THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

CASE NO: 530/05

Reportable

In the matter between

FUEL RETAILERS ASSOCIATION OF SA (PTY) LTD Appellant

and

DIRECTOR GENERAL ENVIRONMENTAL MANAGEMENT, MPUMALANGA AND 13 OTHERS Respondents

Coram**:** **HARMS, CONRADIE, LEWIS, MAYA JJA, CACHALIA AJA**
Heard: 21 AUGUST 2006
Delivered: 22 SEPTEMBER 2006

Summary Decision of the MEC, Department of Agriculture, Conservation and Environmental Management, Mpumalanga to allow the construction of a filling station and the installation of fuel storage tanks on a site in White River not set aside on review: accepting the local authority's decision as to rezoning, based on need and desirability, and making the development subject to obtaining permits and authority where necessary from the Department of Water Affairs, does not vitiate the decision.

Neutral citation: This case may be cited as Fuel Retailers Association v DG, Environmental Management, Mpumalanga [2006] SCA 109 RSA

LEWIS JA

[1] The appellant in this matter, Fuel Retailers Association of South Africa (Pty) Ltd (Fuel Retailers), is a company which represents the interests of filling station proprietors across South Africa. It is represented in this litigation by Mr Tom Hugo Le Roux, the owner of two filling stations, and with an interest in a third still to be constructed, in the town of White River, Mpumalanga. Fuel Retailers applied in the court below (the Pretoria High Court) for the setting aside of a decision made by the second respondent, the Member of the Executive Committee of the Department of Agriculture, Conservation and Environment, Mpumalanga (the MEC), and upheld on appeal by the first respondent, the Director General, Environmental Management, Mpumalanga, (the DG). The decision in question was to permit the construction of a filling station in White River. The application to set aside the decision was brought in terms of the common law, the Environment Conservation Act 73 of 1989 (the ECA), and, alternatively, the Promotion of Administrative Justice Act 3 of 2000 (PAJA).

[2] The relief sought was opposed not only by the DG and the MEC, but by the thirteenth respondent, Lowveld Motors (Pty) Ltd (Lowveld Motors), represented by Mr George Dolezal. The company acquired the rights to the land on which the filling station in issue is to be built from the ninth to the twelfth respondents, trustees of the Imama Family Trust (Imama). The trustees and the other respondents, local and provincial authorities, do not feature in the litigation.

[3] Webster J in the court below refused the application for the setting aside of the decision of the MEC. The appeal against the court's decision lies with its leave. Although the record of decision attacked by Fuel Retailers is signed by the Director of Environmental Management in the Department of the MEC, and the decision was in effect made by Mr David Hlatshwayo, the Deputy Director of the Department (who deposed to the answering affidavit on behalf of the MEC), I shall for the sake of convenience refer to the decision-maker as the MEC.

[4] The background to the application for the setting aside of the decision is briefly as follows. Imama applied to the MEC for the establishment of a filling station in Kingsview, White River, on the main road to Hazyview. The application was made on its behalf by a firm of environmental management services, Globecon, which prepared a 'scoping report'

in compliance with Regulations 1182 and 1183[1] published in terms of the ECA. The construction of facilities for the storage of fuel is a listed activity (one which may have a substantial detrimental effect on the environment) under the Regulations published under s 21 of the ECA. Authority must thus be obtained in terms of the regulations for the construction of fuel storage tanks and applications for authorization must conform with the requirements of the Regulations.

[5] The record of decision, made in terms of s 22 of the ECA, was signed on 9 January 2002. It granted authority for the installation of three underground fuel tanks with a capacity of 21 500 litres each for leaded and unleaded petrol and diesel respectively; the erection of a convenience store, a four-post canopy, ablution facilities and driveways on to the premises. The record of decision states that the following were 'key factors' (presumably in deciding to grant the application):

'1 The property has been rezoned from "special" to "business".

2 No potential threatened plant and animal species were recorded during the site investigation.

3 All identified and perceived impacts were satisfactorily dealt with in the Scoping Report and the Addendum to the Scoping Report. The department is satisfied that the recommendations proposed are sufficient to minimize any negative impacts.'

[6] The decision was also made subject to a number of conditions, set out in an annexure. These included a prohibition on development without obtaining the necessary permits or approvals of the Department of Water Affairs and Forestry (DWAF) and the White River Local Authority. The annexure further states 'This Department may change or amend any of the conditions in this authorization if, in the opinion of the Department, it is environmentally justified.' I shall revert to these 'conditions' since they form the basis for part of the attack on the decision by Fuel Retailers.

