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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: 13956/2017

In the matter between:

MAHOGANY ROSE INVESTMENTS 4(PTY) LIMITED	**FIRST APPLICANT**
SUGARBERRY TRADING 388 CC	**SECOND APPLICANT**
And	
THE CONTROLLER OF PETROLEUM PRODUCTS	**FIRST RESPONDENT**
MINISTER OF MINERALS AND ENERGY	**SECOND RESPONDENT**

ORDER

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1. It is declared that the applications by the first applicant and the second applicant for a site and retail licence in respect of a proposed petrol station development upon Portion 1 of Erf 3111, the suburb of Mason's Hill at Edendale Road, Pietermaritzburg have not lapsed.

2. The respondents are directed to furnish the applicants with a list of the outstanding requirements for the site and retail licences within one month of the date of this order.

3. The applicants are directed to comply with any outstanding requirements within two months from the date the documents indicated in paragraph 2 of this order are provided.
4. The respondents are ordered to pay the costs of this application jointly and severally the one paying the other to be absolved including the costs of senior counsel, save that the costs of 13 February 2018 shall be borne by the applicants jointly and severally the one paying the other to be absolved.

JUDGMENT

Nkosi J

Introduction

[1] The first and second applicants ('the applicants') seek an order directing the first respondent to issue forthwith to the applicants, respectively, the site licence and the retail licence in respect of the proposed petrol station to be developed upon Portion 1 of Erf 3111 in the suburb of Mason's Hill at Edendale Road, Pietermaritzburg ("the immovable property"). Alternatively, the applicants seek an order declaring that the applications for the aforementioned licences have not lapsed. The application is opposed by the first and second respondents (the respondents) on the grounds of non-compliance with the applicable regulations of the Petroleum Products Act 120 of 1977 (the Act).

[2] It appears that the correct citation of the second respondent should be Minister of Energy who currently is the political head of the first respondent. Obviously, s 1 of the Act still refers to the Minister as the Minister of Minerals and

Energy as one portfolio and I believe nothing turns nor should turn on the citation of the responsible minister in this application.

Background

[3] The first applicant owns the immovable property and the second applicant was granted permission by the first applicant to develop a petrol station upon the said immovable property. On 19 February 2010 the applicants submitted applications for the site and retail licences respectively to the first respondent for approval. One Hemanth Rajkumar Singh did so on behalf of the applicants.

[4] The aforesaid applications were first refused by the first respondent but were ultimately successful on 19 April 2013 after the applicants had lodged two successful appeals with the Minister of Energy (annexures "D", "E1" to "E4", "F" and "G1" to"G2" to the answering affidavit). In respect of the retail licence application approval the applicants were specifically informed that before collecting the licence certificate a licence fee of R500 was to be paid by direct deposit at a Nedbank account (with details provided) on or before 19 June 2013. And thereafter to bring a copy of annexure G1 and the original or certified copy of the deposit slip to the first respondent's offices to collect the licence certificate.

[5] In respect of the site licence application approval the applicants were specifically informed to:

(a) Provide the first respondent with an environmental management plan ("EMP") and proof of financial provision for the purposes of rehabilitation of the environment affected by the retailing activities upon cessation of such activities, before 18 July 2013; and

(b) After providing the above requested information and before collecting the licence certificate, to pay a licence fee of R1000 by direct deposit at a Nedbank account (with account details provided) on or before 19 May 2013.

It is common cause that the time conditions as stipulated above were never met by the applicants. It appears that the licence certificates to be collected were only printed and not issued by the first respondent (annexures "H1" to "H2" to the answering affidavit).

[6] However, further approval letters dated 14 February 2017 (annexures "H02" and "H03" to the founding papers) for the site and retail licences respectively were furnished to the applicants by the first respondent again specifically advising the applicants like before to submit the above required information before 16 March 2017 in order to collect their licence certificates. According to the applicants the required documents (annexures "H04", "H05" and "H06" to the founding papers) were furnished to the first respondent. It is evident from H05 and H06 that the required documents, if ever submitted to the first respondent, would have been done after 16 March 2017.

