, the ageing underground petrol tanks are to be replaced and new pumps are to be installed. Thirdly, by virtue of the repositioning of the canopy, additional space will be freed up on the property which will allow for an increase in the number of demarcated parking bays on the property. At present, the property has seven demarcated parking bays. According to the plan prepared by Mr van der Watt, the proposed upgrade will allow for 21 demarcated

parking bays. Fourthly, the level of the forecourt is to be raised to eliminate the risk of flooding that apparently bedevils the petrol service station (and uMzimkhulu as a whole) from time to time. Those are the only proposed changes that are to be made. The building on the property is not to be changed in any way.

[7] The applicants caused Mr van der Watt to submit the building plans ('the plans') that he drew to the respondent for approval. There was frequent communication in the form of written correspondence and meetings between the applicants' representatives and the respondent's representatives. Consequently, the plans were altered from time to time as issues were raised and then resolved. It appeared that some form of consensus had been achieved that would allow for the approval of the plans. This appeared to include the issue of access to the R56, which had been a sticking point in the communications. An indication that this have been resolved occurred on 30 July 2020 when the respondent's authorised official wrote to Mr van der Watt and stated that:

'The only outstanding thing is the dimensions for exits and entrance. Once that is done kindly provide/make submissions to the municipality of four hardcopies of amended plans ... in order to finalise assessment of proposed building plans.'

A further meeting was thereafter held at which the widths of the entrances and exits were measured and confirmed. The final iteration of the plans was submitted on 26 August 2020.

[8] Notwithstanding this, the applicants' plans were not approved. On 2 November 2020, in a letter addressed to Mr van der Watt's firm, bearing the heading: **'DECISION ON SUBMITTED BUILDING PLANS FOR ERF 726 IN UMZIMKHULU FOR PETROL STATION'**,

the respondent stated, in part, that

'1. With regards to the above, please be informed that the submitted ***building plans have not been approved*** due to reasons stipulated below:

a) The submitted building plans does [sic] not comply with the uMzimkhulu Town Planning Scheme on the following:

'(i) The owner has not compiled or addressed the issue of entrance to the site from R56 which was raised as a concern by the municipality on correspondence dated 30 November 2019.

(ii) The proposed entrance indicated on submitted building plans from R56 cannot be approved by the municipality as such proposal is in conflict with section 11(iii) of uMzimkhulu Town Planning Scheme as it has been communicated to applicant a number of times prior to this decision.

(iii) It should be noted that since the municipality was in a position to consider relaxation on parking requirements for this particular submission, that consideration falls away with this decision as the property does not meet the minimum requirements of parking for the proposed building plans.'

I shall refer to this letter as 'the final letter'.

[9] One of the practical consequences of the final letter is that petrol tankers arriving from the direction of Ixopo (which is apparently the direction that they come from, having been despatched from Pietermaritzburg) would not be able to enter the property from the R56. They are apparently unable to enter the property via O. R. Tambo Drive. The point at which petrol is received by the petrol service station from petrol tankers is close to the R56. Because of the difficulties with entering the property from O. R. Tambo Drive, and because petrol tankers discharge petrol only from their left side, petrol tankers delivering fuel to the petrol service station will have to park in the R56. This would appear to be completely unsatisfactory.

[10] As a consequence of the receipt of the final letter, the applicant has now approached this court for relief. Initially, the substantive relief claimed by the applicants in their notice of motion was framed as follows:

'1. The respondent is ordered in terms of section 8 of the National Building Regulations and Building Standards Act, 103 of 1977 to approve the building plans submitted by the first applicant to the respondent, in respect of the property described as Erf 726 Umzimkhulu,

within five days of this order.

