

SOUTH AFRICA / JUDGMENT

Engen Petroleum Ltd and Others v Municipal Manager of the Gamagara Local Municipality and Others (1712/23) [2023] ZANCHC 65 (13 October 2023)

[2023] ZANCHC 65

COURT

Northern Cape High Court, Kimberley

BEFORE

A.D Olivier

CASE / FILE NUMBER

1712/23

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IN THE HIGH COURT OF
SOUTH AFRICA

(NORTHERN CAPE
DIVISION, KIMBERLEY)

CASE

NUMBER: 1712/23

DATE

HEARD: 29 September 2023

DATE

DELIVERED: 13 October 2023

Reportable: YES /

NO

Circulate to Judges: YES

/ NO

Circulate to Regional

Magistrates: YES / NO

Circulate to

Magistrates: YES / NO

In

the matter between:

ENGEN
PETROLEUM
LTD
1st
Applicant
ZELMOND
INVESTMENTS (PTY) LTD
2nd
Applicant
TRACKSTAR
TRADING 20
CC
3rd
Applicant
SAFFI
LAM (PTY)
LTD
4th
Applicant
and
MUNICIPAL MANAGER OF
THE
GAMAGARA
LOCAL MUNICIPALITY
1st
Respondent
THE
GAMAGARA LOCAL MUNICIPALITY
2nd
Respondent
THE BUILDING CONTROL

OFFICER:

GAMAGARA
LOCAL MUNICIPALITY
3rd
Respondent
RESILIENT
PROPERTIES (PTY) LTD
4th
Respondent
BAROKA
FILLING STATION
CC
5th
Respondent

JUDGMENT

Olivier AJ

1. The APPLICANTS approached this Court by way of an urgent application filed on 18 September 2023, for an order in the following terms:

1.1 That the forms and service provided for in the Uniform Rules of Court (herein after referred to only as “the Rules”) be dispensed with and that the application be heard as one of urgency in accordance with Rule 6(12) of the Rules;

1.2 That, pending the finalization of the APPLICANTS’ Review Application, to be instituted within 30(thirty) days from date of the granting of the interdictory relief envisaged in this application, for the review and setting aside of any approvals, consents and/or authorizations which have allegedly been granted or issued[1] by the 1ST, 2ND and 3RD RESPONDENTS (herein after jointly referred to as “the Municipality”) or any other authority for purposes of the development or operation of an intended fuel retailing or filling station facility on the property described as Erf 7319, Kathu, Kuruman RD, Northern Cape (referred to as “the Subject Property”):

1.2.1 An interim interdict is granted in terms whereof:

1.2.1.1 The 4TH and 5TH RESPONDENTS are interdicted and restrained from causing, conducting and/or allowing any further construction activities or building work in respect of any intended fuel retailing or filling station facility on the Subject Property, by virtue of the impugned decision until such time that appropriate land use rights for such intended development have successfully, by way of due statutory process, been procured in respect of the Subject Property in terms of any or all prevailing and applicable Town Planning legislation; and

1.2.1.2 The 1ST to the 3RD RESPONDENTS (the Municipality) are interdicted and restrained from directly or indirectly giving effect, accepting and/or approving any applications for the approval or amendment of building and/or site development plans or from the issuing of special consent or the occupation of structures erected or currently being erected on the Subject Property in terms of either Sections 4, 7, 7(6) or 14 of the National Building Regulations and Building Standards Act[2] and/or in terms of any applicable and prevailing town planning legislation or regulations issued in terms thereof, in so far as such plans and/or applications may pertain to the Subject Property and/or the impugned decisions.

2. The APPLICANTS furthermore moved for an order to the effect that the RESPONDENTS are to pay the costs of this application (jointly and severally the one paying the others to be absolved) on a scale as between Attorney and client which costs should include the costs of 2 (two) Counsel, alternatively that the costs of this application be costs in the intended review application or further alternatively that the costs be reserved for argument during the intended review application.

3. It should be mentioned at this stage already that this application revolved around a development, by essentially the 5TH RESPONDENT, of a fuel retailing or filling station (herein after simply referred to as “the Filling Station”) on the

Subject Property.

