REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(MPUMALANGA DIVISION, MBOMBELA)

(1)	REPORTABLE:NO
(2)	OF INTEREST TO OTHER JUDGES:YES
(3)	REVISED: YES
.....	25/07/2022 .....
SIGNATURE	DATE

CASE NO: 2692/2022

In the matter between:

NAD PROPERTY INCOME FUND (PTY) LTD	First Applicant
ERF 6 HIGHVELD TECHNOPARK INVESTMENTS (PTY) LTD	Second Applicant
and	
NELSON WISANE TIVANE	First Respondent
ELEGANT FUEL (PTY) LTD	Second Respondent
BUSHBUCKRIDGE LOCAL MUNICIPALITY	Third Respondent
MPUMALANGA PROVINCIAL GOVERNMENT DEPARTMENT OF AGRICULTURE, RURAL	

DEVELOPMENT, LAND AND ENVIRONMENTAL AFFAIRS	Fourth Respondent
MINISTER OF ENERGY FOR THE REPUBLIC OF SOUTH AFRICA	Fifth Respondent
CONTROLLER OF PETROLEUM PRODUCTS IN THE NATIONAL DEPARTMENT OF ENERGY	Sixth Respondent

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J U D G M E N T

MASHILE J:

INTRODUCTION

[1] This application has been brought in two parts, A and B. The Applicants seek relief that pending finalisation of Part B of the notice of motion, the First and Second Respondents ("the Respondents"), on urgent basis, be prohibited from proceeding with construction of a petrol filling station and ancillary activities on property described as Stand No: 295, Tsakane, Acornhoek, Bushbuckridge Local Municipality ("the *subject property")* and conducting business of a petrol filling station and all subsidiary endeavors on the subject property. Additionally, that costs of Part A be borne by the Respondents, jointly and severally, the one paying the other to be absolved.

[2] In terms of the notice of motion, the Respondents were directed to deliver their opposing affidavit at 12 noon on or before 6 July 2022. Although it is trite that the time lines laid down in the notice of motion are not to be ignored without any justifiable reasons, the Respondents failed to adhere to them. They joined the virtual proceedings 20 minutes late. Other than advising them that the court took a grim view of their acts, no negative consequence flowed therefrom and the matter continued notwithstanding the delay.

[3] I feel constrained to mention that the Applicants' notice of motion was supported by a 45-paged founding affidavit. The case against the Respondents has manifest grave

business repercussions against them yet and uncharacteristically in such circumstances, the Respondents responded with a six-page document docketed, answering affidavit. Woefully, the answering affidavit is conspicuously insufficient to address all the allegations made in the founding affidavit. In short and in view of the many averments which went unchallenged, it is fitting to say that in large part, the matter is unopposed.

FACTUAL MATRIX

[4] The First Applicant owns Erf 930 Greenvalley Ext 1 Township, Acornhoek, Bushbuckridge, Mpumalanga for which it holds a site license issued in terms of the Petroleum Products Act ("PPA"). The Second Applicant conducts a Puma fuel filling station business on the First Applicant's property in terms of a retail licence issued in terms of the PPA. The First Respondent is the beneficial owner and ostensibly the holder of a permission to occupy ("a PTO") stand 295 Tsakane, Acornhoek, Bushbuckridge, Mpumalanga. The Applicants allege that the Respondents are in the process of unlawfully constructing a petrol filling station on the subject property.

[5] The Third to Sixth Respondents are organs of state with direct and substantial interest in the application especially Part B whose objective is to review and set aside the administrative actions taken by such organs of state in terms of:

5.1 The National Environmental Management Act, 107 of 1998 ("NEMA");

5.2 The PPA;

5.3 The National Building Regulations and Building Standards Act, 103 of 1977 ("the Building Standards Act"); and

5.4 The Spatial Planning and Land Use Management Act, 16 of 2013 ("SPLUMA").

[6] The Applicants allege that they became aware that the Respondents were in the process of constructing a fuel filling station on the subject property during the last week of May 2022. The Applicants further mention that while they may have been aware of the construction prior to the period referred to aforesaid, they were oblivious of the nature and purpose of the structure. It was not until they noticed the construction of a canopy and ground works to establish the forecourt that it dawned to them that a competitive fuel filling station was in the process of being built on the subject property, which is situated approximately 2.4 Kilometres South of the Applicants' property.

[7] It is alleged further that there were no notices displayed at the subject property to notify any member of the public, including the Applicants, that a fuel filling station was in the process of being developed. As such, there has been a complete failure of crucial public participation prescribed in each and every of the aforesaid statutory instruments. The failure also extends to the non-observance of Section 33 of the Constitution of the Republic of South Africa and Section 3 of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA").