2. Costs of suit.'

[11] That relief was later expanded upon and amplified by the inclusion of a review in the alternative to the relief mentioned above. This came about after the delivery of the respondent's answering affidavit and after a formal application for the

inclusion of that relief was brought by the applicants.⁴ The amended order now reads as follows (paragraph 1 not being repeated):

'2. Alternatively to prayer 1 above:

2.1 The decision of the respondent to not approve the building plans submitted by the first

applicant in respect of the property described as Erf 726 Umzimkhulu, and conveyed to the first applicant in the letter dated 2 November 2020, is reviewed and set aside.

2.2 The respondent is directed to reconsider the said plans and to decide whether or not to approve them, within two weeks of this order.

2.3 It is declared that in considering the said plans the respondent is not entitled to reject them on the ground that the plans provide for access to the said property from the provincial road known as the R56.

3. Costs of suit.'

[12] The amended relief has, in turn, now also been further amended. For certainty, the complete order now being sought by the applicants is the following:

'1. The respondent is ordered in terms of section 8 of the National Building Regulations and Building Standards Act, 103 of 1977 to approve the building plans submitted by the first applicant to the respondent, in respect of the property described as Erf 726 Umzimkhulu, within five days of this order.

2. Alternatively to prayer 1 above:

2.1 The decision of the respondent to not approve the building plans submitted by the first applicant in respect of the property described as Erf 726 Umzimkhulu, and conveyed to the first applicant in the letter dated 2 November 2020, is reviewed and set aside.

2.2 The respondent's decision in the letter of 2 November 2020 is replaced by a decision approving the said plans.

3. Costs of suit.'

This final amendment was claimed in the applicants' counsel's amended heads of argument. That it was so proposed excited no controversy. I shall regard this as the relief that is to be adjudicated upon.

[13] Having referred to counsel, it is appropriate at this juncture to mention that when the matter was argued, the applicants were represented by Mr Rall SC and the respondent was represented by Mr Christison. Both counsel are thanked for their interesting arguments and helpful submissions. It also bears mentioning that Mr

⁴ The order was granted by Mnguni J on 24 May 2021.

Christison, at a previous hearing, abandoned any reliance on the failure of the applicants to exhaust whatever internal rights of appeal they may have had, a point that was extensively relied upon in the answering affidavit.

[14] I turn now to consider the case made out for the principal relief claimed in the notice of motion.

[15] In his heads of argument, Mr Rall raised the question of whether the content of the final letter constituted a decision to refuse the plans. This was because the final letter did not specifically contain the words 'reject' or 'refuse', but instead indicated that the building plans had 'not been approved'. Thus, it was argued, no final decision had been taken by the respondent. Based upon that premise, the notice of motion in its original form initially sought relief in terms of the National Building Regulations and Building Standards Act 103 of 1977 ('the Act') to compel the taking of a decision by the respondent. Section 8(1) of the Act reads as follows: 'If a local authority fails to grant or refuse timeously its approval in accordance with section 7 in respect of an application, a court may on the application of the applicant concerned make an order directing such local authority to perform its duties and exercise its powers in accordance with that section within the period stated in such order, or make such other order as it may deem just.'

[16] The Act came into operation on 1 September 1985. It requires anyone wishing to construct a building within a municipal area to obtain prior approval from the municipality concerned for such construction.⁵ Erecting a building without municipal approval constitutes a criminal offence punishable with a fine.⁶ When considering such an application, '[a] local authority is not required to reject [it] but only to refuse to approve it'.⁷ It appears that there is a difference between these two concepts. 'Rejection' indicates an outright and final refusal of an application. 'Refusal to approve' is a more flexible proposition and does not necessarily contemplate the door being finally shut on future approval. Where a municipality responds to such an

⁵ *Johannesburg Metropolitan Municipality v Chairman, National Building Regulations Review Board and others* [2018] ZACC 15; 2018 (5) SA 1 (CC) para 2.

⁶ Section 4(4) of the Act.

