



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**  
**JUDGMENT**

**Reportable**

Case no: 223/2023

In the matter between:

**GENSINGER AND NEAVE CC**

**FIRST APPELLANT**

**DJ FUELS (PTY) LTD**

**SECOND APPELLANT**

**STEIN FUELS (PTY) LTD**

**THIRD APPELLANT**

**SCHOEIVIV ENTERPRISES CC**

**FOURTH APPELLANT**

and

**MINISTER OF MINERAL RESOURCES**

**FIRST RESPONDENT**

**AND ENERGY**

**CONTROLLER OF PETROLEUM**

**SECOND RESPONDENT**

**PRODUCTS**

**SHIPTECH MATATIELE (PTY) LTD**

**THIRD RESPONDENT**

**MATATIELE SERVICE STATION**

**(PTY) LTD**

**FOURTH RESPONDENT**

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

**Coram:** MOKGOHLOA, MBATHA and WEINER JJA and COPPIN and BLOEM AJJA

**Heard:** 16 February 2024

**Delivered:** This judgment was handed down electronically by circulation to the parties' representatives by email, published on the Supreme Court of Appeal

website, and released to SAFLII. The date and time for hand-down is deemed to be 11h00 on 15 April 2024.

**Summary:** Administrative law – interpretation of section 12A(1)(a) of the Petroleum Products Act 120 of 1977 – whether the holders of site and retail licences are persons ‘directly affected’ by the Controller’s decision to grant site and retail licences to applicants to retail petroleum products in the same area as the holders of those licences – whether the holders of such licences have a right to appeal against the Controller’s decision – whether the Controller’s administrative decision is suspended by an appeal against that decision.

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## ORDER

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**On appeal from:** KwaZulu-Natal Division of the High Court, Pietermaritzburg (Padayachee AJ) sitting as court of first instance):

1. The appeal is upheld with costs.
2. The order of the court a quo is set aside and replaced with the following order:
  - ‘1. It is declared that the provisions of the Petroleum Products Act 120 of 1977 (the Act) do not oust the common law principle that there is a presumption that an administrative decision is suspended by an appeal against that decision.
  2. It is declared that the applicants’ appeal, in terms of section 12A of the Act, against the decisions of the Controller of Petroleum Products to approve the third and fourth respondents’ applications for site and retail licences and subsequently to issue those licences to them suspends the Controller’s decisions pending the finalisation of such appeal.
  3. The costs are to be paid by the third and fourth respondents, jointly and severally, the one paying the other to be absolved.
  4. The third and fourth respondents’ counter application is dismissed with costs.’
3. The application is remitted to the High Court for it to deal with the application for an interim interdict.

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## JUDGMENT

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**Bloem AJA (Mokgohloa, Mbatha and Weiner JJA and Coppin AJA concurring):**

- [1] Two issues call for determination in this appeal. The first issue is whether

holders of site and retail licences<sup>1</sup> under the Petroleum Products Act 120 of 1977 (the Act) are ‘directly affected’, as contemplated in s 12A of the Act, by a decision of the Controller of Petroleum Products (the Controller), the second respondent, to approve applications for site and retail licences. The decision in issue related to the Controller approving applications for site and retail licences to the third and fourth respondents, to whom site and retail licences were subsequently issued in respect of the same area in which the appellants, as holders of site and retail licences, retail petroleum products. I shall refer to the decision to grant the site and retail licences and the decision to subsequently issue the licences as ‘the Controller’s decision’, unless the context indicates otherwise. The second issue is whether an appeal to the Minister of Mineral Resources and Energy (the Minister), the first respondent, against the Controller’s decision has the effect of suspending that decision pending the outcome of the appeal.

