THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1264/2023

In the matter between:

PINE GLOW INVESTMENTS (PTY) LTD	**APPELLANT**
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 OLIFANTSFONTEIN (PTY) LTD	**EIGHTH RESPONDENT**
VIVA OIL (PTY) LTD	**NINTH RESPONDENT**
TOKIVECT (PTY) LTD	**TENTH RESPONDENT**

Neutral citation: *Pine Glow Investments (Pty) Ltd v The Minister of Energy and Others* (1264/2023) [2025] ZASCA 75 (2 June 2025)

Coram: ZONDI DP and MOCUMIE, MOKGOHLOA and KOEN JJA and MOLITSOANE AJA

Heard: 5 May 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 2 June 2025.

Summary: Administrative Law – Petroleum Products Act 120 of 1977 (the Act) – whether decision of Minister of Minerals and Energy (the Minister) on appeal remitting decision of Controller of Petroleum Products (the Controller) for re-evaluation constitutes administrative action – whether such remittal within Minister's powers in s 12A of the Act – whether Controller *functus officio* regarding re-evaluation of site and retail licences pursuant to remittal – whether objector to approval of licences had internal remedy of appeal to the Minister in terms of s 12A of the Act and should first exhaust such remedy – if so, whether aggrieved party should be exempted from first having to exhaust internal remedy – whether Controller re-evaluated the licence applications in an unfair manner and/or was biased.

ORDER

On appeal from: Mpumalanga Division of the High Court, Mbombela (Roelofse AJ, Vukeya J and Greyling-Coetzer AJ, sitting as a court of appeal):

1 The appeal is dismissed.

2 The appellant is directed to pay the third and fourth respondents' costs of the appeal, such costs to include the costs of two counsel where so employed.

JUDGMENT

Koen JA (Zondi DP and Mocumie and Mokgohloa JJA and Molitsoane AJA concurring):

Introduction

[1] This appeal concerns a decision by the second respondent, the Controller of Petroleum Products (the Controller), which awarded a retail licence to the third respondent, Erf 6 Highveld Technopark Investments (Pty) Ltd (Erf 6) and a site licence to the fourth respondent, NAD Property Income Fund (Pty) Ltd (NAD) pursuant to the provisions of the Petroleum Products Act 120 of 1977 (the Act).[1] The issue raised is whether the Controller's decision should have been reviewed and set aside at the instance of the appellant, Pine Glow Investments (Pty) Ltd (Pine Glow).

[2] Pine Glow was unsuccessful with its review in both the Mpumalanga Division of the High Court (the court of first instance)[2] and on appeal to the full court of that division (the full court).[3] The present appeal is against the decision of the full court with the special leave of this Court. All references hereafter to section numbers are to

[1] The Petroleum Products Act 120 of 1977.
[2] The high court dismissed the review with the costs of two counsel where employed.
[3] The full court dismissed the appeal and directed Pine Glow to pay the costs of Erf 6 and NAD.

sections of the Act, unless stated otherwise. Only Erf 6 and NAD (collectively referred to as the respondents) oppose the appeal.[4]

Background

[3] Pine Glow holds a site licence for the Caltex Acornhoek Mall filling station, Mpumalanga province. It is also a fuel wholesaler supplying some filling stations in the Acornhoek area.

[4] On 26 April 2018, Erf 6 and NAD applied to the Controller for respectively a retail licence and a site licence in respect of Erf 930, Green Valley, Extension 1, Acornhoek (the site).[5] Pine Glow objected to the issue of the licences. On 9 November 2018, the Controller refused both applications.

[5] Erf 6 and NAD lodged an appeal in terms of s 12A[6] with the first respondent, the Minister of Minerals and Energy (the Minister)[7] against the refusal of the licences. Pine Glow opposed the appeal. On 12 December 2019 the Minister upheld the appeal, set the Controller's refusal of the applications aside and advised that he was referring the site and retail licences back to the Controller for re-evaluation taking into consideration information submitted and other documentation obtained during the appeal process (the Minister's decision). The Minister's decision was recorded as follows:

'1. I, the Minister of Petroleum Resources and Energy . . . considered the appeal . . .

2. After careful consideration of all the facts and arguments presented before me, I hereby set aside the decision of the Controller to refuse the site and retail licence applications.

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[4] The other respondents to the review were the fifth respondent, Royale Energy (Pty) Ltd, the sixth respondent, Royale Energy Group (Pty) Ltd, the seventh respondent, Royale Energy Management Services (Pty) Ltd, the eighth respondent, Royale Energy Olifantsfontein (Pty) Ltd, the ninth respondent, Viva Oil (Pty) Ltd, and the tenth respondent, Tokivect (Pty) Ltd. These respondents and the first and second respondents did not participate in any of the hearings before the court of first instance, the full court, or in this Court.

[5] The need for these licences arises from the provisions of s 2B of the Act. Its terms are not material to the appeal.

[6] Section 12A is quoted in paragraph 36 below.

[7] The Minister of Minerals and Energy is the designated Minister defined in s 1 of the Petroleum Products Act 120 of 1977 (the Act). The Minister was cited in the appeal record as the Minister of Energy.

3. However, I am referring the site and retail licences back to the Controller for re-evaluation taking into consideration the information submitted and other documentation obtained during the appeal process.'

