IN THE HIGH COURT OF SOUTH AFRICA
TRANSVAAL PROVINCIAL DIVISION
NOT APPLICABLE

Date: 28/7/2005

CASE NO.: 35064/2002

FUEL RETAILERS ASSOCIATION OF SOUTH AFRICA (PTY) LTD

Applicant

And

THE DIRECTOR GENERAL ENVIRONMENTAL MANAGEMENT, DEPARTMENT OF AGRICULTURE CONSERVATION AND ENVIRONMENT FOR MPUMALANGA PROVINCE

1ST Respondent

MEMBER OF THE EXECUTIVE COMMITTEE DEPARTMENT AGRICULTURE, CONSERVATION AND ENVIRONMENT, MPUMALANGA PROVINCE

2ND Respondent

THE DEPARTMENT OF AGRICULTURE, CONSERVATION AND ENVIRONMENT, MPUMALANGA PROVINCE **3RD Respondent**

MINISTER OF WATER AFFAIRS AND FORESTRY **4TH Respondent**

REGIONAL DIRECTOR, DEPARMENT OF WATER AFFAIRS AND FORESTRY

5TH Respondent

MEMBER OF THE EXECUTIVE COMMITTEE THE DEPARMENT OF TRANSPORT AND PUBLIC WORKS, MPUMALANGA PROVINCE

6TH Respondent

MBOMBELA LOCAL MUNICIPALITY **7TH Respondent**

GEORGE DOLEZAL	**8TH Respondent**
SOPHIA LEKEISANG INAMA N.O.	**9TH Respondent**
MATEBOGO MARIA INAMA N.O.	**10TH Respondent**
PODUDU OWEN INAMA N.O.	**11TH Respondent**
ARCHIBALD INAMA N.O.	**12TH Respondent**

JUDGMENT

WEBSTER J

This is a review application in terms of the common law, alternatively in terms of section 36 of the Environment Conservation Act No. 73 of 1989 (ECA), alternatively in terms of The Promotion of Administrative Justice Act No.3 of 2000 (PAJA). The application was opposed.

The decision giving rise to these proceedings is based on an application by the 9th to 12th respondents (inclusive) made in accordance with the provisions of sections 21, 22 and 26 of ECA for the establishment of a filling station in Kingsview Extension 1, Whiteriver, Mpumalanga Province. On 9 January 2002, the second respondent granted the necessary authority in terms of section 22 of ECA for the installation of three underground fuel tanks each with a capacity of 21 500 liters for 93 octane leaded and unleaded petrol, respectively, and the third one for dieseline, the erection of a convenience store, a four post canopy, ablution facilities and driveways onto the premises. This authority was subject to

(i) the necessary approval from the Department of Water Affairs;

(ii) the compliance with all control and mitigation measures as set out in the scoping report that had been prepared and submitted on behalf of the applicants; and

(iii) the prevention of any pollution to surface or underground water.

The approval was further subject to reservation of the right to change, amend the conditions of authorization or to withdraw such authorization. The applicant appealed against this decision to the first respondent. The appeal was dismissed by the first respondent on 23 September 2002. The reasons for the record of decision by both the first and second respondents are set out fully and extensively in reasons furnished by both officials in terms of Rule 53 of the Uniform Rules of Court.

It is necessary that the true protagonists in this dispute be identified. The applicant represents the interests of the proprietors of filling stations in South Africa. Amongst those proprietors is the deponent to the founding and replying affidavits of the applicant, one TOM HUGO LE ROUX (Le Roux). The other protagonist is GEORGE DOLEZAL (Dolezal) who is the director of the 13th respondent that acquired the rights title and interest to the filling station that forms the subject matter in this case. In the founding affidavit the said Le Roux admitted to being the owner of one filling station known as SITANANI, Whiteriver. It is common cause that the 13th respondent owns a filling station approximately 500 meters from SITANANI. In the answering affidavit of the 13th respondent DOLEZAL avers that Le Roux owns three and not one filling station in Whiteriver. Le Roux, in the replying affidavit explains that he owns SITANANI filling station, a second one (White River Plaza) situated about 1.2 kilometers from the proposed filling station and an interest in a third filling station (in Senator Park) that has not yet been built but in respect of which the necessary authority has already been granted by the Department of Agriculture Conservation and Environment for Mpumalanga Province. He explains that he did not disclose these latter two filling stations because they do not have a direct

bearing to the dispute. Le Roux admits that the Senator Park filling station is approximately 200 meters from the 13th respondent's proposed filling station. It is common cause that Le Raux opposed the granting of the authority to establish the Senator Park filling station in terms of ECA on essentially the same reasons as those advanced against those in the application forming the subject matter of these proceedings. Le Roux explains that opposing the Senator Park application has been costly and he withdrew his opposition to the granting of the authority when he was offered operating rights in order to recoup his losses.

The Senator Park filling station will, according to Dolezal, be situated about 200 meters from the proposed site. Dolezal states further that he intends to move his existing filling station to the new site. This is not disputed by Le Roux. The latter points out, however, that the 13th respondent's proposed filling station will have 18 filling hoses as opposed to the existing 8 filling hoses. This, he remarks, will increase the 13th respondent's Iitreage to the detriment of his filling station.