[2] The four appellants are holders of site and retail licences issued to them under the Act in respect of three outlets. They operate the 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 another. During May 2019, the third respondent made an application to the Controller in terms of the Act for a site licence and the fourth respondent applied for a retail licence in respect of the same site (applications for site and retail licences) to enable them to operate an additional outlet in Matatiele. I shall refer to the third and fourth respondents, being Shiptech Matatiele (Pty) Ltd and Matatiele Service Station (Pty) Ltd, as ‘the respondents’. The appellants lodged an objection against the applications, contending that an additional retailer in Matatiele would ‘cannibalise’ the sales of the existing retailers and undermine the requirements

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<sup>1</sup> In terms of s 1 of the Act, ‘site’ means premises on land zoned and approved by a competent authority for the retailing of prescribed petroleum products; ‘retail licence’ means a licence to conduct the business of a retailer; ‘retail’ means the sale of petroleum products to an end-consumer at a site and ‘retailer’ shall be interpreted accordingly; and ‘outlet’, in relation to a petroleum product, means any place where any petroleum product is offered for sale to consumers’.

stipulated in the Act 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<sup>2</sup> (the regulations) and approved the applications. The Controller issued the site and retail licences to the respondents on 8 March 2021.

[3] On 8 April 2021, the Controller's office informed the appellants that the respondents' applications for site and retail licences were successful<sup>3</sup> and informed the appellants that they had 60 days within which to appeal to the Minister against the Controller's decision. The appellants lodged their appeal on 7 June 2021, within the 60-day period, and claimed that they understood the common law to be that the appeal suspended the Controller's decision pending the outcome of an appeal and that, during that period, the respondents would not act on the licences to which they had objected. The Department of Mineral Resources and Energy (the Department) and seemingly the respondents adopted the attitude that nothing in the Act or the regulations 'suspends the issued site and retail licences pending an appeal nor is there any provision that prohibits a licensee from constructing a filling station or commencing with retailing activities pending an appeal'.

[4] Fearing that the respondents would commence operations as a retailer in Matatiele before the appeal was finalised, the appellants approached the KwaZulu Natal Division of the High Court, Pietermaritzburg (the high court) for declaratory orders and an interdict. They sought an order declaring that the provisions of the Act do not oust the common law principle that an administrative

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<sup>2</sup> Published under GN R286 in GG 28665 of 27 March 2012, as amended by GN R1061 in GG 35984 of 19 December 2012.

<sup>3</sup> The appellants attached two unsigned and undated letters from the Controller to the main replying affidavit. The deponent of the replying affidavit stated that those letters were received four days before the main answering affidavit was deposed to. In those letters the third and fourth respondents were informed that their applications for site and retail licences had not been granted. Since the letters were referred to in the replying affidavit and since there was no response thereto, it would be inappropriate to make a finding in respect thereof.

appeal noted against an administrative decision suspends the 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.<sup>4</sup> They also sought an order that the respondents be interdicted and restrained, pending the finalisation of this application and the appeal to the Minister, from retailing under the Act from the designated site in Matatiele and costs.

[5] 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 appeal 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 appeal lodged by the appellants lapsed on 6 September 2021; and alternatively, that after that date, the licences issued to them were not suspended.

[6] The high court found in favour of the respondents. It 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 been lodged. It also found that it was only the Controller, and not private parties, such as the appellants, who was entitled to enforce the provisions of the Act. Thus, the appellants did not have standing to institute the application for a declarator against the respondents. The appeal is with the leave of the high court.

### **Statutory framework**

[7] In terms of s 2B(1) of the Act, the Controller must issue licences in

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<sup>4</sup> The second prayer is not for a declarator. It is an order that gives effect to the first declarator, if granted.

accordance with the Act. In considering the issuing of any licence under the Act, the Controller shall give effect to the provisions of s 2C and the objectives set out in s 2B(2). Those objectives are:

- ‘(a) promoting an efficient manufacturing, wholesaling and retailing petroleum industry;
- (b) facilitating an environment conducive to efficient and commercially justifiable investment;
- (c) the creation of employment opportunities and the development of small businesses in the petroleum sector;
- (d) ensuring countrywide availability of petroleum products at competitive prices; and
- (e) promoting access to affordable petroleum products by low-income consumers for household use.’

[8] Section 2C provides for the transformation of the South African petroleum and liquid fuels industry. Section 2C(1)(a) and (b) provide that, in considering licence applications in terms of the Act, the Controller shall promote the advancement of historically disadvantaged South Africans; and give effect to the Charter.

[9] The Charter is set out in Schedule 1 of the Act. In terms of the Charter, the signatories thereto must provide a framework for progressing the empowerment of historically disadvantaged South Africans in the liquid fuels industry. They have agreed to create a fair opportunity for entry to the retail network and commercial sectors by historically disadvantaged South African companies.