[7] When the applicants sought to collect the licences from the first respondent's offices, the first respondent's representative, one Avishker Nandkishore, refused to issue them to the applicants. It appears that the issuance of the said licences was refused because the first respondent held the view that the licences had lapsed.

Pleadings

[8] It is averred in the founding papers that the applicants have, since the approval of the licences, outlayed about R 1 million in professional and other fees as

well as ancillary costs for the development of the site and in applying for the licences. The applicants contended that the first respondent's conduct is unlawful and has caused and is causing damages to be incurred by the applicants in millions of rands.

[9] In reply, the first respondent averred that the Controller in the office at the time, had acted *ultra vires* her powers, in terms of the Act and Regulations regarding Petroleum Products Site and Retail Licences, GN R286, *GG* 28665, 27 March 2006 ('the Regulations') by re-printing the approval letters on 14 February 2017 in respect of the applications which were already granted in April 2013 and which applications had lapsed. The first respondent contended that the Controller ought not to have reprinted the approval letters and, since the conditions in the 2013 approvals were not met, the site and retail licence approvals had lapsed.

[10] The first respondent further averred that the conditions were yet again not met when then Controller gave the applicants a second bite of the cherry in February 2017. The first respondent contended that the conditions, as set out in regs 14 and 15 were not complied with prior to the stipulated date of 16 March 2017 (annexures H02 and H03). That was so, it was further stated, because no EMP or financial provision for purposes of rehabilitation of the site, as required by the Regulations, was provided by the due date upon re-issue of the approvals in February 2017. Furthermore, the applicants did not pay for the licences timeously.

[11] The first respondent contended that the re-printed letters of approval yet again lapsed for non-compliance. Furthermore the applicants neglected and / or failed to contact the Controller at the time fixed for compliance to make arrangements for a late submission of the required documents, with good cause shown, prior to or at any

time after the lapsing of the granted licences. The first respondent submits that this would now necessitate a fresh application and another environmental impact study but no such new applications have been lodged by the applicants, since 16 March 2017. Furthermore, two business plans relating to the fuel suppliers have been filed in the papers, namely, Engen and BP fuel suppliers with different requirements.

Issues

[12] The issues for determination are, first, whether or not the applicants have complied with the conditions for the issuance of the site and retail licences respectively, and, second, whether or not the approval of these licences have lapsed or been rendered invalid due to non-compliance.

[13] I proposed to deal with the merits of the application on the basis that the re-issue of the application approvals by the Controller to the applicants on 14 February 2017 was legally valid. The approvals were not simply re-printed but were re-issued (given a new date) and the first respondent cannot simply disregard one of its own official's decision. See *MEC For Health, Eastern Cape & another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC) paras 64-66.

[14] Counsel for the respondents submitted that the application should fail because the site and retail licences had already lapsed when the conditions imposed in the letters of 14 February 2017 were not met. I do not agree that that would be the correct approach to take against the approvals granted in terms of the applicable regulations. Time was not pertinently stipulated to be a condition for the issuance of the licences by the Controller in the aforesaid letters.

[15] The only reference to lapsing appears in reg 24 (1) which provides as follows:

'A licenced retailer must commence with retailing activities at the corresponding licenced site within a period of 12 months after the date on which a retail licence is issued to the licensee, failing which the licence shall lapse'.

A distinction between the approval of a licence and the issue thereof has been recognised in a number of cases. See *R v Theron* 1959 (3) SA 102 (T) at 104 G-H; *Barrett NO v Macquet* 1947 (2) SA 1001 (A) at 1010; and *Kadwa v Rex* 1946 NPD 706.

[16] It is common cause that the required licences had not yet been issued pursuant the approvals granted on 14 February 2017. The issuance of the licences was to ensue upon submission of the required documentation set out in reg 14 and payment of the relevant licence fees. So the question of licences lapsing does not arise in this case.