It is further common cause that there is a borehole on the 13th respondent's property. This borehole has augmented the water needs of Whiteriver in times of drought. The source of the water in this borehole is an aquifer which lies 16 meters below the ground surface. There is no evidence on how far this aquifer extends. The papers are also silent on the question of ownership of the borehole.

The application lodged with the second respondent by the 9th to the 13th respondents was supported by an "Environmental Scoping Report", that was prepared by GLOBECON, a firm of environmental management services. This report is in compliance with Regulations 1182 and 1183 published in terms of ECA. It (the scoping report) is an extensive document. It deals, *inter alia,* with the activities to be undertaken during the preparation, construction and

operational phases of development; the estimates of type of solid waste, liquid effluent and gaseous emissions expected from the project; biophysical description of the site, including physical, biological and social characteristics; an evaluation of impacts and concerns and recommendations. It deals further with the issues identified during the scoping process that should be addressed, namely, the protection of the existing aquifer, the prevention of dust generation, possible noise impact during construction and operational phases; it gives details as to how these impacts can be mitigated/prevented so that the development will not have a significant impact on the environment and neighboring areas. Annexed to the report is a Geotechnical and Hydrological Report, proof of advertisement and proof of the public participation process. A consultant ECOTECHNIK ENVIRONMENTAL AND WETLAND CONSULTANTS who were duly appointed by the applicant, lodged an evaluation report dealing with certain aspects of the scoping report, the significant being:

(i) The existence of a borehole on the property, and the attendant danger, that the underground water may be contaminated.

(ii) The question of noise pollution, due to the fact that several sensitive receptors are located in the immediate vicinity of the proposed development.

(iii) The type of fuel and the quantity thereof to be stored on the premises.

(iv) The shortcomings in the public participation process.

(v) The fact that no assessment has been performed of the visual impact of the proposed development.

Globecon commented on the issues raised in the evaluation report. The applicant thereupon filed a report by engineers De Villiers Cronje. This report is an analysis and evaluation of the geotechnical report annexed to the scoping report by Globecon. This report (by De Villiers Cronje highlights the

(i) Geotechnical data pertaining to structures and paved areas;

(ii) Hydro-geological data pertaining to future potential pollution hazards and information that is lacking in the scoping report, i.e. soil test data at the base of the fuel tanks, the permeability data for the residual granite at depths below 3.7 meters, data on the aquifer and concludes by recommending further soil tests and that "... *the current and future value and intended utilization of the water from the aquifer be evaluated".*

Various affidavits were files by the respective parties. I do not deem it necessary to summarize the evidence in them. Instead, I shall comment on them when dealing with the pertinent issues as raised in applicant's grounds of review.

The applicant has raised eleven grounds of review. They are

(i) the exclusion of relevant considerations from the Department of Water Affairs (DWAF) in particular the Water Quality Management and Water Utilization Sections of the DWAF;

(ii) the issue of the presence of the underground aquifer and the effects of possible fuel leakage and the consequences thereof;

(iii) need, sustainability and desirability;

(iv) the attempted delegation of responsibility to the Department of Water Affairs and Forestry;

(v) shortcomings in the public participation process;

(vi) that alternatives were not considered;

(vii) the failure to take into account the report of the applicant's engineers, Messrs De Villiers Cronje, into consideration;

(viii) the decision by the 2nd and 1st respondents to reserve the right to change or amend the conditions of authorization;

(ix) the piecemeal approach to need, sustainability and desirability;

(x) whether the 2nd and 1st respondents the issue of the 13th respondent's need and desirability; and

(xi) the failure to call for a full environmental impact-assessment.

The Environment Conservation Act No. 73 of 1989 is an important piece of legislation that deals with a sensitive all-important and a life-sustaining issue, namely the preservation and conservation of our environment. It came into existence in consequence of the awakening of the human conscience. In the quest for power and riches human beings had lost their sensitivities to a healthy environment and the need for conservation. Natural resources including both fauna, flora, minerals etc. were over-exploited resulting in many instances of extinction and a threat to our very existence on this planet. ECA represents one step in the efforts if not to reclaim what has been devastated, but, at the very least, to halt the damage that was done and hopefully accord nature to heal itself. The responsibility for realizing the objectives of ECA rest with the Department of Agriculture, Conservation and the Environment.

It is common cause between the parties that in considering the application for the authority to build a filling station the second and first respondents were performing administrative functions. It is common cause that their decisions are subject to review in accordance with the common law, Section 36 of ECA and PAJA.

The administrative functions of organs of State form part of the executive functions of State. The courts have always recognized that their function in reviewing an administrative act or decision is not to substitute the administrative decision with what they consider to be the correct decision on the merits. It has been stated repeatedly that in order to establish review grounds ... *it must be shown that the tribunal failed to apply its mind to the relevant issues in accordance with the 'behest of the statute and the tenets of natural justice'* ...