[10] In relevant part, s 2E(1) provides that the Minister must prescribe a system for the allocation of sites and their corresponding retail licences by which the Controller shall be bound, provided that the Controller shall only be bound by the

provisions of such a system for the period set out in that regulation or any amendment thereto, or any substitution thereof, which period may not exceed 10 years from the date of commencement of that regulation. In terms of ss 2E(3)(a), (b), (c) and (d) the system for the allocation of licences, contemplated in s 2E(1), must intend to transform the retail sector into one that has the optimum number of efficient sites; must intend to achieve an equilibrium amongst all participants in the petroleum products industry within the constraints of the Act; must be based on the objectives referred to in s 2B(2) and 2C; must promote efficient investment in the retail sector and the productive use of retail facilities and may in this regard: (i) limit the total number of site and corresponding retail licences in any period; (ii) link the total number of site and corresponding retail licences in any period, to the total mass or volume of prescribed petroleum products sold by licensed retailers; and (iii) use any other appropriate means.

[11] Section 12A of the Act provides for appeals and ss (1) reads as follows: ‘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.’

[12] Chapter 1 of the regulations deals with applications for site licences while Chapter 2 thereof deals with applications for retail licences. In terms of regulation 3(2), an application for a site licence must be lodged together with an application for a corresponding retail licence.

[13] Regulations 4 and 16 require applicants for a site licence and a retail licence respectively to give notice of such applications. Those notices must be published in a prominent manner and must state:

‘(a) the name of the applicant;



- (b) the application number issued by the Controller upon acceptance of the application;
- (c) the purpose of the application;
- (d) the place where the application will be available for inspection by any member of the public;
- (e) the period within which any objection to the issuing of the licence may be lodged with the Controller; and
- (f) the address of the Controller where objections may be lodged.’<sup>5</sup>

[14] Regulation 18(2) provides that in the case of an application for a retail licence made by a person in respect of whom s 2D<sup>6</sup> of the Act is not applicable, the Controller must be satisfied that (a) the retailing business is economically viable; and (b) the retailing business will promote licensing objectives stipulated in s 2B(2) of the Act.

[15] It is against the above statutory framework that it must be considered whether the appellants are directly affected by the Controller’s decision, as contemplated under s 12A(1) of the Act. If they are not, then they did not have the right to appeal against the Controller’s decision. They would then not have had standing to institute the application for the relief sought, and the appeal must then be dismissed. If it is found that they are directly affected by the Controller’s decision, then they had the right to appeal against the Controller’s decision. The effect of the appeal must then be considered.

### **Whether the appellants are directly affected by the Controller’s decision**

[16] In terms of s 1 thereof, the Act includes any regulation, notice and licence issued or given in terms of the Act. It means that the Act includes the above regulations, since the Minister issued them in terms of the Act. The right to appeal must be seen in the context that, in terms of regulations 4(2)(d) and 16(2)(d), any

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<sup>5</sup> Regulations 4(2) and 16(2).

<sup>6</sup> Section 2D of the Act provides for transitional licensing provisions, which provisions are not applicable to the facts of this case.

member of the public has the right to inspect the notice of application for a licence. Regulations 4(2)(e) and 16(2)(e) provide that the notice for a licence must state the period within which any objection to the issuing of the licence may be lodged with the Controller. The respondents submitted that not every member of the public has the right to object to the granting of a licence to an applicant. They limited the right to lodge an objection to participants in the application, namely those who made the application for a licence.

[17] 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 purpose of allowing objections is to ensure that, when the Controller considers whether to issue a licence, he or she is in possession of as much information as possible, relevant to that application, to enable him or her to give effect to the provisions of s 2C and the objectives contained in s 2B(2)(a) to (e) of the Act. That information cannot be obtained from only an applicant. If the above regulations are read purposively in the context of the scheme of the Act, they must be interpreted to mean that any member of the public, inclusive of holders of site and retail licences, has the right to lodge an objection to the issuing of a licence to an applicant. In that way the Controller will obtain sufficient information to enable him or her to give effect to the objectives contained in s 2B(2) and the provisions of s 2C. The submission made by the respondents can accordingly not be sustained.