[6] Pine Glow's complaint is not so much against the part of the Minister's decision which upheld the appeal against the initial decision of the Controller refusing the licences, but primarily against the portion of the decision remitting the decision as to whether the licences should be granted to the Controller. The Minister, in a letter of 12 December 2019, explained the motivation for his decision as follows:

'After having due regard to the arguments put forward by the Appellants, Legal Services is of the view that there are numerous possible deficiencies in the assessment of this set of licence applications that have come to the fore. It is apposite that the Controller re-evaluates this set of licence applications with all of the information at hand as well as the information supplied by the Appellants and the objectors. Any deficiency would be cured by such a re-evaluation . . . '

The information alluded to by the Minister comprises, inter alia, updated reports dealing with traffic counts, the economic feasibility of the proposed filling station and the expansion and growth in the area of Acornhoek.

[7] In an email addressed to the Minister on 5 February 2020, Pine Glow's attorney recorded that the Minister's decision was, in his view, unlawful because the Minister was required to decide the appeals and was not empowered to refer the applications back to the Controller. Pine Glow contended that the Minister failed to take a decision as contemplated in s 6(3)*(b)* of the Promotion of Administrative Justice Act 3 of 2000 (the PAJA),[8] and that the Minister had not provided reasons for his decision. It demanded full written reasons forthwith and that the Minister decide the appeal within 30 calendar days. It expressed the view that any decision taken by the Controller pursuant to the Minister's decision would be *ultra vires* and of no legal force and effect, as would be any licences issued by the Controller pursuant thereto. Finally, it cautioned that it would approach the high court for urgent relief should that be deemed necessary.

[8] The Promotion of Administrative Justice Act 3 of 2000.

[8] On 27 February 2020, the Senior Legal Administration Officer of the Controller responded to Pine Glow's attorney. The response recorded that: since the enactment of the licensing system in 2006, decisions by the Minister to refer matters back for reconsideration by the Controller have never been challenged; and that following *Oudekraal Estates (Pty) Ltd v The City of Cape Town and Others* (*Oudekraal*)[9] an invalid administrative action continues to have legal consequences and remains competent and valid until reviewed and set aside in an appropriate forum.

[9] On 12 November 2020, after undertaking various enquiries, a second site visit, visits to competitors in the area of the site, obtaining further information including information from Pine Glow pursuant to a visit to it, the Controller approved the applications and issued the retail and site licences (the Controller's decision).[10] On 10 December 2020, Pine Glow brought an application, pursuant to the provisions of the PAJA, to review and set aside the Minister's decision and the Controller's decision. Pending the review, Pine Glow also sought an order that the respondents be interdicted and restrained from constructing a filling station on the site.

[10] Pine Glow abandoned its challenge to the Minister's decision before the review came to be adjudicated before the court of first instance.[11] It also did not persist with the interdict.

[11] The court of first instance, per Mashile J, dismissed the review of the Controller's decision. It concluded that: the Minister was entitled to refer the matter back to the Controller; the Controller was expected to assist the Minister as requested and in doing so was discharging his responsibilities set out in s 3(2)*(a)*; in doing so the Controller

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[9] *Oudekraal Estates (Pty) Ltd v The City of Cape Town and Others* [2004] 3 All SA 1 (SCA); 2010 (1) SA 333 (SCA) (*Oudekraal*).
[10] The review of the Controller's decision formed the subject of paragraph 3.1.2 of the original notice of motion and para 3.1 of the amended notice of motion dated 13 January 2021.
[11] The review of the Minister's decision formed the subject of paragraph 3.1.1 of the original notice of motion. It was omitted from the amended notice of motion dated 13 January 2021.

was not revisiting his own decision but was merely executing instructions of the Minister; the Controller was therefore not *functus officio;* the Controller's decision re-assessing the applications was part of the Minister's consideration of the appeal; therefore there was no internal appeal available to the Minister in respect of the Controller's re-evaluation and grant of the licences; the Minister could not be *functus officio* as he had upheld the appeal; and the decision to re-assess the applications was that of the Minister and not the Controller.

[12] The subsequent appeal to the full court was dismissed. The full court concluded inter alia that: the Minister's decision and the Controller's decision were separate administrative acts as contemplated in the PAJA; s 7(2)*(a)* of the PAJA required Pine Glow to exhaust internal remedies provided for in any law before taking any administrative action on review; s 12A provided such a remedy; Pine Glow had failed to exhaust such remedy, or to apply to be exempted from the obligation to do so; and Pine Glow's review application was accordingly premature.

[13] Pine Glow seeks an order from this Court that the appeal be upheld with the costs of two counsel, that the order of the full court be set aside and that it be replaced with an order that:

'1. The appeal is upheld and the third and fourth respondents jointly and severally, shall pay the costs of the appeal;

2. That the order of the Court a quo dated 10 June 2022, is set aside and replaced with the following:

   i The decision of the second respondent, taken on 12 November 2020, to re-evaluate and approve the respondents' site and retail Applications in terms of the provisions of the PPA, is reviewed and set aside;

   ii the third and fourth respondents are ordered, jointly and severally, the one paying the other to be absolved, to pay the costs of the application.'

The parties' contentions

[14] Pine Glow argues that: the Minister's decision was not administrative action as contemplated in PAJA; the Controller could not be authorised in terms of s 12A to re-evaluate the licence applications; and the Controller was *functus officio* and could not grant the applications. Alternatively, if the Controller was not *functus officio,* Pine Glow contends that: the Controller did not conduct the re-evaluation of the licences in a procedurally fair manner in compliance with the prescripts of the PAJA and the *audi alteram partem* rule; and that the Controller was biased.