Such a failure may be shown by proof, inter alia, that the decision was arrived at arbitrarily or capriciously or mala fide or as a result of unwarranted adherence to a fixed principle in order to further an ulterior or improper purpose ... " (Johannesburg Stock Exchange v Witwatersrand Nigel Ltd 1988(3) SA 132 (A) at 152. Review is aimed at the maintenance of legality at the administration of *''the law which has been passed by the Legislature"* (Pretoria Portland Cement Co Ltd v Competition Commission 2003(2) SA 385 at 405 (para 35)).

With the advent of constitutionalism a perception emerged that the test enunciated above no longer reflected the correct approach to the function of review by the courts. In Kotze v Minister of Health and Another 1996(3) BCLR 417 (T) at page 425 E - G, Spoelstra J said:

"The word 'justifiable/ will receive proper judicial consideration in the years to come. Its meaning will become clearer as it becomes more definite/precise/better defined by such careful deliberation. According to the Shorter Oxford Dictionary "justifiable" means "capable of being justified or shown to be just". The Afrikaans text uses the word "regverdigbaar". These words denote something that can be defended As I understand it, the section requires that the reasons advanced for the administrative action must show that the action is adequately just or right. In other word~ it must appear from the reasons that the action is based on accurate findings of fact and a correct application of the law. In this regard the difference between a review and an appeal may have been largely eroded If a review under this section is to succeed, a court of review must be satisfied that the reasons advanced for the action under review are not supported by the facts or the law or both/~

In Roman v Williams *N.D.* 1998(1) SA 270 (T) (C) at 284F/G - 285A, Van De Venter J held:

"A decision of the Commissioner of Prisons to re-imprison a probationer as provided for by s 848(1) *supra/ is reviewable administrative action within the*

purview of Section 33(1) *and* (2) *of the Constitution of the Republic of South Africa Act 108 of* 1996 *(lithe Constitution") (as these subsections are to be deemed to be read in terms of item 23(2)(b) of Schedule* 6 *of the Constitution) and such a decision must be justifiable, in relation to the reasons given for it Justifiability as specified is to be objectively tested*

The scope of this constitutional test is clearly much wider than that of the common law test as it overrides the common law review grounds as set out in Johannesburg Stock Exchange v Witwatersrand Nigel Ltd 1988(3) *SA* 132 *(A). Administrative action, in order to prove justifiable in relation to the reasons given for it, must be objectively tested against the three requirements of suitability, necessity and proportionality which requirements involve a test for reasonableness. Gross unreasonableness is no longer a requirement for review. The constitutional test embodies the requirement of proportionality between the means and the end The role of the Court in judicial reviews is no longer confined to the way in which an administrative decision was reached but extends to its substance and merits as well'~*

In Fazenda v Commissioner of Customs and Excise 1999(3) SA 452 (T) Stafford J (as he then was), referred with approval to both the Roman and the Kotze cases *(supra)* at page 463 A-G.

Section 33(1) of the Constitution Act 108 of 1996 provides:

"Everyone has the right to administrative action that is lawful, reasonable and procedurally fair".

In Du Preez and Another v Truth and Reconciliation Commission 1997(3) SA 204 A at 231 G, Corbett C.J. said:

"... *The duty to act fairly, however, is concerned only with the manner in which decisions are taken: it does not relate to whether the decision itself is fair or Not".*

In Bel Porto School Governing Body v Premier Western Cape 2002(3) SA 265 (CC), Chaskalson C.J. remarks as follows:

':95. For good reasons judicial rel4ew of administrative action has always distinguished between procedural and substantive fairness. Whilst procedural fairness and the audi alterim partem principle is (sic) strictly upheld substantive fairness is treated differently ...

86. The unfairness of a decision in itself has never been a ground for review. Something more is requested. The unfairness has to be such a degree that an inference can be drawn from it that the person who made the decision had erred in a respect that would provide grounds for review. That inference is not easily drawn.

87. The role of the Courts has always been to ensure that the administrative process is conducted fairly and that the decisions are taken in accordance with the law and consistently with the requirements of the controlling legislation. If these requirements are met and if the decision is one that a reasonable authority could make, Courts would not interfere with the decision.

88. I do not consider that item 23(2)(b) of Schedule 6 has changed this and introduced substantive fairness into our law as a criterion for judging whether administrative action is valid or not The setting of such a standard would drag Courts into matters which according to the separation of power~ should be dealt with at a political or administrative level and not a Judicial level... "

Before considering the grounds of the review it is necessary to note that the point of *locus standi* of the applicant to being the review proceedings and the absence of a valid authority for TOM HUGO LE ROUX, the deponent to depose to the founding affidavit as points *in limine* were not persisted in. In so far as such objections, or a vestige of *either* of them, may *still* remain an issue, I do not

deem it necessary to pay much attention to them. For purposes of this judgment I have accepted both the *locus standi* and the mandate based on the resolution as confirmed in the replying affidavit. The respective affidavits confirming this. I turn now to the grounds of review.