[18] Once the Controller has decided to approve an application for a licence, not every member of the public has the right to appeal to the Minister against the Controller's decision. That much is clear from s 12A which limits that right to persons who are 'directly affected' by the Controller's decision. There is accordingly a difference between the objection stage and the appeal stage of the application process. The objection stage is open to any member of the public, whereas the appeal stage is open only to persons who are 'directly affected' by

the Controller's decision. Whether a person is 'directly affected' by the Controller's decision depends on the facts of each case, as well as the scheme and purpose of the Act.

[19] To interpret the meaning of the words 'directly affected' in s 12A(1), the provisions of s 2C and the objectives contained in s 2B(2) must be considered. In this case, the applicable objectives are the facilitation of an environment which is conducive to efficient and commercially justifiable investment, the creation of employment opportunities and the development of viable small businesses in the petroleum sector. Where the probabilities indicate that an additional retailer will sell less volumes of petroleum products required for feasibility, such an investment by the additional retailer will neither be efficient nor commercially justifiable. The situation will be aggravated when the additional retailer causes the existing retailers to lose volumes in sales. The investments in all the retailers, existing and additional, will be at stake. The Controller will, under those circumstances, neither promote a retail sector that has the optimum number of efficient sites, and an efficient retailing petroleum industry in Matatiele, nor will he or she develop any of those small businesses.<sup>7</sup>

[20] The appellants submitted that it is immediately apparent from the wording of s 12A that the right of appeal is not confined only to an unsuccessful applicant for a licence, but that the right is extended to any person 'directly affected' by the Controller's decision. They submitted that, in this case, they would be included in the class of persons directly affected by the Controller's decision because first, they lodged an objection to the granting of site and retail licences to the respondents, having been invited in the notice of application to do so; and second, they have site and retail licences, which allow them to retail petroleum products at their respective outlets in the area. The appellants contended that the granting

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<sup>7</sup> *ABM Motors v Minister of Minerals and Energy and Others* 2018 (5) SA 540 (KZP) para 4.

of the site and retail licences to the respondents will negatively affect their respective outlets, in that customers using their outlets would be re-allocated to the respondents' outlet at their (the appellants') expense.

[21] In support of their submission that they were “directly affected” by the Controller’s decision, the appellants relied on *Cianam Trading 104 CC v Peters MP and Others (Cianam)*.<sup>8</sup> But *Cianam* is distinguishable. In *Cianam* the court was required to determine whether the applicant had a right directly affected by the Minister’s appeal decision. The issue in the present case is whether the appellants had the right to appeal against the Controller’s decision. Section 12A(1) is not concerned with the effects of the Minister’s ‘appeal decision’ on a person who is affected thereby. It concerns the right to appeal to the Minister by a person directly affected by the Controller’s decision. Whether the applicant in *Cianam* was a ‘person directly affected by [the] decision of the Controller’ was not an issue before the court. The finding by the high court that ‘the applicant has a right to appeal to the [Minister] against the dismissal of any objection by the Controller’ was therefore *obiter*.

[22] The appellants also relied on *Pine Glow Investments (Pty) Ltd v Minister of Energy and Others*<sup>9</sup> (*Pine Glow*) for the submission that they were directly affected by the Controller’s decision. The respondents sought to distinguish *Pine Glow* from the present case. Their counsel pointed out that in *Pine Glow* the parties accepted that standing existed provided that the facts showed that the applicant was suffering losses. He furthermore pointed out that there was no legal challenge on whether an objector has the right to appeal the Controller’s decision and the right to challenge the Minister’s appeal decision on review. The appellants submitted that it was on that basis that the court found that the respondents’ challenge to the alleged lack of standing was staggering. They

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<sup>8</sup> *Cianam Trading 104 CC v Peters MP and Others* [2014] ZAGPPHC 974.

<sup>9</sup> *Pine Glow Investments (Pty) Ltd v Minister of Energy and Others* [2021] ZAMPMBHC 49.

concluded that the court found in the applicant's favour 'on the factually based issue of whether the applicant had shown prejudice, therefore that it had standing. That is a different issue to the one which served before the court a quo.' In *Pine Glow* two of the respondents contended that the applicant, as a wholesaler of petroleum products, failed to establish that it had standing. They contended that the applicant would not be 'adversely and materially affected' by the Controller's decision awarding the site and retail licences to the respondents.