[15] The respondents maintain that: the Controller's original decision not to grant the licences no longer exists as it was set aside on appeal to the Minister; the Minister's decision to remit the applications to the Controller to consider the licence applications afresh with additional information constitutes administrative action; the Minister's decision is no longer sought to be impugned as separate substantive relief; the Minister's decision accordingly stands; the Controller thereafter took a new decision on facts previously submitted in support of the applications for the retail and site licences augmented by additional information and documents which were not before the Controller previously when the original decision was taken; therefore, the Controller was not reconsidering his own decision on the same facts and was not *functus officio*. They further maintain that a review of the Controller's decision was premature, as Pine Glow had not exhausted the internal remedy of an internal appeal against the Controller's decision to the Minister.

Discussion

Was the Minister's decision an administrative act?

[16] Preliminary to any discussion of the merits of Pine Glow's review based on the provisions of the PAJA, is the question whether the Minister's decision and the Controller's decision each constitute administrative action as contemplated by the PAJA. The Controller's decision was rightly accepted by all the parties as constituting

administrative action. Pine Glow however persisted that the Minister's decision did not amount to administrative action.

[17] It contends that to qualify as administrative action in compliance with the various components in the definition of administrative action, as confirmed in *Minister of Defence and Military Veterans v Motau and Others (Motau)*,[12] its rights had to be affected adversely by the Minister's decision. It maintains that its rights were not affected adversely because when the Minister's decision on appeal did not result in the grant of the licences, the only parties whose rights were affected were the respondents.

[18] That argument cannot be sustained. Pine Glow had participated in the appeal supporting the Controller's initial decision refusing the licence applications. Its contention is that the Minister's powers in deciding the appeal were only two-fold: either to uphold the appeal or to dismiss the appeal. When the Minister upheld the appeal and added the remittal of the licence applications to the Controller, Pine Glow's rights would be adversely affected. As an objector, the licence applications to which it had previously successfully objected, were not disposed of in the appeal, but were now referred back to the Controller for what Pine Glow viewed as 'an unlawful reconsideration'. These consequences satisfy the requirement of its rights being affected adversely.

[19] It was not disputed that the other requirements for the Minister's decision to amount to administrative action, as discussed in *Motau*, were satisfied. The Minister's decision accordingly amounted to administrative action.

The ambit of the Minister's powers on appeal in terms of s 12A

[20] The next consideration is whether the Minister's decision, notably the remittal, fell within the powers conferred on the Minister in terms of s 12A. Pine Glow maintains

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[12] *Minister of Defence and Military Veterans v Motau and Others* [2014] ZACC 18; 2014 (8) BCLR 930 (CC); 2014 (5) SA 69 (CC).

that the Minister did not have such power. It however formulates the proposition from the perspective of the Controller, that is whether the Controller could lawfully re-evaluate the licence applications having been enjoined to do so by the Minister's decision. It views the issue from that perspective probably because, having initially sought to review the Minister's decision, it abandoned that relief against the Minister and removed it from the relief claimed by an amendment to the notice of motion. The review application was however not withdrawn against the Minister. He remained cited as the first respondent.

[21] The question arising is whether this Court can enquire into the legality of the Controller's decision, as it will involve enquiring whether the Minister's decision pursuant to s 12A, remitting the licence applications for re-evaluation, fell within his powers, where Pine Glow had abandoned the relief for the review and setting aside of the Minister's decision as against the Minister. It is trite law, recognised inter alia in *Oudekraal*, that absent a successful review of an administrative action, that administrative action, even if invalid, stands as a fact. That is a necessary consequence to ensure administrative certainty.[13]

[22] *Oudekraal* however recognised that where an administrative body seeks to exercise coercive powers against a person, it is permissible, and a court is indeed enjoined[14] to consider a collateral challenge to the legality of a preceding administrative act on which the coercive provision is premised for its existence and enforcement. It held:[15]

'It is important to bear in mind (and in this regard we respectfully differ from the court *a quo*) that in those cases in which the validity of an administrative act may be challenged collaterally a court has no discretion to allow or disallow the raising of that defence: The right to challenge the validity of an administrative act collaterally arises because the validity of the administrative act constitutes the

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[13] *Oudekraal* para 37.
[14] *Oudekraal* para 37; *City of Tshwane Metropolitan Municaplity v Cable City* [2009] ZASCA 87; [2010] 1 All SA 1 (SCA); 2010 (3) SA 589 (SCA) ; 72 SATC 285 para 16.
[15] *Oudekraal* para 36.

essential prerequisite for the legal force of the action that follows and *ex hypothesi* the subject may not then be precluded from challenging its validity. On the other hand, a court that is asked to set aside an invalid administrative act in proceedings for judicial review has a discretion whether to grant or to withhold the remedy.'

[23] In casu, Pine Glow maintains that the Controller's decision was coercive upon it because it resulted in the approval of the applications, where the applications should have been disposed of in the appeal before the Minister without it becoming the recipient of an invalid referral back to the Controller. Insofar as it is adversely affected by the Controller acting on the Minister's referral when considering the applications afresh, the legal impetus for that being the Minister's decision, the legality of the Minister's decision has significance, because without it, the remittal would not have served before the Controller.