⁷ *eThekweni Municipality v Tsogo Sun KwaZulu-Natal (Pty) Ltd* [2007] ZASCA 38; 2007 (6) SA 272 (SCA) para 17.

application, its notification must be unequivocal: it must either clearly approve the plans or clearly refuse to approve them.⁸

[17] A reading of section 8 of the Act reveals that its plain meaning is to allow a party awaiting a decision on building plans to approach a court to obtain an order that will compel a municipality to make the awaited decision.⁹ So much so is indicated by the words ‘fails to grant or refuse timeously’.

[18] The final letter, in my view, conveys an unambiguous message to the applicants. That message relates, according to the heading to the letter, to a decision that the respondent has taken in respect of the applicants’ application. The message is that the respondent has considered the application and after such consideration, the applicants’ building plans have not been approved. Three principal grounds upon which such non-approval is based have been provided by the respondent, giving the applicants insight into the respondent’s reasoning process. Whether that reasoning is justifiable or correct is another matter altogether. But the message is clear and unambivalent: a decision has been taken.

[19] The applicants have argued further that if a decision has been taken, there is no satisfactory evidence that the person who took the decision was empowered to do so. The respondent disputes that the decision-maker was not so empowered and argues that the office held by the decision-maker, namely its manager of strategic planning, housing and LED, necessarily clothes the decision-maker with the authority to make such decisions. I am not required to enter into this dispute by virtue of the guidance provided by the much-quoted matter of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*.¹⁰ I am required to accept the respondent’s version on this issue and I do so.

⁸ Ibid para 19.

⁹ *Georgiou v Nelson Mandela Bay Metropolitan Municipality and others* [2016] 4 All SA 524 (ECP) para 22.

¹⁰ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

[20] I accordingly cannot agree that a decision has not been taken by the respondent or that what is stated in the final letter is merely an unwarranted postponement of a decision on the applicants' plans. The contents of the final letter constitute a decision to refuse to approve those plans. While section 8(1) of the Act may be relied upon to compel the making of a decision, where that decision has already been taken and the result is not to the satisfaction of the applicant, it cannot be relied upon to challenge the correctness of the decision.

[21] The relief claimed in paragraph 1 of the notice of motion accordingly cannot be granted. But for the amendment of the notice of motion, as Mr Christison remarked in his heads of argument, that would have been the end of the matter. However, the alternative relief of a review of the respondent's decision to not approve the applicants' plans must now be considered.

[22] The starting point of the review inquiry must be the contents of the final letter, this being the document that refused the applicants' application and gave an insight into the respondent's reasons for coming to that decision.

[23] While three grounds have been mentioned by the respondent in the final letter as constituting the reasons for its refusal of the applicants' plans, all those grounds have a common origin in the uMzimkhulu Town Planning Scheme ('the Scheme'). The applicants have disputed whether the Scheme is operative as they argue that it has not been properly promulgated. The respondent asserts that it has been properly promulgated and adduces certain documentary evidence in support thereof. This dispute is also to be resolved by following the principles set out in *Plascon-Evans*.¹¹ I accordingly accept the respondent's version and approach the matter on the basis that the Scheme is properly promulgated.

[24] The Scheme has a specific section that deals with garages and petrol service stations. This is section 11. It reads, in full, as follows:

'(i) The layout of a Petrol Service Station including the siting of pumps, buildings and of vehicular access or egress shall be to the satisfaction of the municipality.

¹¹ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

(ii) No Petrol Service Station shall have direct vehicular access to an existing or proposed major traffic arterial.

(iii) The following prerequisites and conditions shall be observed whenever it is proposed to erect a new Petrol Service Station, or to extend an existing Petrol Service Station.