[17] I therefore assume that a reference to lapsed licences made may have been unwitting or otherwise ill-conceived. The first respondent's argument in essence is that the licence application approvals re-issue on 14 February 2017 had already lapsed by the time the applicants purported to submit the required documentation after the date fixed by the Controller, namely, 16 March 2017 because of non-compliance with time frames. That argument, in my view is misconceived. There is no such provision in the Act nor Regulations for the lapsing of the approvals.

[18] Regulation 7 provides that the Controller must 'if satisfied that an application for a site licence meets the requirements of the Act and Regulations-

(a) inform the applicant that the application has been successful;

(b) require the applicant to, within the period determined by the Controller-

(i) pay the relevant fee determined in Annexure B into the relevant regional bank account; and

(ii) submit the documents contemplated in regulation 14; and

issue the site licence....'

[19] Regulation 14 reads as follows:

'Documentation to be submitted to the Controller upon a successful application-

When an application has been successful and upon request from the Controller, the applicant must-

(a) submit proof of payment of the licence fee to the Controller; and

(b) in the case of an applicant who does not qualify in terms of Section 2D of the Act-

(i) submit an environmental management plan; and

(ii) provide proof of financial provision for the purposes of rehabilitating a site upon cessation of retailing activities'.

[20] I notice that the time limit in reg 7 for the submission of the required documents and payment of the relevant fees is not specified or standardised. It is left for the determination of the Controller. By and large reg 7 only seeks to address the duties of the Controller in regard to the approved licences while reg 14 specifies the documents to be submitted by an applicant at the Controller's request upon approval of a licence or licence(s). The latter regulation is silent on what consequences should follow upon non- compliance by an applicant with the time period determined by the Controller in terms of reg 7 – unlike reg 24 (1) which does. I consider that to mean that the licence approval does not lapse but no licence shall be issued unless or until compliance is attained at some later stage. So non-compliance only defers the issue of a licence(s).

[21] It therefore appears to me that the time fixed by the Controller only stands for the benefit of an applicant. The period fixing, I consider, is only intended to streamline and to expedite the issuance of a licence to an applicant. The sooner an applicant complies with the Controller's request within the time limit the sooner the required licence(s) will be issued. In my view, reg 7 cannot be interpreted to allow the Controller to impose a sanction upon an applicant in that a licence approval granted automatically lapses, in the same way that an issued licence does after 12 months, where there has been non-compliance with the time lines determined by the Controller. A contrary interpretation of the regulation would in my view be unreasonable, arbitrary, and unconstitutional.

[22] I believe that the fact that the approval does not lapse automatically with the effluxion of the time determined by the Controller does not mean that non-compliance would have no consequences at the instance of the Controller. Nothing should stop the Controller from seeking compliance by directing a written notice to such applicant, with time specified, to submit any outstanding documents and indicate to such applicant that any further failure to do so might result in the review of the approval. In my view that would be a fair, reasonable, and just administrative act which would afford such applicant an opportunity to comply with in the period specified in the notice.

[23] I believe that the view I express above is fortified by the transformational objectives set out in s 2C read with s 2B of the Act and the provision of the Constitution relating to Freedom of Trade (s 22 of the Constitution). Section 2B of the Act provides that the Controller shall in considering the issuing of any licences in terms of the Act give effect to the provisions of s 2C and the following objectives –

' (a) ...;

(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) ...; and

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

[24] Section 2C(1) provides that:

' In considering licence applications in terms of this Act, the Controller of Petroleum Products shall –

(a) promote the advancement of historically disadvantaged South Africans; and
(b) give effect to the Charter'.

