

SOUTH AFRICA / JUDGMENT

Comroq (Pty) Ltd and Another v Maqubela N.O and Another (68653/2019) [2020] ZAGPPHC 370 (31 July 2020)

[2020] ZAGPPHC 370**COURT**

North Gauteng High Court, Pretoria

BEFORE

NJ Kollapen

CASE / FILE NUMBER

68653/2019

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORIA****(1)****REPORTABLE:**

NO

(2)

OF

INTEREST TO OTHER JUDGES: NO

(3)

REVISED.

CASE

NO: 68653/2019

In

the matter between:

COMROQ

(PTY) LTD

First Applicant

PETROLEN

(PTY)

LTD

Second Applicant

AND

TSELISO

MAQUBELA N.O.

First Respondent

GWEDE

MANTASHE

N.O
Second Respondent

JUDGMENT

Kollapen, J

Introduction

- [1] These are review proceedings in terms of which the Applicants seeks an order reviewing and setting aside the decisions taken by the Respondents to refuse the Applicants a site and retail license for the purpose of conducting the business of a filling station.
- [2] Both Respondents oppose the relief sought.

Background

- [3] The Applicants made application in December 2017 to the first Respondent for a site and retail license that would allow them to operate the business of a filling station on the property known as Portion 12 of the Farm 787 Paarl (owned by the first Applicant). The application was submitted in terms of the Petroleum Products Act No 120 of 1977 ('the Act'). The property is located along the Old Paarl Road .
- [4] The application complied with all the formalities associated with applications of this nature. In February 2018, the Second Respondent received an objection from Monument Motors who pointed out that in their view the area was overtraded and there was no need for an additional filling station. In addition they pointed out that apart from the existing operational filling stations in the area there was also approval granted on appeal for the establishment of a further filling station in the adjacent area.
- [5] The objection was referred to the Applicants who in turn referred it to Messrs Jan Hanekom Town Planners and Architects (Hanekom) who prepared and submitted a response to the objection .
- [6] In that response, it is argued that there is indeed a need for a further filling station in the light of the planned development in the surrounding area . In particular Hanekom, relying on the Drakenstein Spatial Development Framework (SDF) concluded that there was an area of about 657 hectare in extent to the south of the N1 highway which is to be developed and that using a ratio of 22 units per hectare would yield about 14 500 new residential units. In their view these developments would provide the necessary population and owners of vehicles that would justify the grant of a license for an additional filling station. Finally in their report Hanekom support the approval of the application and conclude by listing the other filling stations and their proximity to

the site of the Applicant.

- [7] No mention is made in the report of Hanekom of the names of the expected new developments to which they make reference in their report nor to the time frames within which such developments are likely to be undertaken and completed. In addition their report makes no mention of the additional license for a filling station granted by the Second Respondent on appeal in 2017 and which is referred to in the objection of Monument Motors and how, if at all, such a site will deal with the demand in the area for filling stations.
- [8] The First Respondent refused the application on the 9th of November 2018 and in its letter to the Applicants informing them of the refusal, the First Respondents took the view that he had to be satisfied that there as need for a site and that the site would promote the licensing objectives stipulated in Section 28 (2) of the Petroleum Products Amendment Act No 58 of 2003 ("the amendment Act").
- [9] In his letter of refusal , the First Respondent set out those objectives and then gave consideration as to whether the application promotes each such objective. Those objectives are as follows:
- i) Promoting an efficient manufacturing, wholesaling and retailing petroleum Industry.
 - ii) Facilitating an environment conducive to commercially justifiable investments.
 - iii) The creation of employment opportunities.
 - iv) Ensuring countrywide availability of petroleum products at competitive prices and
 - v) Promoting access to affordable petroleum products by low income consumers for household use.
- [10] He then advises the Applicants that a site visit was conducted that took into consideration operational filling stations as well as the approved site that was not yet operational, traffic flows and intensity, the average monthly literage that other sites were selling as well as the employment opportunities and access to low income consumers .
- [11] The First Respondent then concludes that given the number of existing sites as well as the new approved site, there would be no need for an additional site as it would not contribute to an efficient industry. In this regard the site visit observed that while the traffic volume on the Old Paarl Road was high it was adequately captured by the existing sit es. He further points out that the sites in the area pump an average of 127 000 litres per month and collectively do not demonstrate the kind of growth to justify a further license being issued. The First Respondent takes the view that a new site will have little impact in creating employment opportunities as the decline in sales (and employment) in other sites if a new license is issued may well cancel the employment gains associated with a new site. It also says that the area is well served so a new site will not affect availability of products or access by low income consumers to petroleum products.

- [12] Importantly the First Respondent also pointed out that there were no new developments mentioned in the application nor were any observed during the site visits and that the issue of another license will therefore likely impact negatively on the viability of existing sites.
- [13] He concluded by stating that in his view the issue of a new license would not advance the objectives as set out in the amendment Act.
- [14] The Applicants then noted an appeal against the decision of the First Respondent which appeal was considered by the Second Respondent. The Second Respondent rejected the appeal and in essence confirmed the decision of the First Respondent, and in doing so found that the existing number of filling stations in the area was sufficient to meet the needs of consumers and that the issue of an additional license would negatively impact on existing license holders.
- [15] After the appeal had been decided, the Applicants commissioned a feasibility study which was undertaken by Innovative Traffic Solutions and which found that there were a number of developments approved and in the process of being approved and would roll out over time. It estimated that most of those developments will "roll out in the next 10 to 15 years". The report also suggested that a new site will be economically viable and will not negatively affect the operations of the existing fuel retailers in the area.
- [16] This report which I will return to later did not serve before either of the Respondents when they made the decisions which they did and which are under review.
- [17] It is in respect of these decisions that this review application is directed.

