IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINICAL DIVISION]

NOT REPORTABLE DATE: 11/3/2005

In the matter between: Case no. 3104/04

TURNSTONE TRADING CC	Applicant
and	
THE DIRECTOR GENERAL ENVIRONMENTAL MANAGAMENT, DEPARTMENT OF AGRICULTURE CONVERSATION & DEVELOPMENT	1 st Respondent
MEMBER OF THE EXECUTIVE COMMITTEE DEPARTMENT OF AGRICULTURE, CONVERSATION AND ENVIRONMENT MPUMALANGA PROVINCE	2nd Respondent
DEPARTMENT OF AGRICULTURE, CONVERSATION & ENVIRONMENT, MPUMALANGA PROVINCE	3rd Respondent
MINISTER OF WATER AFFAIRS & FORESTRY	4th Respondent
REGIONAL DIRECTOR GENERAL, DEPARTMENT OF WATER AFFAIRS & FORESTRY	5th Respondent
GOVAN MBEKI MUNICIPALITY	6th Respondent
FORMPROPS 156 (PTY) L TD	7th Respondent

JUDGMENT

LEGODI J,

INTRODUCTION

[1] This is an application in terms whereof Turnstone Trading CC (hereinafter referred to as the applicant) is asking for an order to review and set aside the decisions of the Director General for the Department of Agriculture Conservation and Environment (Mpumalanga Province (hereinafter referred to as the first respondent) and Member of the Executive Committee Department of Agriculture, Conservation and Environment Mpumalanga Province (hereinafter referred to as the second respondent).

[2] In terms of the decisions, the first respondent authorised and granted Formprops 156 (PTY)LTD (hereinafter referred to as the seventh respondent) permission to construct and operate a new filling station on ERF 8403/1 extension 78, Secunda. This decision was taken by the first respondent on the 10th February 2003 or on the 2nd March 2003 and the decision was upheld by the second respondent on the 9th July 2003.

[3] The decisions taken by the two respondents were purported to have been taken in terms of section 22(1) of Environment Conversation Act 73 of 1989 (hereinafter referred to as the ECA) which provides as follows:

> ***22. Prohibition of undertaking of identified activities***
> **-(1) no *person shall undertake activity identified in terms* of *section* 21(1) *or cause such* an *activity to be undertaken except by virtue* of a *written***

authorisation issued by the Minister or by* a *competent authority or local authority or* an *officer with competent authority or officer designated by the Minister by notice in the Gazette

(2) the authorisation referred to in subsection* (1) *shall only be issued after consideration* of *reports concerning the impact* of *the proposed activity and* of *alternative proposed activities* on *the environment, which shall be compiled and submitted by such persons and in such manner* as *may be prescribed.

(3) the minister or the competent authorised or* a *local authority or officer referred to in subsection* (1) *may at his or its discretion refuse or grant the authorisation for the proposed activities or* an *alternative proposed activity* on *such conditions if any* as *he or it may deem necessary.

BACKGROUND

[4] As during 2003 Raymor Diensstasie Trust (hereinafter referred to as the trust) was the registered owner of a petrol filling station business situated on ERF 4862, Secunda, Extension 4, Registration Division 1.8, Mpumalanga.

[5] The applicant during August 2003 purchased the said filling station business from the trust and was to take occupation thereof on the 1st March 2004.

[6] It is alleged that during or about November 2003 it came to the knowledge of the applicant that the seventh respondent had applied in terms of the provisions of section 22(1) of the Act for the necessary consent to erect a filling station and related amenities on a property described as Paul Kruger Avenue ERF 8401, Secunda Extension 28.

[7] On behalf of the trust or on behalf of Mr Wessel Strauss, Ecotechnik lodged an appeal against the decision of the first respondent referred to earlier in this judgment. The appeal was dismissed by the second respondent and the decision of the first respondent was subsequently upheld by the second respondent on the 9th July 2003.

[8] The reasons for the decision by the second respondent were requested and this was not furnished until round about April 2004 when the second respondent furnished the record of the proceedings which contained detailed grounds for confirmation of the decision of the first respondent.

[9] The record of the decision was furnished by the second respondent subsequent to these review proceedings instituted by the applicant on the 5th February 2004.

ISSUES RAISED

[10] In my view the following issues had been raised by this application: -

Whether or not the applicant was out of time in the institution of these review proceedings and if not,

Whether or not the first and or second respondents were under obligation to consider socio-economic requirement and if not,

Whether or not the first and or second respondents were entitled to consider socio-economic requirements and other documents and if so,

Whether or not the applicant in the present proceedings was obliged to raise and substantiate the socio-economic requirements.