[25] The Charter (for the South African Petroleum and Liquid Fuels Industry on Empowering Historically Disadvantaged South Africans in the Petroleum and Liquid Fuels Industry, signed in November 2000) was developed to provide a framework for progressing the empowerment of historically disadvantaged South Africans in the liquid fuels industry. The parties to the Charter agreed to create fair opportunity for entry to the retail network and commercial sectors by HDSA companies. The HDSA companies are those companies that are owned or controlled by historically disadvantaged South Africans which operate on a basis to meet all aspects of the Charter. In developing the Charter, Member companies and Government undertook to appoint managers who will understand the spirit and background under which the policies relating to empowering historically disadvantaged South Africans in the Liquid Fuels Industry were conceived in order to create a supportive and enabling environment for business success.

[26] A strict interpretation of reg 7 proposed by the respondents that the licence approval lapses where there has been non-compliance with the time lines determined by the Controller would fly in the face of the transformational objectives set out s 2C of the Act and the Charter. Such an approach tends to stifle and not facilitate the attainment of the objectives of the Act and the Charter. I therefore believe that in this case the Controller should have exercised *Ubuntu* and simply directed a written notice to the applicants to submit any outstanding documents, if none were received as claimed, with new deadlines set and also warn the applicants that a failure to adhere to the aforesaid deadlines may result in their licence approvals being forwarded to the Controller for a review of their licence status. The licence approvals do not lapse automatically and the Controller cannot simply reverse such approvals without affording the applicants a further opportunity to comply before reviewing her approval decision.

[27] The applicants claim to have deposited the licence fees required (annexures "HO13" and "HO14" to the replying affidavit) on 11 August 2017. The applicants also claim to have submitted the EMP and the financial provision for the purpose of the rehabilitation of the environment (annexures "HO5" and "HO15") to the Controller's office in Durban by email. The first respondent denies ever receiving any such outstanding documents from the applicants. There is however no supporting affidavit by the officer in the first respondent's office who is actually responsible to receive outstanding licence documents stating that none of the outstanding documents were received from the applicants after the deadline of 16 March 2017.

[28] I believe that the apparent changes in the business plan of the applicants, done previously in keeping with the requirements of Engen fuel supplier, which the applicants changed to BP as the proposed fuel supplier with its own business plan

requirements, can be remedied by the Controller exercising its powers in terms of reg 35 - by requesting an additional information from the applicants that may be necessary to enable the Controller to make a decision regarding the issuing of the licences. In my view it would be unnecessary for the applicants to bring fresh applications for the licence approvals at further cost to the applicants.

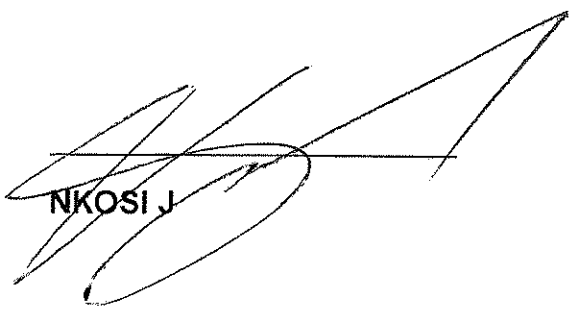
[29] In the result, I make the following order based on the draft order prayed by the applicants:

1. It is declared that the applications by the first applicant and the second applicant for a site and retail licence in respect of a proposed petrol station development upon Portion 1 of Erf 3111, the suburb of Mason's Hill at Edendale Road, Pietermaritzburg have not lapsed.

2. The respondents are directed to furnish the applicants with a list of the outstanding requirements for the site and retail licences within one month of the date of this order.

3. The applicants are directed to comply with any outstanding requirements within two months from the date the documents indicated in paragraph 2 of this order are provided.

4. The respondents are ordered to pay the costs of this application jointly and severally the one paying the other to be absolved including the costs of senior counsel, save that the costs of 13 February 2018 shall be borne by the applicants jointly and severally the one paying the other to be absolved.



NKOSI J

APPERANCES

DATE OF HEARING : 16 AUGUST 2018

DATE JUDGMENT HANDED DOWN : 10 OCTOBER 2018

ON BE HALF OF THE APPLICANTS : T. N ABOOBAKER SC

(Instructed by KEVESH SINGH AND COMPANY

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