1. No vehicular entrance to or exit from a Petrol Service Station shall be within 50 metres of a freeway interchange, 60 metres from an intersection with a road which in the opinion of the Local Authority is a major road or 20 metres from an intersection with any road.
2. The frontage of a Petrol Service Station lot shall not be less than 36 metres in length.
3. Dwarf walls or other permanent structures satisfactory to the Local Authority shall be erected on the street frontage of the site so as to confine the movement of vehicles into or out of the Petrol Service Station to authorised access points.
4. No Petrol Service Station shall be established upon any lot unless, in the opinion of the Local Authority, it has adequate depth so as to enable all activities to be carried on clear of the street. Filler points for underground tanks shall be so sited as to make it possible for tanker vehicles to stand wholly within the curtilage of the lot when recharging the tanks and for such vehicles to enter and leave the lot in a forward direction.
5. Pump islands shall not be less than 5 metres from any boundary of the lot and all traffic routes within the forecourt shall have a minimum width of 5 metres.
6. A Petrol Service Station shall be so sited and designed that traffic entering and leaving the lot will not adversely affect movement of pedestrians or vehicles on any heavily trafficked public street or place.
7. Parking accommodation for motor vehicles to be provided on the lot.

The municipality may relax any of the above conditions (1) - (7) in respect of any application for a Petrol Service Station which, in the opinion of the municipality, is not a traffic generator in terms of Annexure 3.

(iv) In granting its permission for the establishment of a Petrol Service Station, the municipality shall take cognizance of the standards set out in Annexure 3. (Planning Standards for Control of Traffic at Traffic Generating Sites).'

[25] It appears to me that the respondent relies entirely on the provisions of section 11 to support its decision not to approve the applicants' plans. While subsection (iii) of section 11 states that certain prerequisites that thereafter follow are to be observed whenever it is proposed to construct a new petrol service station or to extend an existing one, subsections (i) and (ii) of section 11 must also be read as being subject to that qualification. This is because there is nothing to suggest that section 11 is to apply to any petrol service stations presently existing. In other words, its provisions are not to be imposed retrospectively on already existing petrol service stations. Statutes are presumed not to have retrospective effect unless the contrary is clearly stated.¹² The Constitutional Court in *Veldman v Director of Public Prosecutions, Witwatersrand Local Division*¹³ clarified that this presumption is intended to protect against retrospective interpretations of statutes that had the effect of destroying or curtailing rights which had already been acquired:

'That legislation will affect only future matters and not take away existing rights is basic to notions of fairness and justice which are integral to the rule of law, a foundational principle of our Constitution. Also central to the rule of law is the principle of legality which requires that law must be certain, clear and stable. Legislative enactments are intended to "give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed".' (Footnotes omitted.)

[26] Thus, an existing petrol service station that has access to a major traffic arterial road, such as the second applicant, is not required to give up that access by virtue of the provisions of the Scheme: only if it is extended after the implementation of the Scheme may it be required to do so.

[27] That this must be the case is evidenced by the position taken by the respondent. In the respondent's answering affidavit, the deponent states that if the applicants were to leave the property intact, and simply refurbish it as it is presently constituted, then the respondent would have no concerns and there would be no need to obtain municipal approval. The property could continue to receive bi-directional access from the R56. However, because what is proposed by the

¹² *Adampol (Pty) Ltd v Administrator, Transvaal* 1989 (3) SA 800 (A) at 805E-807F.

¹³ *Veldman v Director of Public Prosecutions, Witwatersrand Local Division* [2005] ZACC 22; 2007 (3) SA 210 (CC) para 26.

applicants is, in the eyes of the respondent, an extension of the petrol service station, the plans cannot be approved because they are not in accordance with the prescripts of the Scheme.

[28] The applicants argue that the Scheme is of no application to the second applicant as approval has not been sought for the erection of a new petrol service station. There is no dispute over this: It is common cause that the petrol service station has been in existence since 1985. Nor, so the applicants argue, is what is proposed an extension of the pre-existing petrol service station. The respondent disagrees. It states that what has been proposed by the applicants is an extension and that the provisions of the Scheme consequently apply. It is accordingly entitled to decline to approve the applicants' plans because they do not comply with the provisions of section 11(iii) of the Scheme, as stated in the final letter.

