




**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

Case numbers: 81043/2017

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
<u>13/01/2021</u> DATE	 SIGNATURE

In the matter between:

**SIGHTFULL 115 CC t/a DAXINA MOTORS**  
(Registration number 2000/031154/23)

Applicant

and

**THE CONTROLLER OF PETROLEUM PRODUCTS**  
**THE MINISTER OF ENERGY**  
**BIXOMART CC**

1<sup>st</sup> Respondent

2<sup>nd</sup> Respondent

3<sup>rd</sup> Respondent

## JUDGMENT

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MNGQIBISA-THUSI, J

[1] The applicant, Sightfull 115 CC trading as Daxina Motors (“the applicant”) seeks the following relief:

- 1.1 an order reviewing and setting aside the decision of the first respondent, the Controller of Petroleum Products, made on 15 March 2017, granting a site and retail licence to the third respondent, Bixomart CC, in respect of a site situated at corner of K4.3 and Wimbledon Road, Lenasia South; alternatively
- 1.2 an order reviewing and setting aside the decision of the second respondent, the Minister of Energy, made on 3 October 2017 to dismiss the applicant’s appeal against the first respondent’s decision of 15 March 2017;
- 1.3 an order that the decision to grant the third respondent a site and retail licence be referred back to the first respondent for reconsideration; and
- 1.4 that the third respondent pay the costs of the application.

### *Applicable law*

[2] In terms of s 2B of the Petroleum Products Act<sup>1</sup> (“the Act”) the first respondent is empowered to issue licences (wholesale, site and retail) and in doing so s 2B(2) provides that:

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<sup>1</sup> Act 120 of 1977.

“In considering the issuing of any licences in terms of this Act, the Controller of Petroleum Products shall give effect to the provisions of section 2C<sup>2</sup> and the following objectives—

- (a) promoting an efficient manufacturing, wholesaling and retailing petroleum industry;
- (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) ensuring countrywide availability of petroleum products at competitive prices; and
- (e) promoting access to affordable petroleum products by low-income consumers for household use”.

[3] The process for the evaluation of applications for a site and retail licence are set out in regulations 6 and 18 of the Regulations to the Act and provide as follows:

**“6. Evaluation of site licence application**

- (1) In evaluating an application for any site licence, the Controller must, subject to subregulation (2), verify that—
  - (a) the information and the documents submitted with the application form are true and correct; and
  - (b) the notice contemplated in regulation 4(1) was published.
- (2) In the case of an application for a site licence made by a person in respect of whom section 2D of the Act is not applicable, the Controller must be satisfied that—

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<sup>2</sup> Section 2C of the Act reads as follows: “(1) 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. (2) The Controller of Petroleum Products may require any category of licence holder to furnish information, as prescribed, in respect of the implementation of the Charter.

- (a) there is a need for a site; and
- (b) the site will promote the licensing objectives stipulated in sections 2B(2) of the Act”.

and

**“18. Evaluation of a retail licence application**

- (1) In evaluating an application for any retail licence, the Controller must, subject to subregulation (2), verify that—
  - (a) the information and the documents submitted with the application form are true and correct; and
  - (b) the notice contemplated in regulation 16(1) was published.
- (2) In the case of an application for a retail licence made by a person in respect of whom section 2D of the Act is not applicable, the Controller must be satisfied that—
  - (a) the retailing business is economically viable; and
  - (b) the retailing business will promote licensing objectives stipulated in section 2B(2) of the Act.
- (3) In determining the economic viability contemplated in subregulation (2)(a), the Controller must be satisfied that the net present value has been correctly calculated and is positive”.

[4] Further, regulation 17 to the Act reads as follows:

**“Evaluation of retail licence application**

- 6(1) In evaluating an application for any retail licence, the Controller must, subject to subregulation (2), verify that –
  - (a) The information and the documents submitted with the application form are true and correct; and

- (b) The notice contemplated in regulation 16(1) was published.
- (2) In the case of an application for a retail licence made by a person in respect of whom section 2D of the Act is not applicable, the Controller must be satisfied that –
  - (a) the retailing business is economically viable; and
  - (b) the retailing business will promote the licencing objectives stipulated in section 2B(2) of the Act.