[24] But coercion apart, in the words of *Oudekraal*:[16]

'It will be apparent from that analysis that the substantive validity or invalidity of an administrative act will seldom have relevance in isolation of the consequences that it is said to have produced - the validity of the administrative act might be relevant in relation to some consequences, or even in relation to some persons, and not in relation to others - and for that reason it will generally be inappropriate for a court to pronounce by way of declaration upon the validity or invalidity of such an act in isolation of particular consequences that are said to have been produced.'

[25] The validity of the Controller's decision and the consequences it produced, depends on the validity of the Minister's decision. Even in the absence of formal relief being claimed against the Minister for the review and setting aside of his decision, considerations of legality and the rule of law render it necessary to consider the extent of the Minister's powers.

[26] The factual position is however a peculiar one, and an irregular review should not be introduced via the back door, where the Minister had effectively been informed

[16] *Oudekraal* para 38.

that no further relief would be claimed against him. This makes it all the more important to ensure that the Minister must have had an adequate opportunity to be heard on the relief claimed, insofar as it may affect him or impact on his powers. That is what the application of the *audi alteram partem* rule requires.

[27] Hence in *Merafong City Local Municipality v AngloGold Ashanti Limited* (*Merafong*)[17] a collateral challenge to administrative action was raised.[18] But significantly, the Constitutional Court did not decide the challenge raised but referred the validity of the Minister's decision for separate determination in a separate substantive review in the Gauteng Division of the High Court against the Minister,[19] where the Minister could be heard on the issue of the extent of his or her administrative powers.

[28] A court should not permit a challenge to the powers of an administrator unless the administrator had been afforded an opportunity to be heard on whether he or she acted illegally, or unless the administrator was afforded an adequate opportunity to be heard and declined that opportunity. As was stated in *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd*:[20]

'It is in general imperative that a party affected by a ruling should be joined in those proceedings. This is particularly so when the constitutional validity of a ministerial act is at issue.'

Whether there was an adequate opportunity for the administrator to be heard is largely a factual enquiry.

[29] In casu, the initial notice of motion cited the Minister, and expressly provided for the Minister's decision to be reviewed and set aside. This was claimed on the basis that he acted beyond his powers in s 12A. After the notice of motion was amended, no relief

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[17] *Merafong City Local Municipality v AngloGold Ashanti Limited* [2016] ZACC 35; 2017 (2) BCLR 182 (CC); 2017 (2) SA 211 (CC) (*Merafong*).
[18] *Merafong* para 22.
[19] *Merafong* para 78
[20] *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* [2009] ZACC 34; 2010 (5) BCLR 445 (CC) para 12.

was being claimed against the Minister, although he still remained cited as a party to the application. The effect thereof was that the Minister did not participate in the proceedings before the court of first instance, the full court, or this Court, and perhaps understandably so, because no specific relief was claimed against him. Indeed, further participation in the review by the Minister was discouraged by costs being sought against such further respondents as may oppose the application.

[30] However, being still cited as the first respondent, he had all the rights of a party to the review and could participate and oppose the relief. He would know that an order was still sought reviewing the Controller's decision and that this was sought on the basis, set out in the founding affidavit, that Pine Glow contended that the decision to refer the applications back to the Controller for re-evaluation of the applications, was illegal, as being beyond the Minister's powers. That was sufficient to convey to the Minister that the relief persisted with involved a determination of the extent of his powers in terms of s 12A on appeal, and that he was required to place any submissions which could impact on the claimed invalidity of the Controller's decision and hence the challenge raised, before the court of first instance.

[31] The Minister did not avail himself of that opportunity. The Controller did not oppose the relief claimed against him either. The Minister would only have himself to blame if this Court was to find that he had acted illegally. The conclusion reached in this appeal regarding the Minister's powers, however, happens to coincide with the contentions of the Minister. It is therefore unnecessary to examine the doctrine of collateral challenge and whether it finds application further[21] because Pine Glow's prospects of reversing the judgment of the full court are non-existent.

[32] Of course, if I am wrong in reaching the conclusions above, and it was to be found that the notice to the Minister was insufficient, then the appeal should for that

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[21] As also in *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* [2009] ZACC 34; 2010 (5) BCLR 445 (CC) para 12.

reason alone be refused. The enquiry into the extent of the powers of the Minister would then, at this stage, be irrelevant and irregular.

[33] Turning then to an examination of the Minister's powers in s 12A. The extent of the powers which would constitute the legal basis for either the Minister's decision, or the Controller's decision, particularly the direction that the licence applications were to be re-evaluated, depends on an interpretation of the relevant provisions of the Act. These provisions are quoted below.

[34] The long title of the Act provides inter alia that it provides '. . . for the licensing of persons involved in the manufacturing and sale of certain petroleum products . . . to provide for matters incidental thereto'.

[35] Section 3 provides:

'(2) Subject to the provisions of this Act, the Controller of Petroleum Products, a regional controller of petroleum products and an inspector –

(a) may assist the Minister in the exercise of his powers and the performance of his functions under this Act;

(b) . . .

(3) The Minister shall, subject to the provisions of this Act, determine the powers, duties and functions of the Controller of Petroleum Products, a regional controller of petroleum products and an inspector, and different powers, duties and functions may thus be determined in respect of different persons or categories of persons appointed or authorised under subsection (1).'