[23] The court in *Pine Glow* found that the fact that the applicant was a site licence holder, on its own, gave it a direct interest in the matter.<sup>10</sup> The court also considered that one of the respondents was the applicant's business tenant because it operated an outlet on land belonging to the applicant. The applicant received rental income from that respondent. The court found that, in the event of a decline in the number or volume of petroleum products sold by that respondent, the knock-on effect on the applicant, as holder of a wholesale licence, would be inexorable. It was found that the applicant's interests were not only direct, but also real and not hypothetical. The court considered the applicant's evidence to the effect that, if the respondents were to be allowed to open an outlet, the applicant stood to lose on revenue. The respondents expected to pump 350 litres of petroleum products<sup>11</sup> per month, which means that the existing retailers in the area, including the applicant, would absorb the decline in volumes. The court found that the anticipated decline in volumes and resultant loss in revenue was material 'and it will affect the Applicant negatively insofar as it will diminish its financial margins. Over and above the financial interest, it cannot be in the interest of justice to deny the Applicant's *locus standi* where the granting of another licence may not enhance the constitutional goals set in the PPA – to ensure the observance of the transformative agenda as contained in s 2C of the PPA. The satisfaction of the transformative agenda does not entail substituting

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<sup>10</sup> Ibid para 16.

<sup>11</sup> I am sure that the learned Judge meant to refer to 350 000 litres of petroleum products per month.

one previously disadvantaged individual by another.’ In the circumstances, it was found that the Controller’s decision materially and adversely affected the applicant and that it had accordingly successfully demonstrated that it had standing. The reasoning and conclusion of the court in *Pine Glow* cannot be faulted.

[24] In *Giant Concerts CC v Ronaldo Investments (Pty) Ltd and Others*<sup>12</sup> (*Giant Concerts*) it was held that a litigant who approaches the court in its own interest must show that a contested law or decision directly affects its rights or interests, or potential rights or interests, and that the requirement of standing must be generously and broadly interpreted to accord with constitutional goals. Such a litigant must establish that its rights or interests are directly affected by the impugned law or conduct. Those interests must be real and not hypothetical or academic. The litigant must show that its interests and the direct effect are not unsubstantiated. The appellants in the present case obviously have a commercial interest in the Controller’s decision. It is that interest that they seek to assert. It was also found in *Giant Concerts*<sup>13</sup> that a commercial interest in the subject matter of the transaction<sup>14</sup> will be sufficient to establish own interest standing to challenge that transaction.

[25] In the light of *Giant Concerts* and *Pine Glow* it should be determined whether the appellants have demonstrated, factually, that their rights or interests have been or will directly be affected by the Controller’s decision. The right to appeal does not arise from or is not acquired from the Controller’s decision, but from the effect that the Controller’s decision will have on the appellants’ interests. In their endeavour to demonstrate how the Controller’s decision would directly affect their interests, the appellants commissioned a report by a consulting firm,

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<sup>12</sup> *Giant Concerts CC v Ronaldo Investments (Pty) Ltd and Others* [2012] ZACC 28; 2013 (3) BCLR 251 (CC) para 41.

<sup>13</sup> *Ibid* para 51.

<sup>14</sup> The sale of land by the eThekweni Municipality to Ronaldo Investments (Pty) Ltd.

FTI Consulting (FTI), for the purposes of commenting on the viability of an additional retailer, considering the prevailing circumstances in the Matatiele area. FTI expressed the view that, based on the sales at the existing outlets, the monthly sales of 300 000 litres of fuel are widely accepted as the lower bound for a feasible outlet; that, based on its calculation, the volume of sales at the respondents' outlet would be between 162 688 and, at best, 225 000 litres of fuel per month, well below the 300 000 litres per month required for feasibility. FTI found that there was no basis to expect that the respondents' outlet would receive a high volume of traffic to sustain a minimum of 300 000 litres of fuel per month required for feasibility. FTI also considered the actual fuel volumes at the three existing outlets in Matatiele and found a declining trend in monthly fuel sales since March 2020. FTI concluded that, if no additional demand for fuel sales could be created, which was not foreseen, the existing demand for such fuel would merely be re-allocated. That will have a negative effect on the existing outlets, resulting in loss of income and loss of employment at those outlets. The drafters of the report also considered that every sale that the respondents' outlet will make, will negatively impact on the sales at the appellants' existing outlets. The decline in sales at the appellants' outlets will in all probability lead to job losses.

