DETERMINATION IN TERMS OF SECTION 51(3) OF THE SPATIAL PLANNING AND LAND USE MANAGEMENT ACT, NO. 16 OF 2003 ("SPLUMA")

In the *Exparte* matter between:-

LAVASCO TRADING 1002 (PTY) LTD t/a ENGEN WIMPY WATERSIDE	*First Appellant*
And	
LDM AFRICA FORENSICS (PTY) LTD t/a AYLIFF GARAGE	*Second Appellant*
And	
MOVE ON UP 1074 CC t/a SSS MOTORS	*Third Appellant*
And	
NCL MOOLAS PTY (LTD) t/a NEWCASTLE PITSTOP	*Fourth Appellant*
And	
KWIKCORP 1 CC t/a LEON MOTORS	*Fifth Appellant*
And	
WE-TWO INVESTMENTS CC t/a AUTO CITY	*Sixth Appellant*

And

MR RAHIM ABDOOL KADER	*The Applicant*
And	
NEWCASTLE MUNICIPAL TRIBUNAL	*Objector*

DETERMINATION

INTRODUCTION

1. This is an appeal brought by **Gildenhuys Malatji Attorneys** on or about **31 March 2016** , for and on behalf of six Appellants, in terms of section 51 (1) of the SPLUMA read with regulation 26 of Regulations in terms of SPLUMA, GG No 38594 of 23 March 2015.

2. There is no objecting memorandum from the Applicant. The Municipal Planning Tribunal (MPT) is a party with an interest in terms of section 51(4) read with subsection (5) of the SPLUMA Act No 16 of 2013.

3. The Municipal Manager has, in terms of section 51 (2) of the SPLUMA prepared and submitted the appeal to the executive authority, and later to this appeal committee of the executive authority.

4. In the sitting of **27 February 2017**, the Appeal Committee ruled that the hearing would be adjudicated on the papers lodged. The Appellants lodged a memorandum of appeal. There was no responding memorandum from the Applicant. The MPT filed an opposing memorandum. The appeal record starts from page 1 until page 563 as paginated by the parties on 27 February 2017. The record was further amended by the ruling on the in limine/preliminary issues on **Friday 10 March 2017**.

5. The Appellants submitted five (5) points *in limine* and/or preliminary issues, as amended in the hearing of 27 February 2017. On 10 March 2017 the Appeal Committee served its ruling on the five (5) points *in limine* and/or preliminary issues. Before addressing the main grounds on appeal, it is prudent that the appeal hearing address the issue of condonation.

CONDONATION

6. The Municipal Manager has made an application for deviation from the norm and rules set out in the regulations and By-Laws. The Municipal Manager record specifically non-compliance setting the matter down within the prescribed 21 days. The Municipal Manager has indicated that:

   4.1 this appeal is the first form of appeal to be processed by the Municipality;
   4.2 the municipality intended to err on the side of caution;
   4.3 the appeal is complex in nature;
   4.4 the application for removal of restriction has been meticulous;
   4.5 the matter has been litigious; and
   4.6 the High Court had ordered the Applicant and Appellants to await the outcome of the application to the Municipality, etc. (pages 3-5).

7. The condonation application has not been opposed.

8. As a matter of principle the Appeal Committee does not condone any non-compliance to set rules and regulations as these seek precisely to set the norm, standard and best practice in the administration of such SPLUMA matters. The Appeal Committee wishes to register unequivocally dismay to non-compliance to set rules and regulations. Rules are rules. Any instance of poor planning should not affect nor justify non-compliance. All irregularities associated with this appeal are as a result declared unfair. The procedural non-compliance is found to be irregular.

9. Furthermore, given the peculiarity to the circumstances of this matter, including specifically that the High Court has directed for the remittal of the matter to the Municipality for consideration and adjudication including this appeal as a final municipal process it is just that the matter be heard on this appeal. The finding is further that the matter is one that is complex in nature. As such the substantive submissions are upheld and condonation granted.

THE APPEAL

10. It follows therefore that the hearing warrants adjudication. This determination addresses the appeal.

The Facts

11. There is a large volume of history on this appeal. For ease of reference this summation will not cover all facts, but shall set out salient facts that are material in this appeal.

12. In **2005** the Applicant unsuccessfully applied for the establishment of a petrol filling station. The application was opposed by six companies. The Applicant then lodged an appeal with the then Town Planning Appeal Board.

