THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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Status: Immediate

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Gensinger and Neave CC & Others v Minister of Mineral Resources and Energy (223/2023) [2024] ZASCA 49 (15 April 2024)

Today the Supreme Court of Appeal (SCA) upheld an appeal with costs. It further set aside and substituted the order of the KwaZulu-Natal Division of the High Court, Pietermaritzburg (the high court), directing that the application be remitted to the high court for it to deal with the application for an interim interdict.

The four appellants are holders of site and retail licences issued to them under the Petroleum Products Act 120 of 1977 (the Act). They operate three outlets in the central business district of Matatiele, where petroleum products are sold or offered for sale to customers. These outlets are near to each other. During May 2019 the third respondent made an application to the third respondent (the Controller) for a site licence and the fourth respondent applied for a retail licence (applications for site and retail licences) to enable them to operate an additional outlet in Matatiele. The appellants lodged an objection against the granting of the site and retail licences to the respondents, contending that an additional retailer in Matatiele would 'cannibalise' the sales of the existing retailers and be contrary to the statutory requirements of efficacy and economic viability. Despite the objection, the Controller was satisfied that the respondents' applications met the requirements of the Act and the Regulations regarding Petroleum Products Site and Retail Licences (the regulations) and informed the respondents that their applications were successful. The Controller issued the site and retail licences to the respondents on 8 March 2021.

On 8 April 2021 the Controller's office informed the appellants that the respondents' applications for site and retail licences were successful. The appellants then lodged their appeal on 7 June 2021, within the 60-day period. Since the appellants appealed against the Controller's decision, they claimed that they understood the common law to be that the appeal suspended the Controller's decision and that, consequently, the respondents would not act on the licences that the Controller had granted to them until the appeal process had been finalised. However, building works commenced.

The appellants approached the high court for two declarators and an interdict. They sought an order that it be declared that the provisions of the Act do not oust the common law principle that an administrative appeal noted against an administrative decision suspends such decision; and declaring that the granting of the site and retail licences to the respondents and the subsequent issuing of those licences to them be suspended pending the finalisation of their appeal to the Minister. They also sought an order that the respondents be interdicted and restrained, pending the finalisation of the current

application and the appeal to the Minister, from retailing under the Act from the designated site in Matatiele.

The respondents opposed the application. They also instituted a counter-application wherein they sought an order declaring that the appellants were not directly affected by the Controller's decision and that the purported appeals against the Controller's decision, alternatively against the issuing of the site and retail licences, be declared of no force or effect; alternatively an order declaring that the appeals lodged by the appellants lapsed on 6 September 2021, alternatively that after that date, the licences issued to the respondents are not suspended.

The high court found that the appellants were not directly affected by the Controller's decision, that they were accordingly not entitled to appeal against the Controller's decision and that, therefore, no proper appeal had in fact been lodged. It also found that it was only the Controller, and not private parties, like the appellants, who was entitled to enforce the provisions of the Act and that the appellants accordingly did not have standing to institute the application against the respondents.

Before the SCA, the issues for determination were thus: (a) whether the holder of site and retail licences under the Act is 'directly affected' by a decision of the Controller to approve applications for site and retail licences to another applicant to whom site and retail licences were subsequently issued; and (b) whether holders of site and retail licences who have objected to the granting of site and retail licences to an applicant who seek to retail in the same area have standing to seek an order interdicting that applicant from giving effect to the site and retail licences after the Controller had approved the applicant's application for site and retail licences.

In addressing the first issue, the SCA reasoned that the drafters of the regulations intended the process of applying for a licence to be transparent, hence the right of any member of the public to inspect an application. The SCA pointed out that the purpose of allowing objections was to ensure that, when the Controller considers whether to issue a licence, he or she was in possession of as much information as possible relevant to that application. The regulations then, read purposively in the context of the scheme of the Act, must be interpreted to mean that any member of the public has the right to lodge an objection to the issuing of a licence to an applicant. The SCA concluded that the appellants had a commercial interest in the Controller's decision and that a commercial interest in the subject matter of the transaction would be sufficient to establish own interest standing to challenge that transaction.

On the second issue, the SCA reasoned that since the appellants will be directly affected by the Controller's decision, they do have the right to appeal to the Minister against the Controller's decision which accordingly meant that the appellants had standing to institute the application.

The SCA also held that it would be inappropriate for it to weigh the harm that the appellants are likely to suffer if the interim interdict was not granted against the harm that the respondents are likely to suffer if it was granted, when it was unaware of the present factual situation in respect of the respondents' outlet. The SCA then stated that it would be just and appropriate for it to refer the application back to the high court to decide whether the interim interdict should be granted or refused as the parties might want to place further facts before the high court to give a correct picture of the present situation.

In the result, the SCA upheld the appeal with costs and set aside and replaced the order of the high court, further directing that the application be remitted to the high court for it to deal with the application for an interim interdict.

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