[8] When it emerged that it was a fuel filling station that was being constructed, the Applicants caused investigations to be conducted at the offices of the Third Respondent ("the Municipality"). These investigations uncovered that:

8.1 A *"consent use permit for a filling station"* was issued subject to a site development plan being submitted within twelve months, i.e. before the 20th of June 2018, failing which the approval would lapsed;

8.2 An environmental authorisation had to be procured;

8.3 Consent had to be obtained from the South African National Roads Agency Limited ("SANRAL") for access to the subject property; and

8.4 A business license had to be applied for.

[9] The Applicants claim that their investigations have exposed that none of the aforegoing conditions were satisfied. As such and insofar as land use is concerned, the Respondents do not have the necessary authorisation to conduct their current activities on the subject property. As though that was not enough, the unlawful nature of the activities of the Respondents are compromised by the fact that they have commenced with construction activities in the absence of an approved site development plan and building plans required in terms of Section 4(1) of the Building Standards Act.

[10] The Applicants also allege that the subject property is still zoned *"Agricultural"* and any consent that was seemingly obtained is irregular in terms of the applicable town planning scheme. To this end, the Applicants have annexed to the founding affidavit Extracts of the Town Planning Scheme to the Founding Affidavit. On 10 June 2022 and following becoming aware of the unlawful nature of the construction on the subject property and investigations as aforesaid, the Applicants caused a letter of demand to be sent to the Respondents. An undertaking to cease all illegal activities on the subject property within 48 hours was demanded.

[11] The Applicants also made telephonic contact with the project manager of the Second Respondent to persuade them not to proceed with their unlawful conduct on the subject property. Such telephonic conversations failed to yield any positive results. Meanwhile, the alleged unlawful construction persisted. An expert engaged by the Applicants, Mr Krause, confirmed the detrimental impact the envisaged fuel filling station of the Respondents will have on the fuel filling station of the Applicants. Against the above background, the Applicants approached this Court on urgent grounds seeking relief as set out at the beginning of this judgment.

ISSUES

[12] The issues that stand for determination are firstly, urgency and simply whether or not the Applicants are entitled to an order in their favour in Part A pending the review and

setting aside of the administrative action of the decision-maker. That determination cannot be made independently of the consideration of the prospects of success of Part B. Thus, the question is, have the Applicants demonstrated that they are entitled to an urgent interim interdictory relief in the terms proposed by them on urgent basis.

[13] To succeed, the Applicants ought to establish that (I) they have a *prima facie* right, (ii) an injury has actually been committed or that there is a reasonable apprehension of it occurring, (III) the balance of convenience favours them and that they lack adequate alternative remedy. The Applicants will be eligible to a relief in the terms sought by them if they can satisfy that they have met all the requirements described above. Since urgency is challenged, I deem it fit to address it first.

URGENCY

[14] I understood the Respondents to argue that the Consent Use Permit for a Filling Station pertaining to the subject property was granted as far back as 2017 and that the Applicants have failed to challenge the granting thereof timeously. In other words, it is now unconscionable for the Applicants to raise this matter almost five years after the approval of the licenses or that by implication, the urgency, if any, has been self-created. The said the thing about this argument is that it is not contained in the opposing papers and as such, constitutes litigation by ambush, which this Court is not at liberty to countenance.

[15] The second basis that I could decipher from the answering affidavit is that the application should simply not be regarded as urgent as it lacks merit and is 'not backed by facts and law that warrant the Court to consider it on urgent basis.' This statement by the Respondents is itself not backed by any facts or law justifying a dismissal of the application. For that reason, it is proper to ignore it.

[16] The Applicants are said to have failed to show a *prima facie* right that deserves protection. This argument is advanced in the face of it being trite that any party aggrieved

or adversely affected by an administrative action must be afforded opportunity to approach the decision-maker to vent his concerns to influence any decision that may be made. The Applicants being owners of the property situated approximately 2.4 Kilometres from the subject property on which they operate a lawful fuel filling station, have a right to protect.

[17] Lastly, the Respondents stated that the Applicants' founding affidavit is silent on why the Court should allow their truncated time lines and be heard on urgent basis. Again, this argument is not in the papers of the Respondents but I mention it for the sake of completeness lest the Court is set not to have taken what was said in Court into consideration. I cannot entertain an argument that is not in the papers of the Respondents as it will amount to allowing litigation by ambush.

[18] Besides, the Applicants have fully explained why they are of the opinion that this matter cannot wait for address in due course. It is not without significance that the Applicants attached a report of an expert, Mr Krause, who says that operation of the new filling station will have devastating consequences on the Applicants' existing business of a fuel filling station. Sadly, and importantly, the report of Mr Krause has not been contested at all. After a consideration of the above, I ruled that the matter was sufficiently urgent warranting immediate attention of this Court.