[26] In addition, the appellants relied on the Minister's decision on 19 May 2020, less than a year before the Controller's decision was taken in the present case, to uphold the Controller's decision not to grant applications for site and retail licences to Pearden Investments (Pty) Ltd and Pearden Trading (Pty) Ltd (Pearden) in respect of a new outlet for the retail of petroleum products in Matatiele. One of the Minister's reasons for dismissing the appeal was that there was no need for a new outlet in Matatiele if regard was had to, inter alia, the actual fuel sales for the existing outlets in Matatiele and the fact that a new outlet would cause a re-allocation of sales to itself at the expense of the existing outlets. The appellants contended that, since the factual situation has not improved in Matatiele, the Controller should, when she approved the applications in the

present case on 8 March 2021, instead have followed the Minister's reasoning in Pearden. The appellants contended that, on appeal, the Minister will in all probability make the same decision as in Pearden, for the same reasons.

[27] Regard being had to all the evidence adduced by the parties, inclusive of the contents of the FTI report and the Minister's decision in Pearden, I am satisfied that the appellants have demonstrated, based on the grounds upon which they relied, that the Controller's decision will directly affect their commercial rights or interests, as contemplated in s 12A of the Act, in that the sale of petroleum products at their outlets will be negatively affected.

### **Right to appeal**

[28] In the circumstances, since the appellants will be directly affected by the Controller's decision, they have the right to appeal to the Minister against the Controller's decision. It accordingly means that the appellants had standing to institute the application.

### **The effect of the appeal on the Controller's decision**

[29] It is the accepted common law rule of practice in our Courts that, generally, the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with the leave of the Court which granted the judgment.<sup>15</sup> Regarding appeals against administrative decisions, the common law principle is that, where an administrative decision has been taken and an appeal has been noted against that decision, there is a presumption that the administrative decision is suspended by the appeal against that decision, unless the applicable legislation provides that such decision is not suspended by an

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<sup>15</sup> *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 544H-545A and *Commissioner for Inland Revenue v NCR Corporation of South Africa (Pty) Ltd* 1988 (2) SA 765 (A). Those authorities obviously deal with decisions granted by courts and not administrative bodies.



appeal. Legislation may expressly or by necessary implication provide that an appeal does not suspend the decision appealed against.<sup>16</sup> The rule of automatic suspension was applied in *Max v Independent Democrats and Others*<sup>17</sup> because, among others, there was neither a statutory provision nor a provision in the code of conduct of the political party in question to suggest that the rule should not apply.

[30] The Act grants a person, who is directly affected by the Controller's decision, the right to appeal to the Minister. The Act does not provide that an appeal against the Controller's decision does not suspend that decision. It follows that the Controller's decision will be suspended when a person, who is directly affected by the Controller's decision, appeals to the Minister against the Controller's decision. It has already been found that the appellants are directly affected by the Controller's decision. The common law principle is applicable to the facts of this case, with the result that the appellants' appeal in terms of s 12A of the Act suspends the Controller's decision. The Minister has, for no apparent reason, not yet decided the appellants' appeal. The respondents' contention that the appeal has lapsed, has no factual or legal basis.

## **Declarator**

[31] An applicant seeking a declaratory order must satisfy the court that he or she is a person interested in an existing, future or contingent right or obligation.<sup>18</sup>

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<sup>16</sup> *Cotty and Others v Registrar, Council for Medical Schemes and Others* [2021] ZAGPPHC 68; 2021 (4) SA 466 (GP) paras 42-64 and the authorities referred to therein.

<sup>17</sup> *Max v Independent Democrats and Others* 2006 (3) SA 112 (CPD) 118F-120H.

<sup>18</sup> See section 21(1)(c) of the Superior Courts Act 10 of 2013. Section 21 deals with the persons over whom and the matters in relation to which Divisions of the High Court have jurisdiction. One such matter is a declaration of rights. Section 21 reads as follows:

‘(1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power—

(a) to hear and determine appeals from all Magistrates' Courts within its area of jurisdiction;

(b) to review the proceedings of all such courts;

In *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd*<sup>19</sup> this Court emphasised that once the applicant has satisfied the court that it is interested in an existing, future or contingent right or obligation, it does not mean that the court is bound to grant a declarator. The court must consider and decide whether it should refuse or grant a declarator, following an examination of all the relevant factors. The court accordingly has a discretion. In the exercise of that discretion, the court considers whether an applicant, in seeking such a declarator, has standing in terms of s 38 of the Constitution. In line with the doctrine of ripeness, the court may enquire as to whether alternative remedies have been exhausted. In addition, a court will not grant a declaratory order on moot or academic issues, as this would conflict with the doctrine of effectiveness.