[29] Given that this is not a new petrol service station, it appears that the meaning of the word 'extend', as used in section 11 of the Scheme, must be considered and determined. The meaning of that word is not dealt with in the lengthy list of definitions that are to be found in the Scheme. The ordinary meaning of the word must thus be sought. It is: 'extend in scope or range or area';¹⁴ or 'to cause to be of greater area or volume';¹⁵ or 'to increase the size of a building or area, especially by adding extra parts onto it'.¹⁶ A synonym of 'extend' is 'expand', which means 'the process of increasing in size and filling more space'.¹⁷

[30] Mr Rall drew attention to the definition of 'petrol filling station' that is contained within the definition section of the Scheme that deals with commercial concepts.¹⁸ That definition is the following:

'A building or portion of a building other than a parking garage used or constructed or designed or adapted to be used for the sale of motor fuels, lubricants [,] motor spares and motor accessories and may include a convenience shop, a caretaker's flat and provision for

¹⁴ Vocabulary.com: <https://www.vocabulary.com/dictionary/extend>.

¹⁵ Merriam-Webster On-line Dictionary: <https://www.merriam-webster.com/dictionary/extend>.

¹⁶ MacMillan On-line Dictionary: <https://www.macmillandictionary.com/dictionary/british/extend>.

¹⁷ Macmillan On-line Dictionary: <https://www.macmillandictionary.com/dictionary/british/expansion>.

¹⁸ The defined term, 'petrol filling station', is not the same term as that employed in the general body of the Scheme, namely 'petrol service station'. It appears that this is simply a result of inaccurate drafting. The meaning of 'petrol service station' will be construed to be the same as the defined term.

the maintenance and/or repair of motor vehicles for reward but shall not include panel beating and spray-painting.'

He submitted that as the second applicant did not seek to alter any of the buildings situated on the property it could not be said that the petrol service station was being extended. There may well be merit in this submission.

[31] Putting aside the definition of petrol service station for a moment, is what the applicants plan on doing an extension of the petrol service station? As previously mentioned, there are only four aspects of the current petrol service station that are to be changed:

(a) The positioning of the canopy is to be changed. The canopy presently covers an area of 253 square metres. Rather than having its size increased by the refurbishment, the proposed repositioned canopy will, in fact, be slightly smaller than the extant one, covering an area of 201 square metres. By virtue of the reduction in size, the canopy will not occupy more space, but less space. On its own, it can hardly thus be viewed as an expansion in any sense. Proof of the expansion caused by the repositioning of the canopy, so the respondent argues, is that its repositioning will cause it to encroach upon another property. Where that encroachment will occur is not easy to comprehend. Neither counsel could point out the property encroached upon with reference to the detailed drawing prepared by Mr van der Watt. As best as I could make out, it appears to lie somewhere between the property and the R56 itself. If this is so, it is a tiny sliver of land, and appears to form part, perhaps, of the road reserve. That sliver, wherever it may be positioned, is owned by a third party. The identity of that third party has been ascertained and it has been contacted. The third party has provided the applicants with a written acknowledgement indicating that it has no objection to the repositioning of the canopy. It is, in any event, not clear that an encroachment will in fact occur on the third party's property. If there is an encroachment, it is that the corner of the repositioned canopy may overhang the third party's property. But because I do not know precisely where the third party's property actually lies, I cannot be satisfied that this encroachment has been established. An encroachment that definitely will occur is an encroachment over the building line. Building lines ordinarily form part of the town planning scheme and they are usually a set distance from any one of the boundaries of a property within which

no structure is allowed to be constructed. The building line has been depicted in the plans prepared by Mr van der Watt. There is, according to the plan, a minor encroachment by the canopy over the building line: a portion of the corner of the canopy intrudes over it. There is no suggestion that the applicants have flouted the building line restriction. On the contrary, it has been acknowledged by them. The infraction, if it can be construed as an infraction, is in any event relatively minimal.¹⁹ The canopy remains within the curtilage of the property.

