IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case number: 2024-149740

In the matter between:

TOPUP PROPERTY INVESTMENTS (PTY) LTD	First Applicant
LALEY (PTY) LTD	Second Applicant
and	
THE MINISTER OF LOCAL GOVERNMENT, ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING	First Respondent
THE DEPARTMENT OF ENVIRONMENTAL, AFFAIRS AND DEVELOPMENT PLANNING (WESTERN CAPE)	Second Respondent
MOSSEL BAY MUNICIPALITY	Third Respondent

Date Heard:	30 December 2024
Before:	Holderness J
Further submissions received:	2 January 2025
Delivered on:	6 January 2025

JUDGMENT

HOLDERNESS J

Introduction

[1] In this application, which served before me in the fast lane of Third Division on 30 December 2024, the applicants seek an urgent interim order permitting the operation of a filling station with storage facilities of less than $30m^3$, pending an application for the review and setting aside of a Compliance Notice issued by the second respondent, the Department of Environmental, Affairs and Development Planning's (Western Cape) ('the Department') on 15 October 2024 ('the October Compliance Notice') and the decision of the first respondent, the Minister of Local Government, Environmental Affairs and Development Planning ('the Minister') upholding the October Compliance Notice.[1]

[2] In terms of paragraph 1.4 of the notice of motion, the applicants seek an order directing the third respondent to furnish the first applicant with a certificate of occupancy for the property in terms of the National Building Regulations and Building Standards Act 103 of 1977 within 2 days of this order. This is effectively final relief in the form of a *mandamus.*

The factual background

[3] The first applicant, Topup Property Investments (Pty) Ltd ('Topup') is the owner of the property located on Portion 65 of Farm 217 Hartenbosch, Mossel Bay ('the Property'), which it currently leases to Laley (Pty) Ltd ('Laley').

[4] Topup purchased the Property in 2018 property located on Portion 65 of Farm 217 Hartenbosch, Mossel Bay ('the Property'). There were rundown buildings and

[1] In terms of Part B of the application.

other filling station infrastructure on the Property when Topup purchased it, however there were no underground or above ground storage tanks on the Property at such time.

[5] Topup has been aware, since purchasing the Property in 2018, that storage tanks installed on the property would not trigger a listed activity under NEMA ('a Listed Activity') and would accordingly not require an Environmental Authorisation ('EA') if the capacity of the tanks did not exceed 30m^3.[2]

[6] After Topup purchased the Property, two undergrounds storage tanks (the 'USTs'), each with a capacity of 14m^3, were installed on the Property.

[7] Subsequently, two additional above ground storage tanks ('ASTs') with a total capacity of 46m^3 were delivered to the property and bund walls and other infrastructure was installed.

[8] According to Topup, it intended to increase the storage capacity from 28m^3 to 76m^3. The ASTs were not connected to the existing infrastructure, nor were they ever filled or operated. As the ASTs increased the total storage capacity on the property to 76m^3, the Department was concerned that a listed activity had been triggered.

[9] On 16 May 2024, the Department issued Topup with a pre-compliance notice informing it that in terms of section 49A of National Environmental Management Act, 107 of 1998 ('NEMA'), it is an offence to commence a listed activity without an EA, and that a person convicted of such an offence is liable to a fine not exceeding R 10 million or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment ('the pre-compliance notice').

[10] In the pre-compliance notice Topup was duly notified by Mr. Achmad Bassier ('Mr. Bassier'), a Director of Environmental Law Enforcement in the employ of the

[2] Emphasis added.

Department, of the Department's intention to issue it with a Compliance Notice in terms of section 31L of NEMA, instructing it to:

10.1 Immediately stop with the continuation of the listed activity.

10.2 Investigate, assess and evaluate the impact that the listed activity has/has had on the environment.

10.3 Rehabilitate the entire site to its original condition; and

10.4 Carry out any other measure necessary to rectify the effects of the unlawful activity.

[11] Section 31L of NEMA provides as follows:

31L Power to issue compliance notices

(1) An environmental management inspector or environmental mineral and petroleum inspector, within his or her mandate in terms of section 31D, may issue a compliance notice which must correspond substantially with the prescribed form and following a prescribed procedure if there are reasonable grounds for believing that a person has not complied-

(a) with a provision of the law for which that inspector has been designated in terms of section 31D; or

(b) with a term or condition of a permit, authorisation or other instrument issued in terms of such law.