LEGAL FRAMEWORK AND ANALYSIS

[19] Insofar as the *prima facie* right is concerned, the degree of proof required to establish it has been formulated as follows:

19.1 The rights can be *prima facie* established even if it is open to some doubt;

19.2 Mere acceptance of the applicant's allegations is insufficient but weighing up the probabilities of conflicting versions is not required;

19.3 The proper approach is to consider the facts as set out by the Applicant together with any facts set out by the Respondent which the Applicant cannot dispute and to decide whether, with regard to the inherent probabilities and the ultimate onus, the Applicant should on those facts obtain final relief at the trial;

19.4 The facts set up in contradiction by the Respondent should then be considered and if they throw serious doubt on the Applicant's case he cannot succeed. See, *Webster v Mitchell*[1]; and *Gool v Minister of Justice*[2].

[20] A Court has a discretion whether or not to grant a temporary interdict. Thus, in *Messina (Transvaal) Development Co Lid v South African Railways and Harbours* [3] Curlewis JA said:

"In an application for an interim interdict pending action, the Court has a large discretion in granting or withholding an interdict. Where there is merely a possibility, not a practical certainty, of interference or injury, as in the present case, the Court will be reluctant to grant an interdict, especially if the party seeking the interdict will have other means of redress and will not suffer irreparable damage. *And the Court is entitled to and must regard the possible consequences, both to the applicant and to the respondent, which will ensue if an interdict be granted or withheld."*

[21] It is settled that any party that stands to be materially and adversely affected by an administrative action should be afforded opportunity to make representations to the decision-maker and be given time to state its concerns, if any, to influence any decision that may ensue. It is unquestionable that the First Applicant, as the owner of the subject property and site license holder and the Second Applicant, as the owner of the fuel filling station on the property, were not afforded the opportunity.

[22] The PPA provides that owners of other fuel filling stations in the vicinity of a property, as parties likely to be materially and adversely affected by the administrative

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[1] 1948 1 SA 1186 (W)
[2] 1955(2) SA 682 (C)
[3] 7929 AD 7 95 at 215 to 216

action, such as the subject property, must be notified and given opportunity to express their concerns to the decision-maker to influence the outcome. Their lack of participation in the process that led to the award of the site and retail licenses to the First Respondent constitutes a direct violation of their right.

[23] To the extent that it is apparent that firstly, the *"consent use permit for a filling station"* has lapsed due to lack of compliance with the condition that a site development plan had to be submitted within 12 months being on or before 20 June 2018; secondly, an environmental authorisation was not procured; thirdly, consent was not obtained from SANRAL for access to the subject property; and a business license was not applied for, the process is tainted with illegality and the rights of the Applicants, as parties affected by the administrative action, necessarily violated.

[24] The above means that the construction work being executed at the subject property by the Respondents is unlawful and constitutes criminal offences leaving no discretion to this Court but to direct the activities to halt. See in this regard, the case of *City of Tshwane Metropolitan Municipality v Grobler*,[4]. While the opposing affidavit purportedly seeks to raise the question of lack of establishment of a *prima facie* right, the Respondents have not elaborated how the Applicants have fell short of showing this. In the result, I am satisfied that the Applicants have in fact gone beyond demonstration of a *prima facie* right.

[24] Turning to reasonable apprehension of harm. This entails a reasonable apprehension that the continuance of the alleged wrong will cause irreparable harm to the Applicant. See, *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality*[5]. Irreparable harm or loss is the loss of property (including incorporeal property and money) in circumstances where its recovery is impossible or improbable. The loss need not necessarily be any financial loss, it may consist of an irremediable breach of the

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[4] 2005 (6) SA 61
[5] 1969(2) SA 256 (C)

Applicant's rights. See, *Braham v Wood*[6], *Cliff v Electro*[7]*Nic Media Network (Pty) Ltd and another.* [8]

[25] Here the expert of the Applicants, Mr Krause, has prepared a report outlining how devastating the addition of competitor in the environment will be on the fuel filling[9] station of the Applicants. The opposing affidavit takes no issue with the report. As such, it stands as uncontested meaning of course that its contents are admitted as are. During argument in Court the Respondents stated that they have invested a substantial amount [10] to get the building where it is now. I understood this to mean that on a grand scale they stand to lose far more than the Applicants. In the absence of a challenge to the report of Mr Krause, that argument rings hollow.