4. In as far as the Subject Property is concerned, it appears from the papers at hand to be common cause that, at the very least, the 4TH RESPONDENT is the registered owner of the Subject Property and that, at the very least, the 5TH RESPONDENT entered into a long term lease agreement with the 4TH RESPONDENT in respect of the Subject Property.[3]
5. The application by the APPLICANTS was opposed by all of the RESPONDENTS[4] who raised various preliminary issues for consideration and determination by this Court.
6. The preliminary issues raised by the RESPONDENTS were (in summary):
 - 6.1 The fact that the application was not urgent, alternatively that any urgency that might in fact exist, was self-created[5];
 - 6.2 The fact that the application itself was not properly served on the Municipality[6];
 - 6.3 The fact that the APPLICANTS lacked the necessary locus standi in this application[7]; and
 - 6.4 The fact that the application itself was defective by reason of non-joinder.[8]
7. It was furthermore contended on behalf of the 4TH and 5TH RESPONDENTS that the interdictory relief sought by the APPLICANTS was not competent by virtue of the fact that the said relief was not sought pendente lite or to put it simply; the APPLICANTS were not entitled to approach the Court for the requested interdictory relief by virtue of the fact that there was no pending litigation between the parties.
8. It was agreed that the parties will be afforded the opportunity to argue the above preliminary issues and that same will be considered and decided upon before the application is set down for argument and determination of the merits thereof, if necessary.
9. It should be mentioned that Mr. Steyn, on behalf of the Municipality, abandoned the issue of the alleged defective service of the application on the Municipality and this issue was consequently not argued and/or considered.

AD URGENCY:

10. It was submitted on behalf of the Municipality by Mr. Steyn that the application was not urgent, alternatively that any urgency was in fact self-created by virtue of the fact that the APPLICANTS, on their own version, gained knowledge of the construction of the Filling Station on the Subject Property during July 2023 already but despite gaining such knowledge, elected to issue the application some 50 (fifty) days thereafter.

Mr. Steyn furthermore pointed out that the Town Planner, one Mr. du Toit (herein after referred to only as “Du Toit” without intending any disrespect) who was appointed by the APPLICANTS was instructed at the end of July 2023[9] to investigate the constructions taking place on the Subject Property and that it took Du Toit approximately 21 (twenty-one) days to complete his investigation.

Mr. Steyn argued that the APPLICANTS were tardy in their approach and that the urgency that might exist was self-created and further that, because of the APPLICANTS’ tardiness, the Court should show its disapproval by ordering the APPLICANTS to pay the costs of the application on a scale as between Attorney and Client.

11. Mr. Liversage SC, on behalf of the 4TH RESPONDENT relied primarily on the background of the matter and the historical events that gave rise to this application being instituted and pointed out, inter alia, that the application was instituted:

11.1 Approximately 16 (sixteen) years after the approval of the site development plan in respect of the Subject Property by the Municipality;

11.2 More than 14 (fourteen) years after the 4TH RESPONDENT’S sister company became the owner of the Subject Property;

11.3 More than 6 (six) years after the approval by the Municipality of a site development plan extending the existing shopping centre to Erven 8130 and 8131, Kathu which included the future Filling Station;

11.4 More than 5 (five) years after a zoning certificate was issued by the Municipality in terms whereof the primary use of the Subject Property was confirmed to be a public garage and service station;

11.5 Approximately 27 (twenty-seven) months after the 4TH and 5TH RESPONDENTS applied for a retail and site license respectively for the construction of the Filling Station on the Subject Property;

11.6 Approximately 7 (seven) months after the 5TH RESPONDENT filed an appeal against a similar application for a site and retail license applied for by the 3RD and 4TH APPLICANTS in respect of Erf 3601, Kathu which application was granted[10];

11.7 Approximately 5 (five) months after construction activities in respect of the Filling Station and more specifically the superstructure thereof commenced in April 2023; and

11.8 Approximately 6 (six) weeks after Du Toit’s appointment.[11]

12. Mr. Liversage SC argued that the application is clearly not urgent, given the above, and that the APPLICANTS made themselves guilty of an abuse of the Court process.