*Factual background*

[5] The following facts are common cause.

[6] Within the area where the proposed site is situated there are three existing filling stations which were used as benchmarks and as competitors of the proposed site because of their proximity to the site, traffic they would share with the site and the refuelling facilities they had. These are:

- 6.1 the applicant's filling station which is situated about 750m on the eastern side of the proposed site and is BP branded, and is situated at the corner of Starling and Azalea Streets, Lenasia South.
- 6.2 a Caltex branded filling station trading as K43. The filling station is 4.5 km north of the proposed site and services traffic along the M10; and
- 6.3 a Total Volta filling station which is 5.5 km from the proposed site along the M10.

- [7] On 12 November 2012, the third respondent applied, in terms of s 3(1)(a) of the Act to the first respondent for a site and a retail licence<sup>3</sup> in respect of a proposed filling station to be established on corner R558 and Wimbledon Road, Lenasia South.
- [8] On 12 December 2012, the applicant published a notice, as contemplated in regulation 4, in the Citizen (12 December 2012) and Beeld (19 December 2012) newspapers.
- [9] On 14 February 2014 the applicant filed an objection against the granting of the licence to the third respondent. As appears from the applicant's founding affidavit it only became aware of the third respondent's application in 2014. The grounds upon which the applicant objected to the third respondent's application were that:
- “23.1 The proposed site is located approximately 750 metres from the Applicant's site;
  - 23.2 The existing filling stations in the area were already experiencing relatively low volumes of sales and some of them were struggling to remain viable;
  - 23.3 The granting of the licence would not facilitate an environment conducive to efficient and commercially justifiable investment;
  - 23.4 The granting of a licence would not create employment opportunities but would cost more jobs than it was likely to create”.
- [10] On 5 July, 2016 the acting regional director of the Department of Energy (Petroleum Licensing) prepared a site visit report in relation to the third

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<sup>3</sup> In terms of regulation 15(4) of the Regulations to the Act, an applicant for a retail licence must at the same time apply for a site licence.

respondent's proposed site after a site visit was conducted on 5 July 2016. In the report reference is made, *inter alia*, to the following:

- 10.1 that the applicant's site was 750 m east of the proposed site and was an indirect competitor of the third respondent. It has half the refuelling facilities of the third respondent and fewer employees than the third respondent's potential employees. Further that it had a decrease of about 9% and 10% in sales during the first and second halves of the past three years;
- 10.2 that Caltex K43 service station was 4.5 km north of the proposed site from the proposed site. This site also has half refuelling facilities than the proposed site, has 14 permanent employees and does not sell diesel 500ppm. Further that this site services traffic mainly south bound on the M10, sharing to some extent the south bound traffic with the third respondent. Furthermore, that the site was visible to traffic in both directions on the M10. During the first half of the past three years it had an increase of 32% and a decrease of 13% in sales during the second half of the period; and
- 10.3 Total Volta service station was 5.5 km from the proposed site. It has half the employees and 36 refuelling facilities. Total Volta's sales for the period were almost stagnant during the first part of the past three years and grew exponentially in the second half. Total Volta's average sales were 616, 000 litres per month. The growth is approximately 3% and 159% respectively during the first and second halves of the past three

years. Further that the sales volumes at this site were approximately 89% above those of an efficient and profitable benchmark filling station. The retail manager of the site associated the growth with the school warehouses and light industries in the immediate surroundings, which bring more business to the site”.

[11] In the conclusion and recommendation for a site and retail licence to be approved by the Controller, the site visit report states the following:

**“Conclusion and Recommendation**

In considering the issuing of any licence in terms of Section 2B(2) of the Petroleum Products Act, 1977 (Act No 129 of 1977) as amended, the Controller of Petroleum Products shall give effect to the provisions of section 2C, and inter alia, the following objectives:

(a) **Promoting an efficient manufacturing, wholesaling and retailing petroleum industry.**

The proposed business will bring a service to an area where there is a high demand and an existing underserved market. Therefore the proposed business will promote efficient retailing of petroleum products.