DISCUSSIONS AND SUBMISSIONS

[11] When the applicant appealed against the decision of the first respondent, it raised a number of environmental issues and these grounds were incorporated in the present proceedings as the basis for review. However during the discussions and also in the applicant's heads of argument, the rest of these grounds were not pursued or vigorously pursued. The real ground which was pursued and seriously argued was the one relating to non

consideration of socio-economic requirement and other documents. I will return to this issue later in this judgment.

[12] On behalf of the seventh respondent, a point *in limine* was taken. The essence of the point was that the applicant was out of time in bringing these review proceedings in that the review proceedings were not instituted within hundred and eighty days from the date on which the internal proceedings were concluded. In this regard the seventh respondent relied on the provisions of section 7(1) (a) of the Promotion of Administrative Justice Act 3 of 2000 (hereinafter referred to as PAJA) which 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 subject to the subsection (2) (c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection 2(a) have been concluded. Internal remedies are said to have been concluded on the 9th July 2003 i.e. the day on which the second respondent dismissed the applicant's appeal, or the date on which the second respondent confirmed the decision of the first respondent.

[13] The proceedings in this application were only instituted on the 5th February 2004 which is almost a month after the expiry of the 180 days calculated from the 9th July 2003. It is however important to mention that in terms of section 5(1) of PAJA any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action, may within 90 days after the date on which that person became aware of the action or might reasonably have

been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action. Subsection (2) provides that the administrator to whom the request is made must, within 90 days after receiving the request, give that person adequate reasons in writing for the administrative action (own emphasis). It was contended on behalf of the seventh respondent that the second respondent furnished reasons for the action or decision.

It is important to mention that letter dated the 9th July 2003 consists of only two pages and most portion of page 2 consists of particulars of the parties. The grounds for dismissing the appeal are in a very general term. Upon receipt of the decision of the 9th July 2003 the applicant or its predecessor requested for reasons for the decision. My understanding of the provisions of section 5(1) is that once a request is made for the reasons, the running of the 180 days time limit in terms of section 7(1) is deactivated . .In fact a party requesting such reasons in terms of section 5(1) has got 90 days within which to make such a request. In my view once such a request is made as prescribed, the running of the 180 days will only be activated in one of the two situations, firstly from the date on which the reasons are furnished provided of course such reasons are furnished within 90 days. Secondly if reasons are not furnished within 90 days it will be presumed that there are no reasons and therefore the 180 days will start to operate upon expiry of the 90 days. **(See subsection (3) of section (5).**

[14] Returning to the submission that reasons were furnished in the letter of the 9th July 2003 from the second respondent, it is important to note the essence of subsection 5(2). Adequate reasons in writing for the administrative action must be furnished or given. I have already alluded to the fact that the reasons for the action as contained in the letter of the 9th July 2003 are in general terms. This of course should be compared with the reasons subsequently given during April 2004. The reasons consist of three pages as compared to the two pages earlier referred to in this judgment.

[15] In my view the applicant was entitled to request for further reasons, better and adequate reasons as envisaged in subsection 2 of section 5. The second respondent for more than 90 days failed to respond or furnish any adequate reasons and subsequent to this the applicant instituted these proceedings during February 2004. Effectively therefore the 180 days started to operate after the expiry of 90 days from the date on which the reasons for judgment were requested being during July 2003. At the time when this issue was argued I ruled that the applicant was not out of time and I still hold that view. This then brings me to consider other issues which have been raised during the discussions.

[16] Counsel for the applicant strongly argued that the first and second respondents were obliged in terms of the legislation to have considered socio-economical requirement and that in doing so it should also have considered other documents which were laid before the respondents and in particular the second

respondent. In this regard the applicant relied on certain provisions of Constitution Act 108 of 1996, Environment Conversation Act 73 of 1989 (hereinafter referred to as ECA) National Environmental Management Act, 107 of 1998 (hereinafter referred to as NEMA) lastly Promotion of Administrative Justice Act 3 of 2000 (hereinafter referred to as PAJA). The applicant also heavily relied on what was said in the matter of BP Southern African (PTY) LTD v MEC for Agriculture Conversation Environment and Land Affairs 2004 (5) SA 124 (w).

[17] Everyone has the right to an environment that is not harmful and to have the environment protected for the benefit of present and future generations, through reasonable legislation and other measures that present prohibition and ecological degradation, promote conservation and secure ecological sustainable development and use of natural resources while promoting justifiable economic and social development. **(see section 24 of the Constitution Act).** Of relevance other legislative and measures would in the present case include National Environmental Management Act. The first and second respondents seemed to have concerned themselves with the prevention of pollution without consideration for promotion of justifiable economic and social development, the contention being that they were not obliged to do so. Promotion of justifiable economic and social development is also repeated in NEMA (see the Preamble thereof). Environmental management must place people and their needs at the forefront of its concern and serve their physical, psychological, developmental, cultural

and social interest equitably. **(See section 2 of NEMA).** Development must be socially, environmentally and economically sustainable. **(See Section 3 of NEMA).** Development sustainability requires the consideration of all relevant factors. These factors are set out in section 4 (a)(i) - (viii) of NEMA. These factors as enumerated in these subsections are clearly not exhaustive. The subsections pose no limitations but instead they are as inclusive as it may become necessary. However the overriding emphasis in the present case is that development in terms of the legislative measures referred to earlier in this judgment has to be socially, environmentally and economically sustainable.