Condonation

- [18] The answering affidavit was filed considerably out of time and the Respondent have sought condonation for its late filing which the Applicants oppose. They have explained the delay as follows:
- a) The notice of opposition was filed on the 8th of October 2019 and the record was filed on the 15th of October 2019.
 - b) The Respondents had always intended to file an Opposing Affidavit but assumed that the Applicant will file a Supplementary Affidavit after the record was filed.
 - c) The Applicant did not supplement and in early December the Applicants attorneys enquired whether the Respondents intended to file an Answering Affidavit.
 - d) Arrangements were then made to brief counsel but due to the holiday period they were only able to follow up in January and eventually an appointment was made for the 13th of February 2020.
 - e) A draft was then prepared and provided to the Respondents for comment and thereafter finalised and filed in about mid-March.

[19] In my view the explanation is not as sufficient as one would have hoped it would be in particular the period between early December and mid February. Ultimately however there is at least a broad exposition of what occurred and in my view the interests of justice which is often the dominant component in applications of this nature would move me in the direction of granting condonation which I intend to do. In addition there was no suggestion on the part of the Applicants that they were prejudiced by the late filing of the answering affidavit which prejudice could not be cured by a costs order.

Grounds of Review

[20] The Applicants in advancing the relief they seek rely on the following review grounds:

- a) That relevant considerations were not taken into account when the decision was taken.
- b) That the decision was taken arbitrarily or capriciously.
- c) That the decision was so unreasonable that no reasonable decision maker would have taken such a decision.

[21] The review grounds in relation to the facts largely centre around the contention that the existing filling station meets the current need of consumers and therefore an additional filling station would not lead to the attainment of the objective of an efficient petroleum industry as well as the related matter that the issue of an additional and unneeded licence would result in a negative impact on the businesses of other fuel retailers in the area.

[22] When one has regard to both the decisions taken, the reasons advanced in support of the decisions as well as the record filed in these proceedings then it is evident that the twin related issues of future developments and the increase in traffic flow were considered by the Respondents in coming to their decisions. In the reasons supporting the decision of the First Respondent it is categorically stated that there is an increase on the volume of traffic but that the existing sites are able to capture that increase. With regard to future developments, the Hanekom report does not provide any indication of the timing of these developments or any further detail about them. It would be manifestly unfair to expect an administrator to then act upon and be bound by such general

and unspecific information in carrying out its legal obligations.

[23] Further if one has regard to the feasibility study by Innovative Traffic Solutions it appears that many of these developments will only be rolled out in the next 10 to 15 years and that the current traffic volumes will double in about 10 years.

[24] On this score therefore I am satisfied that these considerations were taken into account and dealt with properly by the Respondents. In any event I am not sure if the proposed developments that the Applicant speak of and which will come on line in 10 to 15 years time can serve to justify the issue of a further license at the present time.

- [25] Of course a balance must be struck between existing needs and future needs but to suggest that a license should be issued now to meet a need that will only materialise far into the future can hardly be sustainable. In these circumstances there is the greater likelihood that the issue of such a license will lead to inefficiency on the industry and will not facilitate an environment that is conducive to commercially justifiable investment s.
- [26] In addition neither the Applicant nor Hanekom make any reference to the issue of the new license in 2017 as part of their assessment of need, capacity and efficiency. They certainly would have had the opportunity to do so when the letter of objection from Monument Motors containing this information was made available to them for comment and response. This is quite a fatal omission in my view and one which the Respondents deal with in motivating their decisions.
- [27] The consequence of this is that even if it can be said that there was a need for an additional license to be issued, the issue of the license to Katakana Investments (Shell Winelands), in respect of a site some 800 metres away from the site of the Applicants would have satisfied such a need.
- [28] The other review grounds based on arbitrariness and capriciousness and the reasonableness argument (which are related) cannot in my view find success either.
- [29] Professor Hoexter in Administrative Law in South Africa (2nd Edition) at page 325 says that while the Promotion of Just Administrative Action Act 3 of 2000 does not define "arbitrarily or capriciously" at common law these terms are understood to mean an action that is irrational or senseless, without foundation or apparent purpose and to that extent says that Baxter calls this kind of irrationality the "ultimate form of unreasonableness".
- [30] If regard is had to the reasons in support of the decisions advanced by both Respondents as well as the material that was before them and their ongoing obligation to give effect to the objectives of the amendment act in considering the application as well as the appeal of the Applicants, then it can hardly be said that those decisions were arbitrary or capricious or so unreasonable that no reasonable bale decision make would take them,
- [31] A Court must remain careful and vigilant to act within the perimeters of its review powers. Ultimately the questions that arose for determination was whether the Applicant has succeeded in establishing the review grounds that it relied on in support of the relief that it sought. The issue before this Court is not whether it would have come to the same decision on the merits of the application and the appeal.
- [32] For the reasons already given, the Applicant has not advanced the case for review and the application falls to be dismissed.

Order

I make the following order

- a) Condonation is granted in respect of the late filing of the Opposing Affidavit in these proceedings.
- b) The application is dismissed.
- c) The applicants are ordered jointly and severally, the one paying the other to be absolved the costs of the both Respondents of the application.

NJ. KOLLAPEN

JUDGE OF THE HIGH

COURT, PRETORIA

APPEARANCES:

Applicant:

Adv SJ Van Rensburg SC

Instructed by:

Venn & Muller Incorporated

Respondent:

Adv CA Kriel

Instructed by:

The State Attorney, Pretoria

DATE OF HEARING:

27 July 2020

DATE OF JUDGMENT:

31 July 2020

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Prepared on 9 October 2026 · Esheria