EXCLUSION OF RELEVANT CONSIDERATIONS:

Mr. Erasmus who appeared for the applicant, submitted that the first and second respondents failed to obtain the input of the Water Quality Management and Water Utilization Sections of the Department of Water Affairs and Forestry (DWAF). He referred to paragraph 1.3 of annexure "A" to the record of decision which reads as follows:

"1.3 No development may take place on the area of concern without the necessary permits/approvals and/or service and/or lease agreements/ where it is relevant, from the following institutions:

1.3.1 Department of Water Affairs and Forestry'~

He submitted that the second and first respondents have failed to take a decision, alternatively failed to take relevant considerations into account.

In the Record of Proceedings and Reasons the second respondent states that he referred the application for the filling station to the Department of Water Affairs and Forestry. Annexure "R" that appears at page 232 emanated from the Regional Director of the Department of Water Affairs and Forestry. Mr. Mothle who appeared for the first, second and third respondents submitted ,that DWAF is an independent department which has its own internal working arrangements. He submitted further that the second respondent was under no obligations to solicit the views of each division of DWAF.

The second respondent, in his reasons, states clearly that he accepted Annexure "R" as being the response of DWAF, not as a decision of DWAF but for the entire department.

Mr. Du Plessis, who appeared for the thirteenth respondent pointed out consultation with DWAF had continued even after the record of decision as appears from correspondence at pages 1337, 1338, 1339, 1340, 1341 and 1344 of the record.

It is my considered view that the second respondent clearly applied his mind to the issue of consulting with DWAF. The contents of the correspondence filed of record indicate an honest genuine concern by DWAF to ensure that the establishment of the proposed filling station poses no threat to contamination of water. I am satisfied that consultation with the regional director of DWAF constitutes adequate, proper and complete consultation. To my mind, the second and first respondents complied with the necessary procedures and guidelines which they had to comply with in considering the application and that no relevant considerations were excluded, ignored or overlooked in any way.

PRESENCE OF UNDERGROUND AQUIFER

The thrust of the applicant's case on this issue is that as a result of the permeability of the soil on the site in question, should a leakage of fuel occur, contamination of the aquifer is a likely consequence. That the possibility of leakage is a justified and serious concern is common cause.

It was submitted on behalf of the applicant that the upholding of the appeal was not rationally connected to the information before the second and first respondents.

What is significant regarding this aspect are the extensive geotechnical geological sub-soil investigation, hydro-geological investigations undertaken by the consultants GEO 3 CC and the further preventative and mitigatory measures that are referred to in the affidavit of RICHARD GOWER BURGE which is annexed to the thirteenth respondent's answering affidavit.

The second respondent refers to the report by GEO 3 CC and the fact that their report included a site investigation. The geo-hydrological assessment was based on aerial photographs and assessment of ground water potential. This report was deferred by the second respondent to the DWAF for them to use their expertise to assess the reports by GEO 3 Cc. The second respondent avers that he also forwarded the complaints and objections lodged by the applicant's consultants, ECOTECHNIK, to Globecon and the DWAF.

The second respondent entertained certain concerns regarding the evaluation report by Ecotechnik. He submitted it to the DWAF. The latter agreed with the report of GEO 3 Cc. Despite this the second respondent convened a meeting for 12 December 2001. This meeting was advertised in a newspaper, handouts were distributed and notices sent to the DWAF and the applicant's consultants, Ecotechnik. The meeting was attended by representatives from Globecon and a Mr. Grobler on behalf of Ecotechnik.

Tom Hugo Le Roux admits that he was aware of this meeting. He failed to attend it. Regard being had to the duel interests of Le Roux, namely as the executive member of the applicant and more importantly as the person who would be most adversely affected by this proposed filling station, it would be expected that the applicant would have sent a strong delegation to the meeting to challenge the suitability and other concerns that had been raised in the objection filed by Ecotechnik. Le Roux offers the lame and unacceptable explanation that he and other concerned persons would not attend the meeting

because it was already the school holidays. Grobler is described as a junior official who was a token representative of the applicant who raised no comments at that meeting.

The second respondent avers that he was convinced that with the proper public participation process that had been followed, the professional opinions of experts and the mitigatory steps to be taken by the applicants to ensure no spillage into the aquifer were something that would also convince the DWAF.

The procedure followed by the second respondent in considering the impact of the proposed development was certainly not perfunctory, superficial or inadequate. It exhibits, in my considered view, an honest, genuine, purposeful and correct approach to first inviting unlimited public participation, the obtaining of the full facts and the taking of an informed decision. That the issues are complex, are sensitive and impact in the financial consequences for Le Roux and Dolezal cannot be over-emphasized. The decision by the second respondent was procedurally fair. It was not capricious. It was, instead, substantively fair, having evaluated all the issues raised by the parties.

