REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(MPUMALANGA DIVISION, MBOMBELA)

(1) REPORTABLE:NO	
(2) OF INTEREST TO OTHER JUDGES:NO	
(3) REVISED: YES	
	20/01/2021
…….	…….
SIGNATURE	DATE

CASE NO: 3525/2020

In the matter between:

PINE GLOW INVESTMENTS (PTY) LTD	Applicant
and	
THE MINISTER OF ENERGY	First Respondent
THE CONTROLLER OF PETROLEUM PRODUCTS	Second Respondent
ERF 6 HIGHVELD TECHNOPARK INVESTMENTS (PTY) LTD	Third Respondent
NAD PROPERTY INCOME FUND (PTY) LTD	Fourth Respondent
ROYALE ENERGY (PTY) LTD	Fifth Respondent
ROYALE ENERGY GROUP (PTY) LTD	Sixth Respondent
ROYALE ENERGY MANAGEMENT SERVICE (PTY) LTD	Seventh Respondent
ROYALE ENERGY ELIFANTSFONTEIN (PTY) LTD	Eighth Respondent
VIVA OIL (PTY) LTD	Ninth Respondent
TOKIVECT (PTY) LTD	Tenth Respondent

J U D G M E N T

MASHILE J:

[1] This was an urgent application comprising two parts, Part A and B. The former was intended to be an interim interdict pending resolution of Part B, a review application. The application was opposed by the Third and Fourth Respondents while all the other Respondents, including the First and Second Respondents, did not. In essence, the parties before this Court are the Applicant, on the one side, the Third and Fourth Respondents on the other. As such, reference to Respondents will mean the Third and Fourth Respondents.

[2] Formulation of the prayers in Part A of the notice of motion was incorrect in consequence of which the Applicant sought their amendment. The amendment became contested through a Notice in terms of Rules 30 and 30A of the Uniform Rules of Court. Part A ultimately became settled on the basis that the Third and Fourth Respondents would not proceed with the sale of petroleum products until 2 February 2021.

[3] Once that settlement was finalised, the question became one of costs - who was to bear the costs of the Rule 30 and 30A, and Part A? The Third and Fourth Respondents adopted the attitude that they were largely successful and as such, costs ought to follow results, as is normally the position. Conversely, the Applicant held the view that each party should pay its own costs as neither the one or the other could claim an outright victory.

[4] The Applicant initially approached this Court on a notice of motion, prayers of which had been formulated as one seeking final relief albeit that it was manifest that it meant to pursue interim relief pending the outcome of Part B. In their answering affidavit, the Third and Fourth Respondents alerted the Applicant to the inadvertent error in the formulation of its prayers. In response and only after receipt of the delivery of the record referred to in Rule 53(3), the Applicant sought to amend both Part A and B using one vehicle, Rule 53(4). The Rule provides that:

"The applicant may within ten days after the registrar has made the record available to him, by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of his notice of motion and supplement the supporting affidavit."

[5] The Respondents objected to the procedure adopted by the Applicant in amending Part A of the notice of motion. The essence of the argument was that a party could not utilize Rule 53(4) to amend Part A, which had nothing to do with the review application in Part B. The procedure on which the Applicant should have embarked is described in Rule 28(1), which provides:

"Any party desiring to amend a pleading or document other than a sworn statement, filed in connection with any proceedings, shall notify all other parties of his intention to amend and shall furnish particulars of the amendment.".

The Applicant has failed to invoke Rule 28 and it could not do so then, concluded the Respondents.

[6] The Applicant, on the other hand, asserted that Part A and B were so inextricably connected that one could use Rule 53 to amend both. Furthermore, added the Applicant, Rule 6(12((a) states that in urgent applications the court or a judge may dispense with the forms and service provided for in these Rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these Rules) as to it seems meet. The provisions of that Rule are sufficiently wide to allow this Court to exercise its discretion in favour of the proposed amendment.

[7] I refused the application to amend Part A of the notice of motion and undertook to furnish reasons later and these are my reasons. To the extent that Part A is couched in the terms of a final interdict, there is no nexus between it and Part B. Even assuming that it was an interim application, correctly articulated, it still could not be said to have been intricately connected to Part B. This is for the simple reason that the two can be disposed of independently of each other and at different stages. On that basis, the two cannot be said to be entwined. As a result, I fail to understand how Part A can be lumped together with

the Part B amendment governed by Rule 53(4). In any event, it is clear that Rule 28 is of general application but specifically to pleadings whereas the Rule 53(4) is designed for reviews.

[8] The Applicant would have this Court believe that it is entitled to rely on Rule 6(12(6)(a) to use its discretion to practically bring the amendment under a single Umbrella of Rule 53(4). As already remarked above, the procedures are different for a reason and meddling with the two may yield undesired results. That said, I can perceive no barrier in applying the Rule within the precinct of each and that is the purpose for which it has been intended anyway.

[9] Lastly, the Applicant also made the point that the Respondents have not demonstrated any prejudice if the amendment were to be permitted. I do not believe that the Respondents have to show prejudice in these circumstances as it concerns procedure that can be cured by amendment under Rule 28 read with Rule 6(12) or Rule 28 read with Rule 6(12)(a). Perhaps I should add that prejudice exists as every litigant's expectation is that matters will be dealt with under prescribed set of rules. Intermittent adherence to those rules especially in circumstances where they are widely accepted and practiced will necessarily result in prejudice.

[10] Insofar as costs of this application are concerned, it is inexorable that they should follow the result. That is to say that the Respondents were entirely successful and it is only fair and just that they be awarded costs of the application.

[11] Turning then to the costs of Part A. The Applicant came to court hoping for relief in the form of an urgent interim interdict pending finalisation of the review application. To the extent that the settlement has a cut-off date of the 2nd of February 2021, the Applicant cannot claim total victory. The Applicant has also not succeeded in interdicting the Respondents from proceeding with the construction of the filling station. The Respondents too did not walk away satisfied that they were triumphant because their initial stance was that the application be struck off the urgent roll for lack of urgency alternatively and in the event that the Court found that urgency was not present, that the application be dismissed with costs.

[12] The position is that both parties had to abandon their original stances and converge on the date of the 2nd of February 2021. With that understanding in mind, I tend to agree with the Applicant that neither party was completely successful to a degree of deserving costs against the other. My agreement with the Applicant, however, is limited to the costs relating to Part A and not the notice in terms of 30 and 30A. A fair and just order therefore would be one that recognizes this fact. Against that background, I make the following order:

1. The Third and Fourth Respondents undertake not to commence with the streaming of petroleum products from Erf 930 Greenvalley Ext 1 Township, Acornhoek, Mpumalanga, up to and until the 2nd of February 2021;

2. The Applicant is liable to the Respondents for the costs of the Rule 30 and 30A notice;

3. No cost order is made as regards the Part A application.

B A MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 22 January 2021 at 10:00.

APPEARANCES:

Counsel for the Applicant:	**Adv G Erasmus**
Instructed by:	**WDT Attorneys Inc**
Counsel for Respondents:	**Adv AVenter**
Instructed by:	**A Kock and Associates Inc**
Date of Hearing:	**21 January 2021**

Date of Judgment: **22 January 2021**