13. On **23 May 2006** the Town Planning Appeals Board ruled on a restrictive condition for Erf 353 Newcastle, 60 Murchison Street, Central Business District, which reads as follows:

"*20.2 That the appellant,* ***Mr Rahim Abdool Kader*** *("****Applicant****") furnish to the Newcastle Municipality a written undertaking in terms of which he –*

a) *Agrees to cease operating the petrol filling station in the site from which he at present carries on such operations (22 Terminus Street, Newcastle);*

b) *Abandons all rights pursuant to which he operates filling station on such a site.*" (See pages 220-228).

14. It is important to note and reiterate that during the appeal in 2006 the Applicant emphasized that he intended to remove his existing filling station operations in 22 Terminus Street to the appeal site (i.e. Total garage on Sutherland Street). (See page 227). The Applicant acceded that the Appeal Board should consider his application favourably since he was at the point intending to close the PFS B prior to opening the new PFS A on Murchison, (page 31).

15. The Applicant duly submitted his undertaking. However, notwithstanding such submission, the Applicant refused, alternatively did not cease his operation at 22 Terminus Street. This resilience was in turn made a subject of litigation in the High Court to enforce the restrictive condition through an interdict. The litigation as brought by some of the Appellants was successful.

16. In 2015 the Applicant then made an application with the Municipality for the removal of the restrictive condition. The Objectors, through their attorneys, made at least two enquiries with the Municipality why the restrictive condition was not enforced. There was no response from the Municipality.

17. On **12 November 2015**, the Newcastle Local Municipality placed an advertisement in the Newcastle Advertiser (*see page 219*) for the removal of the restrictive condition.

18. The advertisement called for objection to any party with an interest on the matter to make submissions. The Appellants then filed their objection to the removal of the restrictive conditions dated **11 December 2015**. (*see pages 204-2018*). At the heart of the objection by the Appellants mainly related to the infringement of the restrictive condition, by the Total garage – seemingly owned by the Applicant - that commenced operation on 10 September 2015. There is also grievance about the identity number of the Applicant and/or the retail license.

19. The comprehensive submissions made by the Appellants as objectors is well canvassed and unchallenged by the Applicant in this appeal. Only the Objector has filed opposing papers.

20. Pending the above, it became clear that the Applicant traded at Terminus Street inconsistently to the restrictive condition.

21. We nevertheless wish to express our views specifically on the following legal arguments and interpretations:

    21.1 The restrictive condition (that was made a ruling in 2006)–

        21.1.1 was not opposed by the Municipality in 2006;

        21.1.2 was regarded sympathetically in favour of the Applicant and in favour of the intention to relocate the service station from Terminus Street to the Sutherland Street site;

        21.1.3 was a necessity to ensure that the municipality's technical requirement was satisfied. (*In 2005 the Applicant had established a petrol filling station to the incomplete satisfaction of two of the minimum requirements, i.e. submission of the title deed together with the application and the site development plan);*

        21.1.4 assured the Appellants' fears about overtrading;

        21.1.5 (was put or proposed to the Applicant) and/or the Applicant had indicated willingness, during the appeal hearing, that he would accept, as a condition of the grant of his application for the filling station in Sutherland street, a requirement that the existing site in Terminus be closed. ***Our emphasis is that the restrictive condition was indefinite to the above mentioned undertakings.***

    21.2 The restrictive condition was not self-imposed, at least on the strength of the record of the 2006 appeal committee. (We have noted with consideration that *post facto* in 2015 the Applicant submitted that "*I had placed this restriction on myself with the appeal board. . .* ". But it was the resolve of the appeal board that was based on the acceptance by the Applicant during the 2006 hearing to relocate/transfer the service station and in collaboration of that "acceptance" a condition that the filling station in Terminus Street be closed. The restrictive condition may be best defined, or at least accepted in this appeal, as a condition of the special consent that was a reflection of the matter between the parties and most importantly a compromise with the effect of binding the parties on appeal. It was on this basis also that the Department of Energy considered to grant licenses for the Sutherland filling station. Similarly the Municipality approved

building plans for the Murchison site on the strength and effect of consideration of the restrictive condition. The restrictive condition was thus not contractual in nature, but a ruling.

19.2 With regards to the issue of the ID number of the Applicant. We dismiss the submission by the Appellants. There is no finding of fraud made against the Applicant as a natural person in any fora including Engen Petrolium Ltd. We note for example that on pages 120 and 284 the Applicant submitted his ID number as 480121 15098 085. The applicant before us is a natural person not an artificial person.

19.3 There is no averment from the Applicant regarding the prevailing economic conditions as to negate the concerns on overtrading or accommodation of an additional filling station. No position is expressed in this regard.