(b) The underground petrol tanks and the petrol pumps used to pump petrol from those tanks, will be replaced. The petrol pumps are located on pump islands. There will be no increase in the number of pump islands: the only change will be where they are located on the property.

(c) There will be a change in the number of demarcated parking bays available on the property. The repositioning of the canopy will have the consequence of allowing more of the property to be utilised for this purpose. The applicants make the case that there will actually not be an increase in the area available for parking: all that will increase is the demarcated number of parking bays. As the respondent pointed out in the final letter, it ordinarily has the discretion to overlook any shortcomings in the number of parking bays required for any particular property. The respondent's fears regarding the additional parking bays are that the applicants intend in the future to greatly increase the commercial activities on the property that are not strictly associated with the running of a petrol service station. The respondent states that it is the applicants' intention to open a butchery and a supermarket on the property. How it knows that, is not disclosed. The applicants acknowledge that a butchery is already up and running but deny that there is presently any intention to open a supermarket. In my view, the future remains unknown, and the respondent cannot legitimately withhold permission because of a supposed prediction of what may occur in the future. Those are events for another day. Before a supermarket could be opened, the respondent would undoubtedly have to be notified and could at that stage, if so advised, take steps to prohibit what was being proposed. But it is inescapable that in the final analysis, the changes proposed by the applicants will lead to an increase in the number of demarcated parking bays, although not an increase in the area of the property that can be utilised for parking. By virtue of this

¹⁹ *Camps Bay Ratepayers' and Residents' Association v Harrison* [2010] ZASCA 3; [2010] 2 All SA 519 (SCA) para 62.

fact, the attraction is there to conclude that this constitutes an expansion of the petrol service station. But does it really? The area of land occupied by the entire petrol service station remains the same and is unaltered. The buildings remain in their present form and size and are not to be altered. The services offered by the petrol service station are not to be increased: Mr van der Watt's plans show four pump islands presently in place and the refurbished petrol service station will have the same number of pump islands. The area used for parking remains the same. No additional land has been acquired that permits the increase in the number of parking bays. The freeing up of space arises solely from the internal rearrangement of the components that comprise the petrol service station, all of which remain the same, except the canopy which has been reduced in size. I would have thought that the respondent would ordinarily welcome an increase in the number of parking bays that would bring the property concerned into line with the provisions of the Scheme. After consideration, I am not satisfied that the increase in the number of demarcated parking bays constitutes an expansion of the petrol service station. Motor vehicles are ordinarily stopped at the pump islands under the canopy on the forecourt and not in parking bays.

(d) The level of the forecourt will be changed. The upliftment of the forecourt is necessary, according to the applicants, to prevent periodic flooding. The forecourt is an existing part of the petrol service station and is not a new construction. It will not increase in size, merely in height. It will not extend the area of the petrol service station.

[32] In my view, nothing that the applicants propose in their application could properly be construed as an extension of the petrol service station. It has not increased in area, it does not occupy more space and additional land has not been added to the property. In interpreting the provisions of the Scheme as it did to include the applicants' plans as being subject to it, the respondent committed an error in law. In terms of section 6(2)(d) of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), a court has the power to review an administrative action if 'the action was materially influenced by an error of law'. The decision by the respondent consequently falls to be reviewed and set aside.

[33] By virtue of the decision that I have come to, it is not necessary for me to consider whether the respondent is entitled to restrict access to the R56 or whether this is solely the function of the Minister. As the Scheme does not apply to the applicants, neither does that restriction.