(b) **Facilitating an environment conducive to efficient and commercially justifiable investment.**

The proposed business will be commercially justifiable as it will be supported by high traffic volumes.

(c) **The creation of employment opportunities and the development of small businesses in the petroleum sector.**

This objective will be met by the applicant’s business because it has the potential to create more than two dozens of new and permanent jobs.

(d) **Ensuring countrywide availability of petroleum products at competitive prices.**



The proposed business has one direct competitor in an underserved market that has a potential for growth, therefore the applicant's business will meet the requirements of this objective.

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

The applicant does not intend to provide petroleum products that are consumed by low income households.

In terms of Regulation 6(2) of the regulations regarding the evaluation of site licence applications, the Controller must be satisfied that there is a need for a site. Secondly, in terms of Regulation 18(2) of regulations regarding the evaluation of retail licenses, the Controller must be satisfied that the retailing business is economically viable:

Based on the assessment of the current situation and future plans, coupled with legislative requirements, the following conclusion has been reached:

- There is a need for an additional filling station at the applicant's site in Lenasia South.
- The applicant's business will be economically viable with minimal negative impact on the existing businesses.
- The applicant's business will promote most the licensing objectives stipulated in s 2B(2) of the Petroleum Products Act.
- The proposed filling station is not a threat to sustainability existing filling stations".

[12] On 15 March 2017 the third respondent's application for both the site and retail licence was granted.

[13] On 12 May 2017, the applicant lodged an appeal<sup>4</sup> with the second respondent against the first respondent's decision to grant the third respondent the site and

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<sup>4</sup> Section 12A(1) of the Act provides that: (1) Any person directly affected by a decision of the Controller of Petroleum Products may, notwithstanding any other rights that such a person may have, appeal to the Minister against such decision.

retail licence. The applicant subsequently filed supplementary grounds of appeal, to which was attached a filling station evaluation report prepared by WSP Group Africa Consultants (Pty) Ltd (“WSP”), an engineers’ consulting firm. In the report WSP dealt with the average fuel pumped at Total Volta and Caltex K43 and indicated, contrary to the assertion in the site visit report that Total Volta’s average sales was 616, 000, that during the period January 2016 to October 2017 the actual average sales were 350,000. Further the WSP report opined that if an additional site and retail licence for the area, the existing filling stations will suffer undue hardship and that the third respondent would not be sustainable.

[14] On 3 October 2017 the second respondent dismissed the applicant’s appeal and upheld the first respondent’s decision to grant a site and retail licence to the third respondent.

[15] In dismissing the applicant’s appeal and confirming the first respondent’s decision to grant the site and retail licence to the third respondent, the reasons provided by the second respondent are as follows:

“The reasons for my decision are as follows:

- (a) Upon receipt of a site and retail licence applications, the Controller is duty bound to assess the applications in terms of the Act and its Regulations.
- (b) From the Controller’s working sheets it appears that the Controller assessed and weighed up the objectives provided for in section 2B(2) of the Act, amongst others, to ensure: that there was a need for a new site; that the site will promote an efficient retailing petroleum industry with an optimum number of efficient sites, the facilitation of an environment conducive to efficient and

commercially justifiable investment, the creation of employment opportunities, and that the retailing business is economically viable. After having done so, the Controller came to the conclusion that there was a need for proposed filling station. I am of the same view.

- (c) After having scrutinised all the documentation that serves before that Controller, the appeal with its annexures and all the representations submitted on appeal, there is nothing to suggest that the Controller acted mala fides or ultra vires,
- (d) Whilst I have considered that the WSP report submitted with the appeal advises that competitor sites would to some degree be affected by the newly proposed site, I am cognisant of the Full Bench High Court Judgment of *Nine Nine Ninety Nine Projects (Pty) Ltd v Minister of Energy and Others*. The Judgment asserts that petroleum licence applications cannot simply be refused on the basis that competitor sites will suffer hardship. I am of the view that the appeal is predicated on the hardship your client and other competitor sites would suffer and therefore the argument cannot be sustained.