A great deal of technical literature has been introduced by the parties in this application. Lacking any knowledge in the technical issues raised I find myself unable to utilize my legal knowledge in forming an informed decision on the issued covered by this literature. The only guiding knowledge is that the . transportation, handling and storage of fuel can be reduced to a basic level. It is a well-known fact that there is a fuel pipeline from Durban to Gauteng. That pipe crosses literally hundreds of rivers, streams and rivulets. It traverses the greater part of our hunter land and passes through various important catchment areas. It is a well-known fact that there are oil rigs in the oceans. Some of these are located on notorious treacherous water like the North Sea. The entire world is, however, either satisfied with the preventative measures that are in

place or considers them reasonably safe not to advocate the closure of such oil wells. All these activities rely on mitigatory measures. I can find no fault therefore in the second respondent's evaluation of the impact of the presence of the aquifer and his decision on this issue.

NEED. SUSTAINABIUTY AND DESIRABILITY

Whatever the impact of the proposed filling station would have been on the need, sustainability and the desirability to establish it, the over-riding considerations are that there is an existing filling station belonging to the thirteenth respondent a proverbial distance away from the proposed site. The intention of the thirteenth respondent is to relocate its existing filling station to the new site.

The applicant, through the various documents of studies that have been done would have the court believe that the trade in filling stations is so overtraded that it has to be regulated to the extent of having filling stations at specified distances from each other. The applicant relies on the provisions of Sections 2(3), 2(4)(g) and 2(4)(i) of the National Environmental Management Act 107 of 1998 (NEMA) and the guidelines of Gauteng Province.

Section 2(3) of NEMA provides: "... *Development must be socially, environmentally and economically sustainable".*

Section 2(4)(g) provides: *'Decisions must take into account the interests, needs and values of all interested and affected parties, and this includes recognizing all forms of knowledge, including traditional and ordinary knowledge".*

Section 2(4)(i) provides: *"The social, economic and environmental impacts of activities, including disadvantages and benefits, must be considered, assessed and evaluated, and decisions must be appropriate in light of such consideration and assessment'~*

The first and second respondents dispute that they failed to have regard for the aforesaid considerations. The first respondent avers (at paragraph 14.3 at page 629, of the record) that need and desirability are requirements that are considered before rezoning can be approved by the Local Council. He avers " ... *It has always been the practice in the Province of Mpumalanga which practice is in accordance with the legislation and more specifically the Town Planning and Townships Ordinance No.* 15 *of* 1986 *that the requirements 'need and desirability' must be proven, argued and considered by the Local Council whenever applicants apply for the rezoning of land in terms of Section* 56 *of the Ordinance. Schedule* 7 *used in the application for the change of land use makes provision for a report on the need and desirability. Whenever my Department therefore is confronted with an application in the form of a scoping report the applicants must indicate whether the property in question has been rezoned and no reason exist (sic) to doubt this, my department accept that the need and desirability has been considered as is prescribed by both the Town Planning and Townships Ordinance No.* 15 *of* 1986 *as well as the Development Facilitation Act of* 1995 *...* ".

This approach to the 'need and sustainability' test is supported by a township planner IRMA MULLER in her affidavit (Page 571 of the record). Form "B(3)(c)" annexed to her affidavit, at page 583 of the record reads:

"B. I enclose the following:

1. ...
2. ...
3. *Five* (5) *copies of a report which*

   (a) ...

   (b) ..."

   (c) contains a motivation for the need and desirability of the proposed amendment;"

Mr. Erasmus placed great reliance on the judgment of Claassen J in the unreported case of B.P. Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation Environment and Land Affairs, Case No.: 03/16337, WLD (I shall advert to this case later in this judgment) and the unreported case of SASOL Oil (Pty) Ltd, Bright Sun Developments CC and Metcalfe Mary N.D., Case no.: 17363/03, WLD. He submitted that the first and second respondents failed to consider the relevant provisions of ECA and NEMA and that the record of decision should consequently be set aside.

Mr. Mothle submitted that the Town Planning and Townships Ordinance 15 of 1986 as well as the Development Facilitation Act of 1995 to address the question of need and desirability in regard to the use of the land and consequently the attitude taken by the first and second respondents was not irregular.

Mr. Du Plessis supports the contentions of Mr. Mothle. There is merit in the submissions by respondents' counsel.

The provisions in section 2(4)(g) and 2(4)(i) of NEMA are applicable throughout the country. In so far as they relate to local authorities that already have provision that need, sustainability and desirability are requirements for the granting of authority to undertake a business or commercial activity, these provisions are redundant. There is a presumption that the legislature is aware of previous similar legislation. Further, government departments perform separate functions. A department may not usurp the functions of another department. It is common cause that the relevant Town Planning Council considered the need, sustainability and desirability of the proposed site when it considered the application for rezoning. Were the applicant's version accepted, the consequence thereof would be that there is a possibility of more than one view on the same information, data and particulars. The Town Planning Council could

reach its own conclusion. The first respondent could reach an opposing view. The licensing board when considering the application could reach a different conclusion. That clearly could never have been the intention of the legislature.

With regard to the Gauteng Guidelines, I am in agreement with the first respondent that such guidelines remain nothing more than what they are. The second respondent avers that such guidelines are referred to in Mpumalanga Province but they are not binding in their application.

There is no lacuna in the procedure to be applied on this issue. There is no need to introduce considerations that are not relevant.