[26] Insofar as balance of convenience is concerned, the Court must weigh the prejudice to the Applicant if the interim interdict is refused against the prejudice to the Respondents if it is granted. See, *Breedenkamp v Standard Bank of South Africa Ltd* and *Lieberthal v Primedia Broadcasting (Pty) Ltd*[11]. The enquiry is whether or not the Applicant can obtain adequate redress in some other form of ordinary relief or an alternative legal remedy. See, *Camps Bay Residents and Ratepayers Association v Augoustides*.

[27] Usually this will resolve itself into a consideration of the prospects of success in the main action and the balance of convenience. The stronger the prospects of success, the less need for the balance of convenience to favour the applicant. The weaker the prospects of success, the greater the need for the balance of convenience to favour him. See, Breedenkamp *supra*.

[28] The Applicants submitted on balance of convenience that the question of inconvenience does not arise in circumstances where the construction of the fuel filling

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[6] 2005 (6) SA 61
[7] 1956 (1) SA 651 (D) at 655B
[8] [2016] 2 All SA 102 (GJ) at Paragraph 27
[9] 2009(5) SA 304 (GSJ) at 314G
[10] 2009(6) SA 190 (WCC) at 195I- 196A
[11] 2003 (5) SA 39 (W) at 43F

station on the subject property is illegal. This automatically suggests that the prospects of success in Part B are promising consequently the balance of convenience need not be as overwhelming. Even assuming that the inconvenience to be suffered by the Respondents were the urgent relief to be granted was pertinent, contended the Applicants, such inconvenience would be outweighed by the prejudice that the Applicants and numerous other role players will suffer if the Respondents were allowed to continue with the unlawful activities pending the outcome of an application in Part B that is not on urgent basis.

[29] It is highly probable that if the urgent interim relief is refused, by the time Part B is concluded the new unlawful fuel filling station on the subject property will be fully operational. For these reasons, the Applicants argued that the balance of convenience favoured them. Again and at least on the papers, these allegations were not contested. As such, the allegations of the Applicants ought to be taken as they are.

[30] Insofar as the absence of alternative adequate remedy is concerned, the Applicants asserted that there is no remedy that would yield immediate results as can an urgent relief. The alternative to this application would have been to launch a normal application, as they have done under Part B but without Part A. If they were to wait to address the issues in due course, the possibility that they might be confronted with a fully functional unlawful fuel filling station at the end is very distinct. Additionally, it was clear that the Third Respondent would not invoke its statutory powers to halt the illegal activities executed on the subject property by the Respondents. As a result, there was no adequate alternative remedy to address the situation.

[31] Lastly, I turn to consider the prospects of success of Part B. Here I need not dwell on the subject for long. The Applicants have already shown that the Consent Use Permit for a Filling Station was issued subject to a Site Development Plan being submitted within twelve months being on or before 20 June 2018, failing which the approval would lapse. The First Respondent did not comply with this requirement and the Consent Use Permit for a Filling Station has therefore lapsed. Moreover, it was admitted by the latter that the

environmental authorisation was not procured, the Consent for access to the subject property was not obtained from SANRAL and no business license had been applied for. The erected structure or new filling station is therefore illegal. Prospects that Part B will succeed are good.

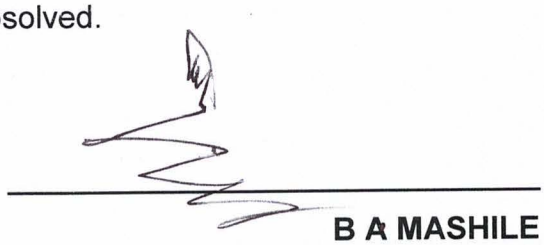
[32] Against that background, it is appropriate to grant an order in the terms proposed by the Applicants, which is as follows:

1. Part A of the application is dealt with as one of urgency and the Court condones the non-compliance of the rules of this Honourable Court in terms of Rule 6(12) of the Uniform Rules of Court.

2. The Respondents are interdicted, pending the final resolution of Part B of the Notice of Motion, from continuing with any further construction and ancillary activities aimed at the establishment of a petrol filling station on a property known as Stand No. 295, Tsakane, Acornhoek, Bushbuckridge Local Municipality ("*subject property*").

3. The Respondents are interdicted, pending the final resolution of Part B of the Notice of Motion, from conducting the business of a petrol filling station and all ancillary or subsidiary activities on the subject property.

4. The cost of Part A of this application shall be paid by the Respondents, jointly and severally, the one paying the other to be absolved.



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 July 2022 at 10:00.

APPEARANCES:

Counsel for the Applicants:	**Adv JA Venter**
Instructed by:	**Ivan Pauw & Partners**
	C/O Caz Dry Attorneys Inc
Counsel for the Respondents:	**Adv DJ Sibuyi**
Instructed by:	**Thobela Sindy Attorneys**
Date of Judgment:	**25 July 2022**