[32] Since it has been found that the respondents are directly affected by the Controller's decision and all the relevant factors having been considered above, I find that the appellants have succeeded on appeal to have it declared that the provisions of the Act do not oust the common law principles that an administrative appeal lodged against the Controller's decision suspends the decision.

### **Interim interdict**

[33] The appellants launched the application on 13 October 2021, two and a half years ago. The high court did not consider the merits of the interdict, considering the conclusion to which it arrived in respect of the question of the appellants' standing. The question that arises is what should be done in relation to that issue.

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(c) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.

(2) A Division also has jurisdiction over any person residing or being outside its area of jurisdiction who is joined as a party to any cause in relation to which such court has jurisdiction or who in terms of a third party notice becomes a party to such a cause, if the said person resides or is within the area of jurisdiction of any other Division.

(3) Subject to section 28 and the powers granted under section 4 of the Admiralty Jurisdiction Regulation Act, 1983 (Act 105 of 1983), any Division may issue an order for attachment of property to confirm jurisdiction.'

<sup>19</sup> *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005 (6) SA 205 (SCA) at para 17.

One of the four requirements<sup>20</sup> that the appellants must satisfy to be entitled to the protection of an interim interdict is that the balance of convenience favours the granting of such an interdict. It would be inappropriate for this court to weigh the harm that the appellants are likely to suffer if the interim interdict is not granted against the harm that the respondents are likely to suffer if it is granted, when it is unaware of the present factual situation in respect of the respondents' outlet.<sup>21</sup> Accordingly, it would be just and appropriate for this Court to refer the application back to the high court to consider the merits of the interim interdict. The parties might want to place further facts before the high court to give a correct picture of the present situation. The parties ought to be given an opportunity to do so. In the determination of the interim interdict, the high court should consider the declarator made as far as it is relevant to the merits of the interim interdict.

[34] In the circumstances, the appeal must be upheld. Since the appellants were substantially successful, they are entitled to the costs of the appeal.

[35] In the result, the following order is made:

1. The appeal is upheld, with costs, such costs to include the costs of the application for leave to appeal.
2. The order of the court a quo is set aside and replaced with the following order:
  - ‘1. It is declared that the provisions of the Petroleum Products Act 120 of 1977 (the Act) do not oust the common law principle that there is a presumption that an administrative decision is suspended by an appeal against that decision.

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<sup>20</sup> The requirements of an interim interdict are that the applicant must show (i) that he or she has a *prima facie* right, albeit open to some doubt; (ii) that he or she will suffer irreparable harm if the interdict were not to be granted; (iii) that the balance of convenience favours the granting the interdict; and (iv) that the applicant has no satisfactory alternative remedy.

<sup>21</sup> *City of Tshwane Metropolitan Municipality v AfriForum and Another* [2016] ZACC 19; 2016 (6) SA 279 (CC) para 62.

2. It is declared that the applicants' appeal, in terms of section 12A of the Act, against the decisions of the Controller of Petroleum Products to approve the third and fourth respondents' applications for site and retail licences and subsequently to issue those licences to them suspends the Controller's decisions pending the finalisation of such appeal.
  3. The costs are to be paid by the third and fourth respondents, jointly and severally, the one paying the other to be absolved.
  4. The third and fourth respondents' counterapplication is dismissed with costs.'
3. The application is remitted to the High Court for it to deal with the application for an interim interdict.

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GH BLOEM  
ACTING JUDGE OF APPEAL

## Appearances

For the appellants:	M J Engelbrecht SC.
Instructed by:	Redfern & Findlay attorneys, Pietermaritzburg. Symington de Kok attorneys, Bloemfontein.
For the third and fourth respondents:	A Stokes SC.
Instructed by:	Cox Yeats, Umhlanga Ridge. McIntyre van der Post Inc, Bloemfontein.