Hearing by appeal authority

22. This appeal is convened as a written hearing in terms of regulation 23 (1) (a) of Regulations in terms of SPLUMA, GG No 38594 of 23 March 2015. Furthermore, in terms of section 25 of the aforementioned Regulations the Appellants were afforded an opportunity to make further submissions.

Grounds of appeal and Responding Memorandum

23. The grounds of appeal are listed from page 13 of the memorandum of appeal attached to the letter by Gildenhuys Malatji Attorneys dated 31 March 2016. Similarly the responding Memorandum sets grounds of opposition. The grounds of appeal will not be listed again but addressed for convenience in the subheading below.

ANALYSIS ON APPEAL

24. The analysis is based on the grounds of appeal and responding memorandum. We re-iterate aspect of our position to the facts made earlier.

(i) Error by MPT not to consider that the restrictive condition was self-imposed.

25. In paragraph 19 we address our position on the restrictive condition. In particular we set out our position on the nature of the restrictive condition. The restrictive condition was not self-imposed; but it was a ruling of the appeal committee and we find that such condition was of special consent accommodative of a combination of all issues by and between the parties and not just unilaterally by the Appellant.

26. The submission by the Appellants *post facto* the ruling, including the submissions by the Applicant that the restrictive condition was 'self-imposed' does not sway our position on the formulation of, and interpretation of the nature of the restrictive condition. This reasoning applies also to the Appellants' submission on page 15, paragraph 29 as it relates to the restrictive condition.

27. This ground fails in so far as the nature of the condition is concerned. However the ground is upheld in in so far as the MPT unreasonably ignored the special nature and effect of the restrictive condition – in particular that the condition was a compromise of special consent to practically address the application before the municipality and relations between the parties. These relations live on to date.

(ii) Refusal and/or failure to avail documents to the Appellants

28. This ground was fully addressed in the *in limine/preliminary* ruling. That ruling is herein incorporated.

(iii) Reliance on section 153 of the Constitution and the current establishment to families, whom if the business ceases to operate

29. As reflected earlier, the restrictive condition was made a ruling largely, if not solely, on the acceptance of the Applicant to transfer his business and secondly the interest of the Appellants. Put more tersely the submission of fact that the Engen site on Terminus Site *"will be relocated"* to Total site was disregarded by the MPT. The MPT indeed erred in accepting argument on loss of employment as such employees would have transferred from Terminus to Murchison site. There is no loss of employment to any family. The MPT has submitted that failure by the Appellants on the logic that when the Applicant made the undertaking to relocate or transfer staff to the Total site was in 2009. This position as, we show below, is not the case made by the Applicant. It is for the Applicant to logically make his case. The submission by the MPT in this regard is dismissed.

30. Similarly, the MPT irrationally ruled on the argument of the traffic movements in the vicinity and CBD as no argument was advanced before the MPT. The report of the registered planner is noted. That report is relevant for the impact on how traffic movement will be affected by closing the Engine site, but disregards that Engine site had to be shut down on the strength of the ruling and was subsequently interdicted from operation. The report would have been more relevant before the Municipal Planning Appeal Board. True to the submission by the Appellants, in page 14, there is also no basis why the MPT did not to consider the contradictions between the Applicant and the Municipality in relation to safety. It is so that the Appellant accepted that the taxi rank was a generally unsafe area and is avoided by motorist as administrative action. We address the legalities of our finding below.

31. Furthermore it is inconceivable that the application at hand should solely be considered as *"nothing else but planning and development"* when the case presented before the MPT was not solely about planning and development. It is on this basis that rationality sanctions a decision maker to apply its mind proportionately to all the facts before it. It is not the terrain of any authority to be swayed by choosing "not to limit its consideration of the application of removal of the restrictive condition to the view of the Appellants and the Applicant in making its determination on the application." Any effort, as was done by the MPT, to open its consideration beyond the application and objections brought before it makes the MPT to enter a terrain of making a case for and on behalf of either of the parties. This would be tantamount to exercising discretion that is unfettered and doing so would be irrational. Rationality is regarded as a minimum threshold requirement for the exercise of public authority, Pharmaceutical Manufactures Association of SA In Re: Exparte Application of President of the RSA 2000

(3) BCLR 241 (CC). Put more tersely, administrative action must be rationally connected to the information before the public official.

32. The submission by the MPT that planning is an overarching discipline is undisputed, including site inspections but remains subjected to the test against the face of fair administrative action. Principles of lawfulness, reasonableness and procedural fairness must be invoked.

33. Administrative action is defined in section 1 of the Promotion of Administrative Justice Act as a decision taken by an institution or State (or a natural person) in the exercise of authority or when performing a public function in terms of any legislation (or in terms of an enabling provision) that adversely affects rights of and has a direct external effect on, any person.