[36] Section 12A provides

'Appeal –

(1) Any person directly affected by a decision of the Controller of Petroleum Products may, notwithstanding any other rights that such a person may have, appeal to the Minister against such decision.

(2) An appeal in terms of paragraph *(a)* shall be lodged within 60 days after such decision has been made known to the affected person and shall be accompanied by –

(a) A written explanation setting out the nature of the appeal;

(b) Any documentary evidence upon which the appeal is based.

(3) The Minister shall consider the appeal, and shall give his or her decision thereon, together with written reasons therefor, within the period specified in the regulations.'

[37] The only regulation relevant to the s 12A appeal process is regulation 33 which provides that the period contemplated in s 12A(3) for the Minister to give his decision is 90 days.[22] The General Guidelines for the Submission of Internal Appeals to the Minister in terms of s 12A[23] prescribe time limits for various steps in the appeal process, but do not proscribe the powers of the Minister in any way. They simply provide in regulation 4.6 that '[t]hereafter, the appeal will be considered, and the Minister will make a decision on the appeal'. It is correctly accepted by the parties that the internal appeal contemplated is an appeal in the wide sense.[24]

[38] The court of first instance relied on s 3(2)*(a)* to find that the Minister could remit the matter back to the Controller, as the Controller would then assist the Minister, but the decision would be that of the Minister. In terms of s 3(2)*(a)*, the Controller may assist the Minister with the exercise of his powers and the performance of his duties, but such assistance is rendered specifically in respect of the Minister's exercise of those powers. The Minister does not issue retail and site licences. That is the preserve of the Controller. The decision whether to issue a licence is a polycentric decision involving particular skills and knowledge. It is best entrusted to a specialist administrator like the Controller. There is no basis to conclude that what the Minister referred back to the Controller to consider and decide, would become or be part of a decision of the Minister. In fact, the converse is the case.

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[22] Regulation 33 published in GN R286 in GG 28665 of 27 March 2006 as amended by GN R1061 in GG 35984 of 19 December 2012.

[23] The General Guidelines for the Submission of Internal Appeals to the Minister in terms of s 12A, published in GN 4465b in GG 50248 of 1 March 2024.

[24] See *Golden Arrow Bus Services v Central Road Transportation Board* 1948 (3) SA 918 (A) at 924; *SA Broadcasting Corporation v Transvaal Townships Board and Others* 1953 (4) SA 169 (T) at 175E–176F; *Rosenberg v South African Pharmacy Board* 1981 (1) SA 22 (A) at 28B-C; *National Union of Textile Workers v Textile workers Industrial Union (SA and Others)* 1988 (1) SA 925 (A) at 939B-C.

[39] The Minister's powers in s 12A(3) are wide and not circumscribed in any way. The internal appeal does not only lie against the approval or disapproval of a licence, but at the instance of '[a]ny person' who might be 'directly affected by a decision of the Controller'. The Minister's powers when considering the appeal are also not confined to only either upholding or dismissing the appeal. Section 12A(3) does not limit the powers of the Minister.

[40] Section 12A simply contains four requirements: first, the Minister has to consider the appeal; second, he must decide the appeal; third, he must give written reasons for his decision; and fourth, he must deliver his decision within the time prescribed. The Minister complied in all these respects.

[41] Section 12A is silent on the granting of licences when an appeal against a refusal to issue licences is upheld. The Minister cannot issue licences. Only the Controller may do so. Thus, where an appeal against the refusal of a licence is upheld by the Minister, the decision would have to include some direction that the Controller should issue the particular licences. The power to include such direction is not expressly provided for in s 12A(3) but must necessarily be implied. It is difficult to conceive why a direction, issued by the Minister that the Controller should re-evaluate an application in the light of additional information which had come to light and which had not been considered by the Controller initially, would be any different. Such a direction is necessarily implied as an essential part of the Minister deciding the appeal. It gives practical effect to the Minister's reasons.

[42] Pine Glow's argument is that because the appeal contemplated by s 12A is one in the wide sense where the Minister can have regard to whatever additional information he may consider appropriate to decide the appeal, that the Minister is the only one to decide the fate of the applications, even if it means having to call on the Controller to place his view on the impact of the additional documents before the Minister. But having considered the appeal, as the Minister was obliged to do and did, there is nothing

which precludes him in deciding the appeal and in the exercise of his discretion in the wide sense, inherent in the decision making process, and having regard to the object of the Act, his responsibilities, the obligations of the Controller, and the interest of the general public, from remitting the applications for re-evaluation.

[43] The grant of retail and site licences involves specialised skills of officials involved in those processes and who have acquired such expertise through the exposure to what should inform such decisions, on a continuous basis. These decisions are almost invariably policy laden and polycentric. The full-time officials dealing with these policies are best suited to make these decisions. They are employed by the Controller. They are able to undertake further investigations, collate these meaningfully, and assess the impact thereof. An appeal tribunal, like the Minister in s 12A, can only benefit considerably from having the investigative background, which should have preceded any decision on the licences, taking into account all relevant information and documentation, collated, analysed, examined and assessed for the purpose of the Controller deciding whether a particular licence should be granted or refused. That will result in the Minister having the benefit of the considered result of such a distilling process, should any appeal be pursued thereafter.