13. An important aspect that was highlighted on behalf of the RESPONDENTS and more specifically the 4TH RESPONDENT, was the fact that on or about 17 February 2023, the 5TH RESPONDENT lodged an appeal in terms of the Petroleum Products Act[12] against a decision of the Controller of Petroleum Products to grant a site and retailing license to the 3RD and 4TH APPLICANT respectively, in respect of Erf 3601, Kathu.

In the relevant appeal document, it is clearly stated that the Appellant (the 5TH RESPONDENT in this application) is the holder of a retail license and that the 4TH RESPONDENT is the holder of a site license in respect of the Subject Property which licenses were granted by the Controller of Petroleum Products on 7 June 2022 and more specifically that the 5TH RESPONDENT is in process of establishing the Filling Station on the Subject Property.

Mr. Liversage SC emphasized that, despite having obtained knowledge of the 4TH and 5TH RESPONDENTS' alleged rights in respect of the Subject Property, the 3RD and 4TH RESPONDENTS did not challenge same at the time.

14. The above was also stressed by Mr. Strydom SC during his argument on behalf of the 5TH RESPONDENT in respect of the issue of urgency whilst he (Mr. Strydom SC) furthermore reiterated the fact that the APPLICANTS did not object to the 4TH and 5TH REPONDENTS' applications for site and retail licenses in 2021 despite these applications being advertised.

Mr. Strydom SC furthermore argued that the mere fact that building operations were commenced during early 2023 already, should have prompted the APPLICANTS to react more quickly than they eventually did.

Mr. Strydom SC, based on the above, implored the Court not to accept the version of the APPLICANTS that they only realized late in July 2023 that the Filling Station was being built and further added that this version of the APPLICANTS is clearly untenable because of the fact that the building works that did in fact take place, on the APPLICANTS' own version, were huge and grotesque.

15. It should be mentioned that on the papers at my disposal, it appears that the 4TH and 5TH RESPONDENTS, at the time of applying for the site and retail licenses during 2021 as afore-said, did invite public participation by way of notices that were published in the Noord-Kaap Bulletin and Gemsbok Newspapers on 13 and 14 March 2021 respectively.

It should furthermore be mentioned that the above notices clearly stipulated that the 4TH and 5TH RESPONDENTS envisaged the construction of the Filling Station on the Subject Property and that the only objection that was received as a result of the notices, was from a company called TFC Operations (Pty) Ltd t/a Elegant Fuel Kathu Motors & Engen Akasia Motors ("TFC").

It furthermore appears that subsequent to the granting of the site and retail licenses to the 4TH and 5TH RESPONDENTS, TFC did not take the matter any further.

16. Mr. Erasmus SC on behalf of the APPLICANTS argued that the matter was indeed urgent if regards are to be had to all of the facts before the Court.

Mr. Erasmus SC stressed the fact that there was no prior indication given by the 4TH and/or 5TH RESPONDENT of their intention to construct the Filling Station on the Subject Property which argument I can unfortunately not accept given the fact that the 4TH and 5TH RESPONDENTS' applications for site and retail licenses were publicly published in 2021 and by virtue of the fact that the 4TH and 5TH RESPONDENTS' intentions were made clear in the appeal against the granting of the 3RD and 4TH APPLICANTS' similar applications.

17. Despite the fact that I pointed the last-mentioned issue out to Mr. Liversage SC during his argument and intimated that this might be the most important aspect to consider in respect of the issue of urgency, Mr. Erasmus SC elected not to deal with this issue during his argument, electing instead to primarily focus on the events subsequent to Du Toit's findings becoming available on or about 21 August 2023 and on the fact that the APPLICANTS, thereafter, acted with the necessary haste to bring this application.

18. It remains unexplained:

18.1 Why the 3RD and 4TH APPLICANTS did not challenge, alternatively took steps to challenge the approval of the 4TH and 5TH RESPONDENTS' site and retail licenses during February 2023 already;

18.2 Why it took Du Toit 21 (twenty-one) days to complete his instructions to investigate the intended construction of the Filling Station; and

18.3 Why, subsequent to being provided with Du Toit's findings on approximately 21 August 2023, it took up and until 31 August 2023 for the APPLICANTS to cause a letter to be addressed to the RESPONDENTS in an attempt to obtain the alleged required information from the RESPONDENTS in order to mount this application.