In the BP Southern Africa (Pty) Ltd case *(supra)* Claassen J expressly points out that *"There must be intergovernmental co-ordination and harmonization of policies, legislation and actions relating to the environment". I* agree. Consequently, there is no merit on this ground.

ATTEMPTED DELEGATION OF RESPONSIBILITY

It was submitted on the applicant's behalf that by "attempting" to transfer the responsibility of ensuring that no environmental pollution takes place to DWAF, the first and second respondents attempted to further delegate their responsibility. The basis for this submission is that by delegating the decision on the issue of environmental pollution the applicant and other interested parties were denied their right of public participation and inputs to be made to the decision maker prior to the decision being reached. Mr. Erasmus referred me to President of the Republic of South Africa v South African Rugby and Football Union and Others 2000(1) SA 1 (CC) para 40; Mathipe v Vista University and Others 2000(1) SA 396 (T); Grove Primary School v Minister of Education and Others 1997(4) SA 982 (C) at 998 F - 1003 B.

.,,]71~ It is common cause that the second respondent referred the scoping report as well as the evaluation report to DWAF. The first and second respondents take the position that DWAF was not restricted in consulting any 'of its sub-departments. It was submitted, and correctly in my view, that there is no onus on second respondent to engage the sub-departments of DWAF: the participation of such departments is solely a domestic matter.

My understanding of the record is that the second respondent took a decision on the granting of the application to establish a filling station. He then referred the issue of mitigation of pollution to DWAF for it to deal with conditions to mitigate pollution. All that was expected of DWAF was to formulate, according to its expertise, these conditions.

Mr. Du Plessis referred me to a useful view regarding this issue in the well-known work, ADMINISTRATIEFREG: Marius Wiechers, 2de Uitgawe, at page 60 where the author states:

"Administratiewe desentralisasie van magte en funksies is by uitstek 'n wyse van werkverdeling om voorsiening te maak vir die daarstelling van gespesialiseerde liggame binne 'n administratiewe raamwerk. Streng gesproke is daar by die daarstelling van gedesentraliseerde liggame nie meer sprake van die delegasie van administratiewe magte en funksies nie; eerder is dit die verdeling van sulke magte en funksies onder selfstandige organe en liggame, onderworpe aan die beheer en kontrole van beheersliggame".

The statement by the learned author is in fact a pertinent response to the applicant's objection as it is framed.

Mr. Du Plessis referred further to Regulation 9 of the activities identified under Section 21(1) of ECA, GN R1183, dated September 1997. This regulation provides:

"9(1) After the relevant authority has made a decision contemplated in Regulation 6(3)(a) ... the relevant authority must consider the application and may decide to issue an authorization with or without conditions; or (b) refuse the application.

(2) *.....*

(3) *The relevant authority may, from time to time/ on new information review any condition determined by it as contemplated in sub-regulation 1(a), and if it deems it necessary, delete or amend such condition or at its discretion determine new condition~ in a manner that is lawful, reasonable or procedurally fair".*

The procedure adopted by the second respondent and endorsed by the first respondent was in accordance with the provisions of the sub-regulations set out above. In my view, that is remiss in their actions. The objection of the applicant is without substance.

SHORTCOMINGS IN THE PUBLIC PARTICIPATION PROCESS

Two submissions were made under this ground of review. The first was that the public participation process was flawed and the second that when the second respondent delegated ': .. *its decision making powers regarding the underground aquifer and that all requirements relating to water to be dealt with in terms of the necessary permits or approvals by DWAF; the Applicant ... [was) ... prevented from exercising ... [its) ... rights of the public participation process'~*

The first part of this ground has already been dealt with. The meeting scheduled for 12 December 2001 was advertised and published widely. The non-

availability of the applicant's environmental specialist on the date of the meeting could never vitiate the business transacted at that meeting and any resolution or decision taken in consequence thereof.

With regard to the second part, the applicant's submission is clearly wrong. The second respondent took a decision - he granted the necessary authority. His decision to enlist the expert knowledge of the DWAF in the framing of mitigating conditions was part of his decision which was known to the applicant. The applicant was, in my view, entitled to make submissions to DWAF regarding the nature, extent and ambit of such conditions. If aggrieved by the rejection of its views, the applicant would have been further entitled to engage DWAF. In my view the acts of the second and first respondents, respectively, were justified.

ALTERNATIVES THAT HAD TO BE CONSIDERED

The applicant avers that the scoping report contains very "... *cursory reference to protect alternatives* ... "and that the first and second respondents,

(i) failed to consider alternatives to the proposed development;

(ii) accepted the say-so of the thirteenth respondent regarding alternatives;

(iii) never considered the alternative not to act.

The applicant relies on Regulation 7(1)(b) and Section 6(2)(e)(iii) of PAJA.

The criticism of the first and second respondents is not justified. The scoping report identified a specific site which had been rezoned by the Local Council for a filling station. The predecessors of the thirteenth respondent owned this site and they intended to establish a filling station on it. It would have been absurd in my view for the first and second respondents to then consider other alternative sites. Such other sites, if they in fact existed, may

have belonged to other people or entities. To then identify such 'other sites' as being 'possible alternatives' begs the question: Was the thirteenth respondent expected to acquire rights to all 'feasible alternatives?