[34] The applicants enjoin this court to substitute the court's decision for the decision taken by the respondent. I am mindful, however, of what was stated in *Masamba v Chairperson, Western Cape Regional Committee, Immigrants Selection Board and others*,²⁰ where the court held that:

'The purpose of judicial review is to scrutinise the lawfulness of administrative action in order to ensure that the limits to the exercise of public power are not transgressed, not to give courts the power to perform the relevant administrative function themselves. As a general principle, therefore, a review court, when setting aside a decision of an administrative authority, will not substitute its own decision for that of the administrative authority, but will refer the matter back to the authority for a fresh decision...'

[35] This was echoed in *Gauteng Gambling Board v Silverstar Development Ltd*,²¹ where the court noted that:

'An administrative functionary that is vested by statute with the power to consider and approve or reject an application is generally best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision. The court typically has none of these advantages and is required to recognise its own limitations.'

[36] It is a generally accepted principle of our common law that a court will be reluctant to assume a decision-making power for itself where a discretion has been entrusted to another functionary.²² This arises from the separation of powers,²³ and because the true purpose of judicial review is to scrutinise the decision-making process of the relevant administrator and not simply for the dissatisfied party to secure a different decision from a judge in the place of the administrator's decision.

²⁰ *Masamba v Chairperson, Western Cape Regional Committee, Immigrants Selection Board and others* 2001 (12) BCLR 1239 (C) at 1259E.

²¹ *Gauteng Gambling Board v Silverstar Development Ltd and others* [2005] ZASCA 19; 2005 (4) SA 67 (SCA) para 29.

²² *Premier, Mpumalanga, and another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* [1998] ZACC 20; 1999 (2) SA 91 (CC).

²³ *Intertrade Two (Pty) Ltd v MEC for Roads and Public Works, Eastern Cape, and another* 2007 (6) SA 442 (Ck) para 46.

The proper course is ‘almost always’ to remit the matter to the administrator for reconsideration.²⁴

[37] However, section 8(1)(c)(ii)(aa) of PAJA provides as follows:

- (1) The court or tribunal, in proceedings for judicial review in terms of section 6 (1), may grant any order that is just and equitable, including orders—
- (a) . . .
 - (b) . . .
 - (c) setting aside the administrative action and—
 - (i) remitting the matter for reconsideration by the administrator, with or without directions; or
 - (ii) in exceptional cases—
 - (aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action. . .’

[38] Exceptional circumstances are not defined in PAJA, nor could they reasonably be expected to be. Each matter is to be considered on its own merits. Generally, it appears that the requirements of ‘exceptional circumstances’ have been distilled to include the following:

- (a) the end result is a foregone conclusion such that remittal would be a ‘mere formality’ or ‘waste of time’ given the inevitability of the outcome;²⁵
- (b) there is a delay causing unjustifiable prejudice to the affected party;²⁶
- (c) there is bias or incompetence on the part of the administrator such that ‘it would be unfair to require the applicant to submit to the same jurisdiction again’;²⁷ or
- (d) the court is in ‘as good a position’ as the administrator to take the decision.²⁸

[39] In *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and another*,²⁹ the Constitutional Court stated as follows:

²⁴ *Gauteng Gambling Board v Silverstar Development Ltd and others* [2005] ZASCA 19, 2005 (4) SA 67 (SCA) para 1.

²⁵ *Johannesburg City Council v Administrator, Transvaal, and another* 1969 (2) SA 72 (T) at 76E-G.

²⁶ *M v Minister of Home Affairs and others* [2014] ZAGPPHC 649 paras 166 and 175–176.

²⁷ *Johannesburg City Council v Administrator, Transvaal and another* 1969 (2) SA 72 (T) at 76F-G.

²⁸ *Gauteng Gambling Board v Silverstar Development Ltd and others* [2005] ZASCA 19, 2005 (4) SA 67 (SCA) para 39.

²⁹ *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and another* [2015] ZACC 22; 2015 (5) SA 245 (CC) para 47.