34. Reasonableness varies from case to case depending on the particular facts and circumstances. Of consideration are the factors such as:
    - the nature of the decision;
    - the identity and expertise of the decision maker;
    - the issues relevant to the decision;
    - the reasons given for the decision;
    - the nature of the competing interests involved; and
    - the effect of that decision on the lives and wellbeing of those affected.

35. In Trinity Broadcasting (Ciskei) v Independent Communication Authority of South Africa 2004 (3) SA 346 (SCA), para 20, the court held that (un)reasonableness is an administrative action which is so 'unreasonable that no reasonable person would have resorted to it'. In the contextual sense reasonableness is the standard of 'good' public administration that the Constitution calls for, whose converse is simply unreasonableness – axiomatically something that no reasonable public official would perform.

36. That said, the standards above do not, however, mean that the decision of the MPT, including this appeal, must be correct or perfect in all respects. The standard simply mean that decisions must fall within the range of decisions that a reasonable public official will make.

37. Similarly the Applicant did not advance persuasive motivation in his application for the removal of the ruling by the Town Planning Appeal Board over and above the compulsory documents. It is therefore not for us or any authority to make a case for the Applicant. The Applicant must make his own case well and good. It is unfortunate that the Applicant has not defended his course on this appeal. This does not mean that the ruling by the Town Planning Appeal Board stands indefinite. But it is the burden of the Applicant to qualify persuasive submissions militating for a favourable ruling by the MPT and/or this appeal authority amid facts and sound planning principles. In this matter this was not done.

38. Lastly, we welcome the weight on the submission of the error by the MPT alternatively that MPT did *"not properly consider(ing)"* the retail license of Engen in terms of the dictates of the Petroleum Act. Further rational is that the restrictive condition in its nature and ruling triggered the stopover of trading on the Engen garage effectively from the date of the ruling. But this ruling was not observed as we learn that subsequent litigation by the Appellants interdicted the Applicant to enforce the ruling. Indeed the ruling gave way for consideration by the Department of Minerals and Energy to grant licences for the Total site.

39. There was no need for the Department of Minerals and Energy to order the shutdown of the Engine site when the ruling of the Town Planning Appeal Board was self-explanatory, nor was it the role of the ministry to do so. The MPT has conceded this submission (paragraph 8.8, page 37). We nevertheless note the pending determination for the licenses for the persuasive weight that it remains pending for consideration by the Department. This submission sways us not otherwise on the restrictive condition.

40. The issues of the suitability and zoning are ancillary in this matter and remain largely common cause. The issues is about the removal of the restrictive condition. Significant weight resides mainly on this issue.

41. This ground of appeal is upheld.

(iv) Abuse of two separate ID numbers

42. This ground fails. There is no basis for the Appellants to insinuate any form of abuse. Documents considered in this appeal show the ID number as 480121 5098 085, i.e. page 120. Also there is no persuasive weight put on this submission. The Appeal Committee is not convinced that the intention to legally challenge the alleged abuse transcend to abuse. This aspect has not been proven as a fact.

(v) Error by the MPT not to consider validity of retail licence to retail petroleum products

43. The Petroleum Act No. 120 of 1977 regulates, among others the supply to any person, sale, the transfer from one place to another of any business or undertaking conducted at any outlet, and supply of petroleum products. One of the unrefuted outcome of the restrictive condition is the seizure of retail licence at the Engen site. It is thus not only a matter of principle flowing from the restrictive condition, but practically as a matter of operational trade that the Appellant has no retail license to retail petroleum products in the Engine site. This material fact was indeed incorrectly overlooked by the MPT.

(vi) Independence of the Municipal Planning Appeal Authority

44. The submission is noted.

CONCLUSION

45. This appeal relates to the unfavourable ruling of the MPT regarding the application to remove the restrictive condition. The restrictive condition granted by the Town Planning Appeal Board sought simply to regulate a transition of a petrol filling station from one establishment to another. This was a material if not sole significance of the ruling of the Town Planning Appeal Board. Regrettably the Applicant has not filed any papers on this appeal. Opposition to the appeal came from the memorandum of the MPT.

46. The grounds of appeal and opposition by the MPT have been engaged and dissected.

47. It is our conclusion that the Applicant has not made a case for this Appeal Committee to interfere with the restrictive condition, which was of special consent between the parties.

48. The Appeal therefore is successful. It follows therefore that the ruling of the MPT is set aside.

Mr. Qiniso Zwane

Chairperson

Appeal Committee