The action adopted by the first and second respondents was the only one that could have been adopted. A site was identified. They considered whether it was suitable or not in accordance with the local authority bye-laws, provincial legislation and relevant national legislation such as NEMA and ECA.

FAILURE TO TAKE THE REPORT OF MESSRS DE VILLIERS CRONJE INTO CONSIDERATION

The applicant's case on this point is as set out above, namely, that the first and second respondents failed to properly take into account what was set out by the applicant's expert engineer with specific reference to the aquifer. The first and second respondents dealt fairly extensively with this issue. See para 34, pp. 615-616; para 3.2, p. A39; para 3.4, p. A40; para 3.6 p. A42; para 3.7, p. A42, para 4, pp. A42-A43. They expressed the considered views on the interpretation of the data by the applicant's engineer. These remarks by the first and second respondents are a clear manifestation of a genuine consideration, assessment and evaluation of the views by Messrs De Villiers Cronje. Whether one agrees or disagrees with the conclusions of the first and second respondents they cannot, in my view, be found to have failed to consider the views of the applicant's engineers. In fact, the first and second respondents evaluated several reports by various experts, exercised their discretions in good faith and reached their decisions after having applied procedural and substantive fairness. That a court of law may have arrived at a different conclusion, as is the applicant's clear desire, is or no consequence. In my view the first and second respondents are clearly not in breach of the provisions of section 6(2)(e)(iii) of PAJA.

RESERVATION OF RIGHT TO CHANGE OR AMENT DECISION

The applicant avers in its affidavits that by issuing the record of decision and upholding same on appeal the first and second respondents became *functus officio* and reserving the right to unilaterally amend or change any conditions was *ultra vires.* The applicant further avers that the applicant may not unilaterally change or amend the conditions of record of decision. It was submitted that by granting the authority the second respondent becomes *functus officio* and may not revisit the matter.

The objection and submission are clearly wrong. In paragraph 12 of the second respondent's answering affidavit at page 1301 it is averred that the right to amend or change conditions in the record of decision or the authorization is normally reserved to cover instances where a new or unforeseen environmental programme could arise necessitating the change or amendment (Vide Section 22(4) of ECA).

It would indeed be most unsatisfactory were the powers of the second respondent curtailed as suggested by the applicant. One need merely postulate the following hypothetical set of circumstances to highlight the need for the second respondent to be inveigled with such powers, *viz* should evidence be produced that the mitigatory conditions imposed by DWAF be found to be clearly unsuitable and incapable of preventing the pollution or leakages that have been the focal point of debate, it would be the height of absurdity and indeed folly to say that all the second respondent could do is shrug his or her shoulders. The responsibility to conserve and protect the environment is not static - it can never be. The need for constant refining of mitigatory conditions is, to my mind, an ongoing one to keep up with new and improved technology, if not today but in the future.

THE PIECEMEAL APPROACH TO THE NEED, SUSTAINABILITY AND DESIRABILITY

This ground is based on the first and second respondents' allegation that there is no need for them to revisit the issue of need, sustainability and desirability because that had already been done by the Local Authority when the decision to rezone the property was taken.

It was conceded in argument by applicant's counsel, that the reference made in paragraph 18 at page 1035 of the record that the matter of Wildlife and Environment Society of SA (WESSA) v Department of Environmental and Cultural Affairs (Western Cape) regarding Paradys Kloof Golf Estate Development in Stellenbosch that the Court upheld the objection to a piecemeal approach to need, sustainability and desirability as the case had not been so decided. It was submitted, however, that the first and second respondents "may feel themselves pressured in merely accepting the rezoning and therefore the proving of need, sustainability and desirability. It was submitted further that such an approach breached the provisions of Section 6(2)(a)(ii) and 6(2)(e)(iv) of PAJA.

Mr. Mothle submitted that a filling station raises a number of subject matters which constitute the line functions and expertise located in other spheres of government and other government departments. ECA envisages this situation and makes provision for the Minister to act in consultation with these departments and other spheres of government (Vide Sections 21 and 22). He submitted that the respondents applied their minds to the issues before them.

There is merit in Mr. Mothle's submissions. It is not that the first and second respondents did not apply their minds to the issue. Regard being had to the undesirability of a proliferation of views on the same issue by one

government, the fact that the rezoning was done by a department that has the specific know-how, after considering various facts and having the benefit of public participation on the issue the first respondents may have exposed themselves to criticism for the view they took but they certainly cannot be validly accused of not having applied their minds to the issue at hand.

It must be further borne in mind that the thirteenth respondent is operating a filling station. There is no evidence that that business is not desirably or sustainable or that there is no need for it. On the contrary it has been in existence and will be expanded to supply a higher quantity through the doubled number of hoses. What is clear is that Le Roux is clearly unhappy at the fact that the thirteenth respondent will be better situated then he is with reference to the targeted route of out of town traffic.

It is my view that the first and second respondents did apply their minds to the issue. There is no evidence that they were unduly influenced. Again, there was procedural and substantive fairness on their part. There is no basis for the attack of a piecemeal approach.