' . . . given the doctrine of separation of powers, in conducting [the] enquiry there are certain factors that should inevitably hold greater weight. The first is whether a court is in as good a position as the administrator to make the decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include delay, bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all implicated parties. It is prudent to emphasise that the exceptional circumstances enquiry requires an examination of each matter on a case-by-case basis that accounts for all relevant facts and circumstances.' (Footnote omitted.)

[40] The respondent has relied on the Scheme to refuse to approve the applicants' plans. I have found that the Scheme is not applicable and that the second applicant is an extant petrol service station that is not being extended. The repositioning of the canopy and the raising of the forecourt appear to be constructions that will require plans to be approved. It is beyond this court's area of expertise to comment on whether technically these issues have been properly addressed by the applicants in their application. I am accordingly not in as good a position as the respondent's administrators to finally consider the applicants' application. In addition, while I have sympathy for the frustrations of the applicants due to the delay that they have suffered in finalising their project, I cannot find that the respondent has been biased against them. In my opinion, it would be preferable to refer the matter back to the respondent with directions and time limits, as contemplated in section 8(1)(c)(i) of PAJA.

[41] In counsel for the applicants' heads of argument, despite what is claimed in the finally amended notice of motion, he moves for a punitive order of costs to be awarded against the respondent. The two basic principles governing the awarding of costs are:

- (a) it is in the discretion of the Court, whether to award costs; and
- (b) costs follow the result, meaning that the successful party must ordinarily have its costs. A court will, however, on good cause, deviate from these basic principles.

[42] The purpose of '[an award of] punitive costs is to punish a litigant who is in the wrong due to the manner in which he or she approached litigation or to deter [other] would-be inflexible and unreasonable litigants from engaging in such inappropriate conduct in the future'.³⁰ A further consideration also includes ensuring that 'the successful party will not be out of pocket in respect of the expenses caused'³¹ to it by the approach to the litigation by the losing party.

[43] It is accordingly to the conduct of the respondent that I must look. After a conspectus thereof, I discern no evidence of mala fides or unconscionable conduct on its behalf. Being incorrect, as I have found the respondent to be, does not imply such conduct. It appears that the respondent was always receptive to representations made to it by the applicants and it engaged with them in attempting to resolve the issues. I can find no outrageous or reckless conduct on its behalf nor is there evidence of a conscious disregard of the rights of the applicants. Much was made of an alleged aspersion cast by the deponent to the respondent's affidavits (and by counsel for the respondent) regarding the honesty of the first applicant. As another court previously said:

'He who enters the lists must be prepared to take verbal knocks; a contest in the courts is not to be equated to the proceedings of a young ladies' debating society.'³²

The applicants must have their costs, but they must be on the ordinary scale.

[44] I accordingly grant the following order:

1. The decision of the respondent to refuse to approve the applicants' building plans for the refurbishment of the petrol service station situated at Erf 726, uMzimkhulu, is reviewed and set aside;
2. The matter is remitted to the respondent to reconsider the applicants' application;
3. In reconsidering the applicants' application, it is directed in terms of the provisions of section 8(1)(c)(i) of the Promotion of Administrative Justice Act 3 of 2000, that the respondent is:

³⁰ *Maribatsi v Minister of Police and another* [2020] ZAGPJHC 150 para 12.

³¹ D E van Loggerenberg and E Bertelsmann *Erasmus: Superior Court Practice* (RS 18, 2022) at D5-21.

³² *S v Tromp* 1966 (1) SA 646 (N) at 655-656.

- (a) Not to regard the proposed refurbishment of the second applicant's petrol service station as an extension as contemplated by section 11 of the uMzimkhulu Town Planning Scheme; and
 - (b) Not to decline to approve the applicants' plans by virtue of the fact that the petrol service station enjoys bi-directional access to the R56; and
 - (c) To render its decision within 21 days of the date of this order;
4. The respondent shall pay the applicants' costs on the party and party scale.

MOSSOP J

APPEARANCES

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Date of Hearing : 14 September 2022

Date of Judgment : 4 October 2022