[44] Not only does the above conclusion mean that the remittal to the Controller for re-evaluation was within the powers of the Minister, but it also emphasises that the subject matter of what was referred back, was not the evidential material which previously served before the Controller and on which the licences were refused. The material to be considered in the re-evaluation was as different from what previously served before the Controller, as entirely new applications based on the original material amplified by the further information and documentation would call for a fresh determination of the applications by the Controller.

[45] The remittal did not entail the Controller making a new determination on the same material which he had considered previously. The Controller would therefore not

be *functus officio*. The Minister, having regard to the purposes of the Act, simply expedited the process of properly deciding the respondents' licence applications, to avoid the further delays which might occur if fresh applications were to be commenced, to save costs by avoiding much investigative work which had already been done, and to arrive more speedily at a properly informed determination. The re-evaluation further was reached, not in response to any illegality, but as the result of a proper mandate to the Controller, which he was obligated to perform.

[46] Pine Glow contends that any argument that because s 12A does not prohibit the Minister from remitting the applications back to the Controller for reconsideration, it was competent for him to do so, flies in the face of authorities such as *Principal Immigration Officer v Medh* (*Medh*)[25] and *Compcare Wellness Medical Scheme v Registrar of Medical Schemes and Others* (*Compcare*).[26] Generalised comparisons are however unhelpful. Every case must depend on its own facts and on a proper interpretation of the statutory power granted to the administrator.

[47] In *Medh* the power granted was to either exempt a person from a class of prohibited immigrants or not. There was no intermediate option of attaching a condition of domicile. The enquiry was confined to whether an exemption should be granted, or not. In casu, the Minister had to decide the appeal, not decide between options. His discretion and powers were not fettered in any way.

[48] In *Compcare* it was found that the provision empowered the Board to either approve a name change of a medical scheme or not, but not to add conditions. Significantly, the learned judge held, unlike the position in the present appeal, that 'I can see no possible basis for somehow implying [that power] in the section'. In this appeal, there is a basis to imply such a power.

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[25] *Principal Immigration Officer v Medh* 1928 AD 451.
[26] *Compcare Wellness Medical Scheme v Registrar of Medical Schemes and Others* [2020] ZASCA 91; 2021 (1) SA 15 (SCA); [2020] HIPR 169 (SCA) (*Compcare*) para 32.

[49] The powers of the Minister are contained in s 12A, but they will include powers necessarily implied. There is no reason, on a proper interpretation of s 12A, and having regard to the text thereof, in the context of the Act, and having regard to the purpose of the Act, why the Minister in serving an effective role as an internal appeal adjudicator, could not direct that the site and retail licence applications be remitted to the Controller for re-evaluation.

[50] That power is necessarily implied to give effect to the purpose of the Act as recorded in its long title. It is permitted by law,[27] as much as it is not prohibited or precluded. It is furthermore not a function beyond that necessarily conferred in our constitutional order.[28]

[51] The mere fact that a statutory provision in a related statute, s 96 of the Mineral and Petroleum Resources Development Act (MPRDA),[29] in regulation 74(13)*(b)* of the Mineral and Petroleum Regulations[30] accords to the same Minister the power to 'set aside the administrative decision concerned with or without directions', might place the power to remit a decision in the context of that statute beyond doubt. But it does not *per se* mean that absent such an express conferral of the power, it is not competent for the Minister to remit in the context of s 12A.

[52] Section 12A(3) provides in the most general of terms that the Minister shall consider the appeal and shall give his 'decision thereon'. That is without any restriction on what the decision might be.[31] It does not follow that because a power to refer the decision back was not conferred expressly, that it would not be competent as part of

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[27] *Compcare* para 30.
[28] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) para 58.
[29] Act 28 of 2002.
[30] Mineral and Petroleum Regulations R527 of 2004.
[31] *Metro Service Station (Pty) Ltd and Others v Minister of Energy and Others* [2021] ZAKZDHC 2 shows that, after the Director-General of the Department of Energy recommended confirmation of the Controller's grant of the licence, the Minister duly dismissed the appellants' appeal (para 71). The decision confirms the normal course of the Minister's statutory powers to review, set aside, confirm or remit a Controller's licensing determination on appeal.

'the decision thereon' which the Minister may reach. The MPRDA, like the other statutes referred to above are not *in pari materia* (not the same).

[53] It is not insignificant, although the point apparently did not specifically arise for decision thus rendering its precedential value limited, that in *Total Brite Star Service Station CC v ENSPA Trading Company (Pty) Limited and Others*[32] the Minister had set aside the decisions of the Controller and remitted the decisions to the Controller, without demur from the parties or any interested person, and the decision following on the remittal was thereafter taken on appeal again to the Minister.

The failure to exhaust the internal remedy of an appeal in respect of the Controller's decision

[54] At the outset of this discussion, it is necessary to deal with a preliminary procedural issue raised by Pine Glow. The court of first instance did not deal with the respondents' argument that Pine Glow failed to exhaust the internal remedy of an appeal in respect of the Controller's decision to grant the licences. The full court however dismissed the appeal against the order of the court of first instance primarily on the basis that Pine Glow had not exhausted such remedy. Pine Glow maintained that the full court erred in basing its judgment on the failure to exhaust the internal remedy, because there was no cross appeal against the order of the court of first instance for not having relied on that defence.