19. I deem it prudent at this stage to point out that the RESPONDENTS did not seriously deny or place in dispute the events subsequent to the appointment of Du Toit as set out in the APPLICANTS' Founding Affidavit, although (and this should be stressed) the RESPONDENTS took definite issue with the time that it took for the APPLICANTS to eventually lodge this application since appointing Du Toit to conduct his required investigation and also with the fact that the APPLICANTS provided little or no proof of exactly when Du Toit was instructed, exactly when he did his searches and site visits and exactly when his investigation was complete.

20. For purposes hereof I am however prepared to accept the following as set out by the APPLICANTS in their Founding Affidavit:

20.1 That the APPLICANTS, subsequent to receiving the feedback from Du Toit on or about 21 August 2023, appointed their legal representatives to assist them in the matter;

20.2 That said legal representatives addressed a letter dated 31 August 2023 to the RESPONDENTS requesting certain information from the RESPONDENTS and affording the RESPONDENTS up and until 8 September 2023 to provide the required information;

20.3 That a consultation took place between the APPLICANTS and the said legal representatives on 11 September 2023; and

20.4 That the application was eventually finalized and issued and served on 18 September 2023.

21. In respect of the events set out in paragraph 20.2 above, it should be mentioned that the APPLICANTS afforded no explanation as to why the letter to the RESPONDENTS of 31 August 2023 was dated approximately 10 (ten) days after receiving the above feedback from Du Toit.
22. What I cannot however accept are the contentions made on behalf of the APPLICANTS to the effect:

22.1 That the Subject Property is to a certain extent obscured from view by a KFC drive-through facility which resulted therein that the building of the Filling Station was not noticed at an earlier stage; and

22.2 That the commencement with ground works and especially a stand-alone water reservoir on the Subject Property did not initially reveal that the Filling Station was being built on the Subject Property.

If I am allowed one remark in as far as the first aspect herein above is concerned, it should be mentioned that it is evident from aerial photographs attached to the Answering Affidavit deposed to on behalf of the 4TH RESPONDENT, that the KFC facility obscures less than one half of the Subject Property when viewed from the side of the main road and further that the whole of the Subject Property is visible in its totality from the road that affords access to the mall which is built on the adjacent property.

I consequently find the argument that the construction works on the Filling Station were obscured from sight, unconvincing.

23. It is trite that it is incumbent on an Applicant who wishes an application to be heard on an urgent basis, to set out the circumstances that render the matter urgent as well as the reasons why said Applicant cannot be afforded substantial redress in due course^[13] and that the Applicant should do this in the founding papers.^[14]
24. It is also trite that a Court will not come to the assistance of an Applicant in instances where urgency is self-created.^[15]
25. In their Founding Affidavit, the APPLICANTS contend that the development of the Filling Station has potential serious consequences, hence the appointment of Du Toit to investigate the situation on the Subject Property.

The APPLICANTS furthermore contend that the Filling Station, upon the completion thereof, shall have serious financial and other adverse implications for inter alia the APPLICANTS.

26. The above contentions by the APPLICANTS however flies in the face of the obvious tardiness with which the APPLICANTS approached this matter since February 2023 and specifically in view of the unexplained issues set out in paragraph 18 above.
27. I am consequently of the view that this application is not urgent and that any urgency that might exist in this instance is entirely self-created and that the APPLICANTS only have themselves to blame for the fact that this application is removed from the roll on this basis alone.
28. In view of the above, I do not deem it necessary to deal with any of the other preliminary issues raised by the parties herein.

COSTS:

29. In as far as the issue of costs is concerned, I see no reason why the costs should not be awarded to the RESPONDENTS in this instance.
30. I view the conduct of the APPLICANTS in this instance similar to the analogy drawn by Mr. Liversage SC between litigants approaching the Courts with matters that are clearly not urgent in an attempt to “jump the queue” and drivers of motor vehicles who uses the emergency or yellow lane to pass other law-abiding motorists waiting patiently in peak hour traffic.

In this instance however, the APPLICANTS are not only “breaking the rules of the road” by bringing this application on an urgent basis, but they are doing so because they over-slept or because they “hit the snooze button one time too many”.