Having regard to the above, I am of the opinion that the Controller correctly applied his mind when adjudicating upon the site and retail licence applications in terms of the Act and acted bona fides in the decision making process. Accordingly, the decision of the Controller to grant the site and retail licence application was justified”.

### *Grounds of review*

- [16] The applicant seeks the review and setting aside of the decision of the first and second respondents to grant the third respondent a site and retail licence in terms of the Promotion of Administrative Justice Act<sup>5</sup> (“PAJA”) on the grounds that:

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<sup>5</sup> Act 3 of 2000.

16.1 the decision of the first and second respondent was materially influenced by an error of law<sup>6</sup>;

16.2 the first and second respondents did not take into account relevant considerations<sup>7</sup>; and alternatively

16.3 the decision of the first and second respondents was not rationally connected to the reasons given<sup>8</sup> or the information placed before it<sup>9</sup>;

[17] On behalf of the applicant the following submissions were made. The first and second respondent performed their functions in an unreasonable manner that no reasonable person could have so exercised. It was submitted that it was not reasonable for the respondents not to have verified the figures relating to the volume of sales of the applicant and the other filling stations in the area, presented to them by the inspector, particularly as the respondents have access to the average sales figures in the area. Further that since the second respondent, on considering the applicant's appeal, had in his possession the WSP report, there is no reason why he did not verify the information presented by the inspector, in view of the inconsistent figures in the site visit report and the WSP report on the volume of sales of Total Volta. It was argued on behalf of the applicant that by ignoring the WSP report and only relying on the site visit report, the second respondent ignored relevant considerations and taken into

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<sup>6</sup> Section 6(2)(d).

<sup>7</sup> Section 6(2)(e)(iii) of the PAJA provides that: "A court or tribunal has the power to judicially review an administrative action if the action was taken because the irrelevant considerations were taken into account all relevant considerations were not considered".

<sup>8</sup> Section 6(2)(f)(ii)(dd) of the PAJA provides that: "the action itself is not rationally connected to the reasons given for it by the administrator".

<sup>9</sup> Section 6(2)(f)(ii)(dd) of the PAJA provides that: "the action itself is not rationally connected to the information before the administrator".

account incorrect information as contained in the site visit report. It was further argued that the first and second respondents had not taken into account the impact the proposed site would have of the employment situation in the area. It was further submitted that the respondents had failed to verify if the third respondent's Net Present Value ("NPV") was correctly determined.

[18] The applicant denies that the sales figures of the filling stations in the area were obtained from the managers of the respective filling stations. It is the applicant's contention that even if the figures were obtained from the managers, it was incumbent on the respondents to have interviewed the applicant as owner and the owners of the other filling stations in order to verify the information received. It was further submitted that the first and second respondents misconstrued the information placed before them, in particular, as relates to the economic viability of the proposed site, having regard to the volumes of the product sold by its competitors, which would have had an impact on the determination of the third respondent's application.

[19] On behalf of the respondents the following submissions were made. Since the information on the sales volumes were received from the managers of the filling stations in the area, there was no reason for the first and second respondents to doubt them. As it appears that the WSP and the applicant's complaint is about the impact the proposed site is going to have on the applicant's customers, current and potential, it was submitted that such prejudice was not a decisive factor in the determination whether or not to issue the licence to the third respondent. Counsel submitted that the following factors were taken into account when the application was approved:

20.1 that the applicant's site is located within the Lenasia township and not visible and readily accessible to motorists travelling on the R558 whereas the proposed site was easily accessible to motorists on the R558;

20.2 that in view of the economic growth in the area, there was a need for another filling station.

[20] It was further submitted on behalf of the third respondent that there was nothing unreasonable in the decision of the first and second respondents to approve the application as the third respondent had satisfied all the requirements in s 2B and 2C of the Act.

[21] It is common cause that in the area in which the proposed site is located there are three existing filling stations, namely, Daxina Motors (the applicant's site) which is 750 metres away from and on the eastern side of the proposed site; Caltex K43, which is 4.5 km, north of the proposed site; and Total Volta, which is 5.5 km from the proposed site.