[55] This submission is without merit. An appeal lies against the order of a court, not the reasons for arriving at that order.[33] If the order of the court of first instance was, in the view of the full court, the correct order but on a legal basis not considered by the

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[32] *Total Brite Star Service Station CC v ENSPA Trading Company (Pty) Limited and Others* [2022] ZAECELLC 29 para 7.

[33] *Western Johannesburg Rent Board and Another v Ursula Mansions (Pty) Ltd* 1948 (3) SA 353 (A) at 355. See also *Cape Empowerment Trust Ltd v Fisher Hoffman Sithole* [2013] ZASCA 16; [2013] 2 All SA 629 (SCA); 2013 (5) SA 183 (SCA) para 39.

court of first instance, nothing precluded the full court from relying on such ground to justify its refusal to interfere with the order of the court of first instance.

[56] Turning then to the merits of this defence, the Controller's decision regarding what was referred back to him, constituted separate and distinct administrative action. As separate administrative action, any party aggrieved by the decision, such as Pine Glow, could appeal to the Minister, as provided in terms of s 12A. The merits of such an appeal would depend on the new body of evidence and reports on which the Controller's decision approving the licences would be based. The grounds of appeal could also include any alleged unfair treatment of Pine Glow by the Controller, or bias on the part of the Controller.

[57] Section 7(2)[34] of the PAJA requires that no court shall review administrative action in terms of that Act unless any internal remedy provided had first been exhausted. If a court is not satisfied that an internal remedy has been exhausted, it must direct that the person concerned must first exhaust such remedy before instituting proceedings for judicial review.

[58] An appeal to the Minister in terms of s 12A would be an adequate remedy. Pine Glow has not contended that it is not. Pine Glow however failed to invoke that remedy. This is not simply a technical defence. Internal appeals carry distinct benefits in an administrative context. It has been said that:

'Internal remedies are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilise its own mechanism, rectifying irregularities first, before aggrieved parties resort to litigation. Although courts play a vital role in providing litigants with access to justice, the

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[34] Section 7(2) of the PAJA provides:
'*(a)* Subject to paragraph *(c)*, no court or tribunal shall review any administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.
(b) Subject to paragraph *(c)*, a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph *(a)* has been exhausted, direct that the person concerned must first exhausted such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.
(c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.'

importance of more readily available and cost-effective internal remedies cannot be gainsaid. First, approaching a court before the higher administrative body is given the opportunity to exhaust its own existing mechanisms undermines the autonomy of the administrative process. It renders the judicial process premature, effectively usurping the executive role and function. The scope of administrative action extends over a wide range of circumstances, and the crafting of specialist administrative procedures suited to the particular administrative action in question enhances procedural fairness as enshrined in our Constitution. Courts have often emphasised that what constitutes a "fair" procedure will depend on the nature of the administrative action in the circumstances of the particular case. Thus, the need to allow executive agencies to utilise their own fair procedures is crucial in administrative action.'[35]

[59] Pine Glow's failure to appeal the Controller's decision to the Minister is accordingly fatal to its prospects of success in the review. That is unless it was exempted from having to first exhaust such remedy.

Exemption from exhausting internal remedies

[60] A court may in exceptional circumstances and on application by the person concerned, in terms of s 7(2)*(c)* of the PAJA, exempt such person from the obligation to exhaust any internal remedy if deemed in the interest of justice.[36] The position was explained as follows in *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Co Ltd*:[37]

'The exemption is granted by a court, on application by the aggrieved party. For an application for an exemption to succeed, the applicant must establish "exceptional circumstances". Once such circumstances are established, it is within the discretion of the court to grant an exemption. Absent an exemption, the applicant is obliged to exhaust internal remedies before instituting an application for review. A review application that is launched before exhausting internal remedies is taken to be premature and the court to which it is brought is precluded from reviewing the challenged administrative action until the domestic remedies are exhausted or unless an exemption is granted.

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[35] *Koyabe and Others v Minister for Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae)* [2009] ZACC 23; 2010 (4) SA 327 (CC); 2009 (12) BCLR 1192 (CC) (*Koyabe*) paras 35-36.
[36] *Bason v Hugo and Others* [2018] 1 All SA 621 (SCA); 2018 (3) SA 46 (SCA) para 12; *Koyabe* para 34; *Nichol and Another v Registrar of Pension Funds and Others* [2005] ZASCA 97; 2008 (1) SA 383 (SCA); [2006] 1 All SA 589 (C) para 15.
[37] *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Co Ltd and Others* [2013] ZACC 48; 2014 (3) BCLR 265 (CC);2014 (5) SA 138 (CC) para 116.

Differently put, the duty to exhaust internal remedies defers the exercise of the court's review jurisdiction for as long as the duty is not discharged.'

[61] The person seeking exemption must satisfy the court: first, that there are exceptional circumstances, and second, that it is in the interest of justice that the exemption be given.[38] To insist on an internal remedy first having to be exhausted, is not simply a technicality. There are very sound reasons for doing so.

[62] As explained in *Koyabe and Others v Minister for Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae)*:[39]

'Internal administrative remedies may require specialised knowledge which may be of a technical and/or practical nature. The same hold true for fact-intensive cases where administrators have easier access to the relevant facts and information. Judicial review can only benefit from a full record of an internal adjudication, particularly in the light of the fact that reviewing courts do not ordinarily engage in fact-finding and hence require a fully developed factual record.