[7] The application and decision-making process is described by Hlatshwayo in a document giving reasons for the decision. He is in charge of the department that deals with applications in respect of listed activities and is himself educated and experienced in environmental management. The application prepared by Globecon complied, he said, with all the requirements of the Regulations and the ECA. After an initial consideration of a plan of study prepared by Globecon, Hlatshwayo, in August 2000, asked for further

[1] GN R1182 and 1183, *GG* 18261 of 5 September 1997.

information from Globecon, and requested that a public meeting be held to ensure proper consultation with all parties who might be affected by the decision. On 20 September 2000 another environmental management firm, Ecotechnik, registered as an interested and affected party. On the same day Globecon filed its full scoping report.

[8] Attached to the scoping report was a report on the geotechnical and geohydrological investigations done by the firm Geo 3 in respect of the site. Hlatshwayo then referred the scoping report for comment to the DWAF. The reason for the referral was that there is a borehole on, and an aquifer running beneath, the property and the expertise of officials in the DWAF was needed to assess Geo 3's report.

[9] In October 2000 Ecotechnik objected to the construction of the filling station inter alia on the bases that no noise or visual impact assessment had been done and that the quality of the water pumped from the borehole and running through the aquifer might be adversely affected by the existence of the filling station and possible leakage from the fuel tanks. The objection was referred to the DWAF for comment. The objection was followed by an evaluation by Ecotechnik of Globecon's scoping report. It was not based on any investigation of its own.

[10] Hlatshwayo stated that he was 'convinced that proper surveys were done and that the results of Messrs Geo 3 were well founded and scientifically based'. The applicants, he said 'were realistic in their proposals, accepted that there will be an impact on the environment but I was convinced that scientifically the impact when weighed with the economic development, social acceptability, visual impact and in general from an environmental science perspective far outweighs the impact on the environment. I was convinced that the impact on the environment will not be that significant . . . .' The applicants, he added, had convinced him that mitigatory steps were being taken to ensure that the environment was not adversely affected. Moreover, Globecon had responded to the evaluation made by Ecotechnik and had satisfactorily addressed their objections.

[11] The DWAF responded to the scoping report in May 2001, accepting the report of Geo 3, and stating that the developer must ensure that there was no pollution of groundwater, and that there must be monitoring as proposed in the report and in accordance with regulations. Subsequently a public meeting was held (in December 2001): the meeting was attended by an employee of Ecotechnick who raised no queries and made no

objections. Further information was supplied as to the noise impact. Hlatshwayo was then satisfied that all objections had been met and accordingly recommended the grant of the authorization. Nonenetheless, because of concern about the aquifer, he made the development subject to the taking of mitigating measures and obtaining of permits where necessary.

[12] An appeal against the issuing of the record of decision was made by Ecotechnick to Dr Garth Batchelor, the Director of the Department authorized to deal with appeals in terms of the ECA and Regulations. The appeal documentation consisted of a letter coupled with a report from consulting geologists, De Villiers Cronje Consulting Engineering Geologists. This report was based on that of Geo 3, and was not the result of any independent tests done. Batchelor considered the report of De Villiers Cronje to be incorrect in a number of respects. Nothing turns on this. He was satisfied that the appeal was without merit and rejected it.

[13] The MEC, the DG and Lowveld Motors argue that Fuel Retailers' opposition to the application for the development of a filling station is plainly motivated by the wish to stifle competition but is thinly disguised as a desire to protect the environment. The interests of Tom le Roux Hugo in other filling stations in the area (which were not disclosed in the founding affidavit) bear out the suggestion. As will be seen from a discussion of the objections, there appears to be some merit in the contention. Fuel Retailers, in the application to the high court to set aside the decision of the MEC, raised 11 grounds of review all purportedly relating to environmental issues. It is not clear from the heads of argument of Fuel Retailers' counsel, nor from the application itself, where it relies on the common law, on the ECA, or on PAJA. These grounds overlap to some extent. I shall deal with them, where necessary, discretely.