31. I therefore find that a punitive costs order against the APPLICANTS is appropriate.

ORDER:

32. In view of all of the above, I make the following order:
 - 32.1 The application is removed from the roll due to a lack of urgency; and
 - 32.2 The APPLICANTS are to pay the costs of this application jointly and severally, the one paying the others to be absolved, on a scale as between Attorney and Client which costs will include, where appropriate, the costs of two Counsel.

A.D OLIVIER

ACTING JUDGE

For APPLICANTS: Adv. M.C. Erasmus SC Adv. D.J. van Heerden o.i.o Adriaan Venter Attorneys & Assoc PRETORIA c/o Van De Wall Inc. KIMBERLEY For 1ST to 3RD RESPONDENTS: Adv. P. Steyn o.i.o Peyper Attorneys BLOEMFONTEIN c/o Haarhoffs Inc. KIMBERLEY For 4TH RESPONDENT: Adv. A. Liversage SC Adv. M. Majozi o.i.o Ivan Pauw & Partners PRETORIA c/o Engelsman Magabane Inc. KIMBERLEY For 5TH REPONDENT: Adv. T. Strydom SC o.i.o Gerhard Wagenaar Attorneys PRETORIA c/o Haarhoffs Inc. KIMBERLEY

- [1] These approvals, consents and/or authorizations were collectively referred to by the APPLICANTS as “the impugned decisions”.
- [1] These approvals, consents and/or authorizations were collectively referred to by the APPLICANTS as “the impugned decisions”.
- [2] Act 103 of 1977.
- [3] The averments made in these regards in paragraphs 4.2.6 and 2.1 of respectively the Answering Affidavits of the 4TH and 5TH RESPONDENTS are not dealt with by the APPLICANTS in reply.
- [3] The averments made in these regards in paragraphs 4.2.6 and 2.1 of respectively the Answering Affidavits of the 4TH and 5TH RESPONDENTS are not dealt with by the APPLICANTS in reply.
- [4] The 1ST to 3RD RESPONDENTS (the Municipality) acted jointly whilst the 4TH and 5TH RESPONDENTS acted individually.
- [4] The 1ST to 3RD RESPONDENTS (the Municipality) acted jointly whilst the 4TH and 5TH RESPONDENTS acted individually.
- [5] This preliminary point was raised on behalf of all of the RESPONDENTS.
- [6] This was raised on behalf of the 1ST to 3RD RESPONDENTS.
- [7] This was essentially raised on behalf of the 4TH RESPONDENT, but was referred to on behalf of the 5TH RESPONDENT as well during argument.
- [7] This was essentially raised on behalf of the 4TH RESPONDENT, but was referred to on behalf of the 5TH RESPONDENT as well during argument.
- [8] This was raised on behalf of the 5TH RESPONDENT, but was referred to on behalf of the 4TH RESPONDENT as well during argument.
- [8] This was raised on behalf of the 5TH RESPONDENT, but was referred to on behalf of the 4TH RESPONDENT as well during argument.

- [9] This appears to be common cause if regards are to be had to Du Toit's affidavit which was attached to the founding papers.
- [9] This appears to be common cause if regards are to be had to Du Toit's affidavit which was attached to the founding papers.
- [10] It should be mentioned that this appeal is, according to all indications, still pending.
- [10] It should be mentioned that this appeal is, according to all indications, still pending.
- [11] It should be noted that Mr. Liversage referred to various other events that preceded the institution of this application in his Heads of Argument on behalf of the 4TH RESPONDENT, but I refer only to those events that I deem relevant for purposes hereof.
- [11] It should be noted that Mr. Liversage referred to various other events that preceded the institution of this application in his Heads of Argument on behalf of the 4TH RESPONDENT, but I refer only to those events that I deem relevant for purposes hereof.
- [12] Act 120 of 1977.
- [13] Rule 6(12)(b) of the Rules.
- [14] See *inter alia* Sikwe v SA Mutual Fire & General Insurance Co Ltd [1977] 3 All SA 231 (W) at 233.
- [14] See *inter alia* Sikwe v SA Mutual Fire & General Insurance Co Ltd [1977] 3 All SA 231 (W) at 233.
- [15] See *Dlamini & Others v Mogale City Local Municipality* [2021] JOL 51105 (GJ).
- [15] See *Dlamini & Others v Mogale City Local Municipality* [2021] JOL 51105 (GJ).

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