The duty to exhaust internal remedies is therefore a valuable and necessary requirement of our law. However, that requirement should not be rigidly imposed. Nor should it be used by administrators to frustrate the efforts of an aggrieved person or to shield the administrative process from judicial scrutiny. PAJA recognises this need for flexibility, acknowledging in section 7(2)*(c)* that exceptional circumstances may require that a court condone non-exhaustion of the internal process and proceed with judicial review nonetheless. Under section 7(2) of PAJA, the requirement that an individual exhaust internal remedies is therefore not absolute.

What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and/or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile.'

[63] As to whether there are exceptional circumstances will depend on the facts and circumstances of each case. Generally, factors taken into account in deciding whether

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[38] *Nichol and Another v Registrar of Pension Funds* [2005] ZASCA 97; 2008 (1) SA 383 (SCA); [2006] 1 All SA 589 (C) para 15.

[39] *Koyabe op cit* paras 37-39.

exceptional circumstances exist, are whether the internal remedy is effective, available and adequate. An internal remedy is effective if it offers a prospect of success and can be objectively implemented taking into account relevant principles and values of administrative justice present in the Constitution and our law. It is available if it can be pursued without any obstruction, whether systemic or arising from unwarranted administrative conduct. It is adequate if it is capable of redeeming the complaint.[40] Such an application to be exempted from the provisions of PAJA is compulsory.[41]

[64] The aspect of an exemption was dealt with casually by Pine Glow. It simply, almost in passing, asked the court of first instance to condone its failure to appeal the Controller's revisitation of the decision, submitting that: it was advised and accepted that the respondent's appeal in terms of s 12A in respect of the refusal of the licences exhausted the internal remedies available to the parties; the Minister, having made his decision, was also *functus officio*; the Minister is not empowered by the Act to make a second decision on appeal regarding the same licence applications; it would be an exercise in futility for the parties to repeatedly appeal decisions of the Controller related to the same set of applications; and that the court is properly vested with the authority to entertain the review application.

[65] There is no merit in these considerations. They are certainly not exceptional. They simply indicate that Pine Glow was misdirected. That is inherent in the litigation process and cannot *per se* constitute exceptional circumstances. Pine Glow was directly affected by the decision of the Controller and dissatisfied with its decision. As a person aggrieved by the Controller's decision it was required first to exhaust its internal remedy under s 12A by an appeal to the Minister. It failed to do so and it failed to apply to be exempted. As a result the appeal stands to be dismissed.

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[40] *Koyabe op cit* paras 42 to 45.
[41] *Member of the Executive Council for Local Government, Environmental Affairs and Development Planning, Western Cape and Another v Plotz NO and Another* [2017] ZASCA 175 paras 20 and 21.

Alternative grounds

[66] The alternative grounds of appeal, namely that the Controller's decision was allegedly procedurally unfair or that he was allegedly biased, should have formed the subject of the internal appeal. They will therefore not be considered further in much detail in this judgment.

[67] If it was to be found that these alternative grounds should have been determined by this Court, then I simply record that: material disputes of fact exist as to whether the procedure adopted by the Controller was unfair and whether the Controller was biased; the rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[42] therefore finds application; the version of the respondent accordingly prevails in respect of any material factual disputes.

[68] Pine Glow maintains that it was unaware of what transpired with the reconsideration by the Controller until, on 26 November 2020, it came to its knowledge that construction activities had commenced on the site and it was notified by the respondents' attorney on 7 December 2020, that the site and retail licences had been issued by the Controller. This is disputed. The respondents allege that subsequent to the Minister's decision being conveyed to the parties, Pine Glow, on 5 February 2020, addressed a letter to the Minister alleging that the Minister's decision constituted a failure to take a decision, demanded that the Minister provide reasons, and claiming that the Controller was now *functus officio*.

[69] Pine Glow failed to challenge the decision of the Minister. It did nothing further. It was aware that in the absence of the Minister's decision being challenged, the Controller would act on such decision and re-evaluate the applications taking into account the new information. The Controller requested further information from competing filling stations before deciding the applications. This included Pine Glow,

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[42] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

trading as ‘Caltex Mpumalanga North Marketer’, which responded and supplied information. After a site inspection and volume data being requested, Pine Glow made further representations to the Controller. The respondents made no further representations and did not submit any further documents in addition to what had previously been submitted to the Minister as part of the appeal. On 12 November 2020 the Controller issued the licences.

Conclusion

[70] Pine Glow has not established any circumstances, leave aside special circumstances, why the appeal should succeed. The appeal accordingly falls to be dismissed.

Costs

[71] The respondents have been successful. There is no reason why they should not be entitled to their costs of the appeal. The respondents were represented before this Court by two counsel and Pine Glow by four counsel. It is appropriate and fair that the costs of two counsel be allowed.

Order

[72] The following order is granted:

1 The appeal is dismissed.

2 The appellant is directed to pay the third and fourth respondents’ costs of the appeal, such costs to include the costs of two counsel where so employed.

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P A KOEN

JUDGE OF APPEAL

Appearances

For the appellant:	M C Erasmus SC (with him E Bloem, D J Van Heerden and E Ngantweni)
Instructed by:	Doyer & Doyer Attorneys, Mbombela Symington De Kok Attorneys, Bloemfontein
For the third and fourth respondents:	J A Venter (with him N Satekge)
Instructed by:	A Kock & Associates, Mbombela Honey Attorneys, Bloemfontein.