Failure to take into account 'socio-economic considerations'

[14] The MEC failed, it is alleged, to consider the need and desirability for a filling station on the site, together with its sustainability. These factors were referred to by Fuel Retailers as 'socio-economic considerations'. The MEC and the DG accept that such factors must be taken into account when considering an application for authority to carry on a listed activity. Lowveld Motors, on the other hand, argues that these are not factors relevant to a decision by an environmental authority. However, it is clear from a number of decisions that socio-economic considerations must be taken into account in making decisions under

s 22: indeed ss 2, 3 and 4 of the National Environmental Management Act 107 of 1998 (NEMA) require development to be socially, environmentally and economically sustainable. See in this regard *MEC, Agriculture, Conservation and Environment and Land Affairs, Gauteng v Sasol Oil (Pty) Ltd*,[2] *BP SA (Pty) Ltd v MEC, Agriculture, Conservation and Environment and Land Affairs, Gauteng,*[3] *Capital Park Motors CC and Fuel Retailers Association of SA (Pty) Ltd v Shell SA Marketing (Pty) Ltd*[4] and *Turnstone Trading CC v The Director General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga*.[5]

[15] However, as pointed out by the MEC, whose views are supported in a supporting affidavit by a town planner, Ms Irma Muller, the questions of need, desirability and sustainability were considered when the application for the rezoning of the site was made. The practice in Mpumalanga, which is consistent with the relevant Town Planning Ordinance, is to examine these factors at the stage when rezoning is under consideration. Indeed there has to be a report on need and desirability before property is rezoned. Hlatshwayo, in dealing with the decision of the local authority to rezone the site, said that he had applied his mind to whether need and desirability had been addressed by the local authority. He had 'no reason to doubt' the integrity of the applicant nor of the members of the local authority. That, counters Fuel Retailers, is not enough. The rezoning had taken place eight years before the application to the MEC was made for environmental approval.

[16] Muller, who has expertise in the zoning of property for the construction of filling stations, confirmed that questions of need and desirability would have been considered by the local authority when permitting the rezoning. Subsequent developments in the area would have been permitted taking into account the existing rezoning of the site in question. One of the filling stations in which Le Roux has an interest was constructed after the application in question had been approved. Thus, states Muller, Fuel Retailers 'created their own dilemma': they 'convinced the Local Council that despite the relevant property [the site at issue] a need and desirability for their own development exist'. The same point was made by the DG in his answering affidavit.

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[2] [2006] 2 All SA 17 (SCA).
[3] 2004 (5) SA 124 (W) especially at 144B-D.
[4] Unreported judgment of the Pretoria High Court, case 3016/05, handed down on 18 March 2005.
[5] Unreported judgment of Pretoria High Court per Legodi J, case 3104/04, handed down 11 March 2005 also cited at [2006] JOL 16554 (T).

[17] It is not clear to me what additional factors should be considered by the environmental authorities in assessing need, desirability and sustainability once the local authority has made its decision. The environment may well be adversely affected by unneeded, and thus unsustainable, filling stations that become derelict, but there was no evidence to suggest that this was a possibility.[6] In the circumstances I consider that Webster J in the court below correctly held that the MEC, in having regard to the local authority's obligations when making the rezoning decision, applied his mind to these factors and took them into account when making the decision to allow construction of the filling station.

[18] It should be noted that the eleventh review ground raised by Fuel Retailers is in effect a repeat of the complaint that the MEC did not properly take into consideration the questions of need, desirability and sustainability since Hlatshwayo had relied on the earlier rezoning decision and the integrity of the officials in the local authority who had made the decision. This is argued to be an impermissible, piecemeal approach. The argument must fail for the same reason as does the argument that the MEC was not entitled to rely on the rezoning decision of the local authority in considering the socio-economic factors: the approach was to take into account a decision made properly by the appropriate authority charged with the duty to consider such matters. There was no evidence at all that the rezoning decision was subject to attack and nothing to show that circumstances had subsequently changed.

Failure to consider alternatives to the proposed development

[19] Regulation 7(1)(b)[7] provides that in the 'plan of study for an environmental impact assessment', there must be a description of the 'feasible alternatives identified during scoping that may be further investigated'. Fuel Retailers argues that no feasible alternatives were considered. The scoping report explained why the particular site was considered most suitable, and no other possibilities were placed before the MEC. In the circumstances there were no feasible alternatives for the MEC to consider. This ground accordingly has no basis and is rejected.

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[6] See, however, the discussion of the need to consider the impact of social, economic and environmental activities together in Tracy-Lynn Field 'Sustainable development versus environmentalism: competing paradigms for the South African EIA regime' (2006) 123 *SALJ* 409. The author argues that attempting to 'separate the commercial aspects of a filling station from its environmental features is not only impractical but makes little sense from an environmental perspective'. She relies in this regard on the decision in *Sasol* above para 15.

[7] Regulations in respect of listed activities under s 21 of ECA, promulgated under ss 26 and 28 of the ECA in GN R1183 *GG* 18261 of 5 September 1997.