[18] The respondents want to separate consideration for socio-economic requirement from other environmental considerations. The suggestion being that such a consideration for socio-economic aspect is not specifically provided for in the Act. I cannot agree with this suggestion especially in the light of the provisions of the Act referred to earlier in this judgment requiring development under NEMA to be socially, environmentally and economically sustainable. The view was better expressed by Classen J. All these statutory obligations make it abundantly clear that the department's mandate includes the consideration of socio-economic factors as an integral part of its environmental responsibility. This is an inevitable conclusion arising from constitutional injunction emanating from s24 of the constitution and the existing legislation which is currently in force regulating the environment and development of identified activities on land which may have

a detrimental effect on environment. **(See BP (PTY) LTD supra 151** E). I must therefore reject the contention by Mr Vorster and Mr Cockrell on behalf of the first and second respondents and seventh respondent respectively that the first two respondents were under no obligation to consider the socio-economic aspect.

[19] It was common cause that the first and second respondents did not consider the socio-economic aspect. This was so because these respondents were of the view that they were not obliged to do so. Having found that they were indeed obliged to consider socio-economic factor, it is also important to deal with the issue whether or not the first and second respondents should have considered its own guidelines although not in use at the time, the Gauteng guidelines and Defra document. Although the respondents were not obliged to consider these documents, in my view especially in the light of the complex nature of the legislative measures relevant to the issue of authority in terms of Section 22 of ECA, the respondents were entitled to consider not only guidelines within its area of jurisdiction but also those outside its area and in appropriate cases those outside the country. The respondents should always be sensitive not to ignore any information brought to its attention which might be relevant in the issuing of section 22 authorisation. In my view the first and or second respondents should have considered any document relevant and brought to their attention.

[20] Counsels for the first, second and seventh respondents argued that in the event I find that the first and second respondents

were not obliged in terms of the legislation to consider socio-economical aspect, but that the first two respondents were in any event entitled and should have considered the aspect and other documents, then in that event I should find that the applicant had a duty to have raised and substantiated socio-economical requirement, at the beginning of the process, i.e. during and after public participation, before the decision by the first respondent and during the appeal. I do not think that it is necessary to go into this issue in detail. However if the first and second respondents were not obliged to have considered socio-economic requirement it would have been incumbent also on the applicant to specifically raise and substantiate the socio-economic requirement. The applicant did not do this and I don't think failure on its part is vital especially in the light of my finding that the first two respondents were under obligation to consider socio-economic requirement.

[21] The notice of motion in regard to the further order which I need to make in the event the decisions of the first and second respondents are set aside is that the reviewed decisions should be replaced by such an order as this court might deem fit. The suggestion was made on behalf of the applicant, that the matter be remitted to the respondents for consideration of the socio-economic aspect. This in my view would be the appropriate remedy. In doing so it is also important to facilitate the quick reconsideration of the application for authorisation in terms of section 22 of ECA. Whilst the first and second respondents should consider the socio-economic factor and other documents insofar as they might be relevant, the applicant must also ensure

should consider the socio-economic factor and other documents insofar as they might be relevant, the applicant must also ensure that it places such information at its disposal to the respondents as may be necessary and relevant to the subject matter being socio-economic requirement.

CONCLUSION

[22] I therefore conclude by making the following order:

[22.1] The decision taken by the first respondent on the 10th February 2003 and or 2nd March 2003 giving authorisation to the seventh respondent in terms of section 22 of ECA for a development of a filling station is hereby reviewed and set aside.

[22.2] The decision of the second respondent taken on the 9th July 2003 confirming the decision of the first respondent referred to in 22.1 above is hereby reviewed and set aside.

[22.3] The application by the seventh respondent for authorisation in terms of section 22 ECA is hereby remitted for reconsideration by the first respondent.

[22.4] As regard order 22.3 above, the first respondent is ordered to consider or take into account socio-economic factor and any other document or guideline insofar as it might be relevant for consideration of the socio-economic aspect.

[22.5] The first, second and seventh respondents to pay the costs of the application.

M F LEGODI
JUDGE OF THE HIGH COURT

Applicant's attorneys: **Van Zyl, Le Roux & Hurter Inc.**

1st to 5th Respondents' Attorneys: **The State Attorney**

6th Respondent's Attorneys: **George Moroasui Attorneys**

7th Respondent's Attorneys: **Maluleke Msimang & Associates**