[22] From the papers filed and submissions made, the main purpose for the opposition to the granting of a licence to the third respondent appears to be that there is no need for another filling station as the area is already over-served by the existing filling stations. Further, it appears that the applicant seems to have a concern about the possibility of the proposed site luring some of its customers which could lead to a decline in its business.

[23] In *MEC for Environment Affairs and Development Planning v Clairison's CC*<sup>10</sup>

the court stated that:

“[18] .... When the law entrusts a functionary with a discretion it means just that: the law gives recognition to the evaluation made by the functionary to whom the discretion is entrusted, and it is not open to a court to second-guess his evaluation. The role of the court is no more than to ensure that the decision-maker has performed the function with which he was entrusted.”

[24] In *Bato Star Fishing (Pty) Ltd v Minister of Environment Affairs and Others*<sup>11</sup>,

the Constitutional Court said that:

“[48] In treating the decisions of administrative agencies with the appropriate respect, a Court is recognising the proper role of the Executive within the Constitution. In doing so a Court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A Court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a Court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the Courts.”

[25] It is not in dispute that in terms of s 2B of the Act the first and second respondent are vested with the power to make a determination whether a site and retail licence should be granted, subject to the provisions sections 2B(2) and 2C of

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<sup>10</sup> [2013] 3 All SA 491 (SCA).

<sup>11</sup> 2004 (4) SA 490 (CC).

the Act read with regulations 6 and 18. With the information at their disposal, the first and second respondents made a determination that there was a need for a site and exercised their discretion in favour of granting the licence which in their view would promote and facilitate an environment conducive to an efficient and commercially justifiable investment that would result in the creation of employment opportunities and promote competition. Further the respondents came to the conclusion that the third respondent would be viable. This is supported by the report of a feasibility study conducted by Corli Havenga Transport Engineers which was submitted with the third respondent's application and in which it is concluded that that the third respondent would be serving mainly people travelling on the R558 which is a major arterial road carrying traffic from Orange Farm, Sebokeng and Ennerdale to Eldorado Park, Randfontein/Krugersdorp, Johannesburg and Soweto.

[26] Further the court in the *Clairison's* matter (*supra*) held that:

"[22] ... It bears repeating that the review is not concerned with the correctness of the decision made by the functionary, but with whether he performed the function with which he was entrusted. When the law entrusts a functionary with a discretion it means just that: the law gives recognition to the evaluation made by the functionary to whom the discretion is entrusted, and it is not open to a court to second-guess his evaluation. The role of the court is no more than to ensure that the decision-maker has performed the function with which he was entrusted".

[27] I am of the view that the first and second respondents' decision cannot be said to have been unreasonable under the circumstances, taking into account the



information provided and in their evaluation, having considered that the proposed site fulfilled the requirements set out in s 2B and C and regulations<sup>12</sup>.

[28] As correctly pointed out by counsel for the third respondent, the fact that the granting of the licence could create some hardship to any of the existing filling stations is not a decisive factor. In *Nine Ninety Nine Projects (Pty) Ltd and Another v The Minister: Department of Energy and 2 Others*<sup>13</sup> held that:

“[68] ... Close proximity and hardship could be one of many factors”.

[29] Having read the papers filed and considered the submissions made, I am of the view that the applicant has not shown sufficient cause why the decision of the first and second respondents to grant the site and retail licence to the third respondent and the second respondent's decision to dismiss its application should be reviewed and set aside.

[30] In the result the following order is made:

‘The application is dismissed with costs, including costs of senior counsel.



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**NP MNGQIBISA-THUSI**

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<sup>12</sup> In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) the court set out the test to be applied to reviews as follows:” “[110] To summarise, *Carephone* held that s 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that s 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in *Bato Star*. Is the decision reached by the commissioner one that a reasonable decision-maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair’.”

<sup>13</sup> Unreported judgment, Case number: A543/12, Gauteng Division (30 April 2014).

## **Judge of the High Court**

Date of hearing: 18 February 2019

Date of judgement: 14 December 2020

### Appearances

For applicant: Adv N P G Redman SC (instructed by S Suleman Attorneys)

For third respondent: Adv W F Wannenburg (instructed by Tshepo Mofokeng Attorneys)