Failure to consider the effect of the construction of fuel tanks on the underground water system, particularly the aquifer

[20] Fuel Retailers raises five grounds of review which relate to the potential contamination of the ground water, the aquifer in particular, in the area. It was not in dispute that there is a borehole on the property which has as its source an aquifer which runs some 16 meters underground. (There is some confusion as to the depth of the aquifer but this is not relevant to the issues.) Fuel Retailers alleges that the installation of fuel storage tanks and the possibility of leaks of fuel into the natural water system are serious hazards, this despite the mitigatory measures that the applicants are obliged to take.

[21] It is not necessary to deal with each ground separately. The gravamen of the complaints is that the MEC delegated his decision-making power in respect of the construction of the filling station and its effect on the natural water system by transferring responsibility to the DWAF. Further complaints are premised on an alleged failure to appreciate criticisms of conclusions drawn by the applicant's advisers.

[22] It will be recalled that the record of decision was made subject to various conditions,[8] inter alia that the DWAF issue the necessary permits. The consequence, argues Fuel Retailers, is that the DWAF in effect makes the decision whether the filling station can be constructed. Such delegation is contrary to the requirements of PAJA and may be reviewed under s 6(2)(e)(ii) which provides that administrative action is reviewable where the administrator acted under a delegation of power which was not authorised by the empowering provision; or under s 6(2)((e)(iv) which makes reviewable action taken 'because of the unauthorised or unwarranted dictates of another person or body'.

[23] The latter provision is plainly inapplicable. The decision was made before there was any reference to the DWAF. Equally, there was no delegation of decision-making power: the decision was made and the applicant was then required to obtain permits required by the DWAF and legislation. The MEC was in fact requiring further steps to be taken to ensure the protection of the environment. It is not the DWAF, therefore, that decides whether or not to allow the construction of a filling station. On the contrary: the DWAF is required by the MEC to monitor the project and to ensure that the water system is

[8] Section 22(3) of the ECA provides that authorization may be granted subject to conditions and the regulations expressly make it possible for a decision to be issued subject to conditions: reg 10(2)(g) states that the record of decision must include the conditions of the authorisation including measures to mitigate, control or manage environmental impacts or to rehabilitate the environment.

protected while Lowveld Motors exercises its right to construct the filling station and instal underground fuel storage facilities. There is thus no substance in these grounds of review and Webster J in the court below correctly dismissed them.

The alleged failure to take the views of engineers for Fuel Retailers into account

[24] The complaint of Fuel Retailers in this regard is that both the MEC and the DG did not appreciate nor take into account the views of the engineers De Villiers Cronje. As the respondents point out, the proceedings in the court below were for a review of the decision made by the MEC. The complaints that he erred in understanding the opinions of the experts would be grounds for appeal but not review.[9] In any event, as the MEC and the DG point out, they considered the reports placed before them: the criticisms levelled by De Villiers Cronje at the geotechnical reports produced by Geo 3, allegedly misunderstood by the MEC and the DG, were based entirely on De Villiers Cronje's evaluation of the Geo 3 report and not on their independent investigations. The decision of the court below that the MEC and DG had properly applied their minds to the various reports and made a decision in good faith cannot be faulted.

The reservation of the right to amend the conditions of authorisation

[25] The argument of Fuel Retailers in this regard is that once the decision was made, and the appeal rejected, the MEC and the DG had discharged their functions and had no further authority to deal with the application. However, the power to amend the conditions is reserved to cover new or unforeseen environmental circumstances: reg 9(3)[10] provides that after the relevant authority has made a decision it may 'from time to time, on new information, review any condition determined by it . . . and if it deems it necessary, delete or amend such condition, or at its discretion, determine new conditions, in a manner that is lawful, reasonable and procedurally fair'. Accordingly there can be no objection to the inclusion of this term. If the relevant authority were to act contrary to the provisions of the regulation there might be cause for complaint. But that has not arisen. Accordingly, in my view, the court below correctly rejected this ground of review.

[26] The decision of Webster J to reject the application for the review of the decisions of the MEC and the DG on all the grounds raised by Fuel Retailers must thus be upheld.

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[9] See *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* 1988 (3) SA 132 (A) and *Pretoria Portland Cement Co Ltd v Competition Commission* 2003 (2) 385 (SCA) para 35.
[10] Inserted in GN R1183 *GG* 18261 by GN R672 of 10 May 2002.

[27] The appeal is dismissed with costs.

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C H LEWIS

Judge of Appeal

CONCUR:

HARMS JA

CONRADIE JA

MAYA JA

CACHALIA AJA