THE APPROACH BY FIRST AND SECOND RESPONDENTS APPROACH TO THE APPLICATION

It was submitted that the first and second respondents erred in taking the view they took as appears in paragraph 14.4 at page 630 of the record, viz.,
"1 applied my mind to the fact as to whether need and desirability has been addressed When I am so informed by an applicant and no need exists to doubt their integrity or the integrity of my colleagues at the Local Council I apply my mind to this fact and accept that need and desirability has (sic) in fact been considered".

This response, it was submitted, was made notwithstanding the fact that the applicant gainsaid the fact. It was submitted that the second respondent ignored the information placed before him by the applicant.

This ground of review must be considered in the light of what the second respondent did after receipt of the applicant's objections. The second respondent referred the objections to the DWAF and Globecon (the thirteenth respondent's consultants) for their response to the objection. Responses were received from these entities. The second respondent perused them and decided against the applicant. My understanding of this is that the second respondent weighed the two conflicting versions and made a conscious decision. The test is not whether it was right or wrong. The question is whether it meets the constitutional requirements.

The answer to the above question must be answered in the affirmative, The second respondent did apply his mind, not once, but at least twice. That was upon receipt of the objections and the responses of Globecon and DWAF to the applicant's objection.

In my view, there is no merit in the applicant's argument on this point.

THE NEED FOR A FULL ENVIRONMENTAL ASSESSMENT

It was submitted that given the sensitive nature of the environmental issues because of the presence of the aquifer the first and second respondents *"erred in issuing the record of decision on the scoping report only" but* that they should have called for a full environmental impact assessment with specific reference to the underground aquifer.

The applicant's geologists raised certain concerns that were discussed in the report of GEO 3 CC. The second respondent avers that the scoping report submitted by the thirteenth respondent's predecessors contains all aspects relating to the environmental impact assessment. At para 21.1 of the respondent's supplementary affidavit at page 1310 of the record the second respondent avers that he did not deem it fit to order a further environmental assessment report as this would have amounted to a duplication.

The second respondent gives reasons for accepting and preferring the geological report of GEO 3 CC and for rejecting those of the applicant's geologists. He points out that Messrs De Villiers Cronje did not carry out any tests or conduct inspections. Their report is a mere commentary on issues raised in the GEO 3 CC report. This is indeed true. The second respondent has a discretion in matters of this nature. He exercised that discretion. There is no evidence that the report by GEO 3 CC is wrong. The second respondent's exercise of discretion does not amount to PAJA. There is no merit in this ground of review.

At the commencement of this judgment I noted that Le Roux failed to disclose that he has an interest in three as opposed to one filling station in Whiteriver. His explanation for not disclosing, more so given the fact that he and the thirteenth respondent are competitors servicing the same artery of traffic. It is clear that the new filling station will challenge and heighten business competitiveness between the applicant and the thirteenth respondent. That Le Roux has a personal interest is beyond doubt. In this context, it is necessary to bear in mind that it is not the applicant *per se* who is speaking in the applicant's papers but Le Roux.

It has further been already demonstrated by Le Roux that the objections raised in the papers and the ostensible concern for the environment can be

compromised as occurred when he withdrew a similar objection in a previous application.

I am mindful of the fact that the reports filed by the different experts in the papers before me are highly technical and I cannot claim proficiency therein. The second respondent exercised no discretion and took a decision. All this Court is called upon to do is to review the procedure adopted by the second respondent and considered whether he acted fairly in doing so (Minister of Environmental Affairs and Tourism v Bato Star Fishing (Pty) Ltd 2003(6) SA 407 (SCA). I am satisfied that the second respondent applied his mind to the issues and exercised a discretion. I can find no arbitrariness or capriciousness on his part. This Court may not substitute its views for those of the second respondent. I am further satisfied that the first respondent likewise applied his mind to the issues. My considered view is that he did so independently of the record of decision by the second respondent. I am satisfied that the review should fail.

There are two further issues that were raised in argument. The first relates to a supplementary affidavit filed by the applicant. The respondents did not object to this but replied to the issues raised therein. All the issues raised by the applicant were canvassed by the respondent and the opportunity to place more facts before this Court was not wasted by the thirteenth respondent in particular. I exercised my discretion in allowing the additional affidavits so that the matter could be dealt with on the basis of everything the parties wished to raise on all the issues.

With regard to the question of reserved costs I can see no reason why the costs order should not follow the result. The fact that the one day was not adequate to dispose of the matter is not the determining factor.

The application is accordingly dismissed with costs.

G. WEBSTER

JUDGE IN THE HIGH COURT

Counsel for the Applicant	Adv. M.C. Erasmus
Instructing Attorneys	Van Zyl, Le Roux & Hurter Inc. Pretoria
Counsel for the 1st - 6th Respondents	Adv. Mothle
Instructing Attorneys	The State Attorney Pretoria
Counsel for the 9th - 13th Respondents	Adv. Du Plessis
Instructing Attorneys	De Swardt, Vogel Attorneys Pretoria