(2) A compliance notice must set out-

(a) details of the conduct constituting non-compliance;

(b) any steps the person must take and the period within which those steps must be taken;

(c) anything which the person may not do, and the period during which the person may not do it; and

(d) the procedure to be followed in lodging an objection to the compliance notice with the Minister, Minister responsible for mineral resources, Minister responsible for water affairs, MEC or municipal council, as the case may be.

(3) An environmental management inspector or environmental mineral and petroleum inspector may, on good cause shown, vary a compliance notice and extend the period within which the person must comply with the notice.

(4) A person who receives a compliance notice must comply with that notice within the time period stated in the notice unless the Minister, Minister responsible for mineral resources, Minister responsible for water affairs, MEC or a municipal council has agreed to suspend the operation of the compliance notice in terms of subsection (5).

(5) A person who receives a compliance notice and who wishes to lodge an objection in terms of section 31M may make representations to the Minister, Minister responsible for mineral resources, Minister responsible for water affairs, MEC or a municipal council, as the case may be, to suspend the operation of the compliance notice pending finalisation of the objection.

[12] On 27 May 2024 and in response to the pre-compliance notice, an online meeting was held with officials from the Department, one of Topup's attorneys, Mr Hanno Brummer of Herbie Oosthuizen & Associates ('Mr Brummer') and Mr Paul Slabbert, the environmental assessment practitioner ('the EAP') appointed by Topup.

[13] According to Topup, it was agreed at that meeting that the $46m^3$ storage capacity of the ASTs pushed the total storage capacity on the Property above the regulated threshold, that the filling station could continue operating and that it was

not necessary to remove the ASTs, provided that a Rectification Application was made. The respondents deny these allegations and state that at the meeting Topup was untruthful when it informed the Department that it had ceased with the construction of the filling station.

[14] According to Mr Ayub Mohamed, the Acting Head of Department, Topup informed the Department that it intended to apply for an environmental authorisation in terms of section 24G but to date, no such application has been filed. This is disputed by the applicants, who aver that the application involves a multi-step process, including the conducting of an environmental impact assessment and public participation, a process which it says has already commenced and which it envisages will be completed by August 2025.

[15] It is common cause that on 18 June 2024 the Departments received a section 24G project schedule from Topup. On 21 June 2024 the Department issued a compliance notice directing Topup to comply with the project schedule. In the compliance notice the Department recorded that approval of the section 24G application does not remedy the unlawful commencement of the listed activities, which remain unlawful until EA is granted.

[16] The applicants aver that, based on the aforegoing, and the fact that they had already commissioned an Environmental Impact Assessment, that the Rectification Application is in process, and that they have complied so far with the timeline in the programme for its implementation, which was approved by the Department complete the sentence.

[17] On 16 July 2024 Mr. Bassier addressed a letter to Topup acknowledging that it was in the process of applying for ‘rectification through the section 24G application process for the alleged unlawful activity that transpired’ on the property and informed it that the Department’s file would accordingly be closed. It is unclear why the Department intended closing its file when this application was pending.

[18] On 15 October 2024 Mr Bassier of the Department issued Topup with the October Compliance Notice in terms of section 31L of NEMA. In paragraph 4 of the

Notice the 'conduct constituting non-compliance' is specifically described as '*the alleged unlawful development of a fuelling station that exceeded the combined storage capacity of its tanks without the requisite environmental authorisation from the Department.'*

[19] The ASTs, which had been installed but never used, were removed from the Property at the end of October 2024. The respondents do not dispute that the applicants removed the ASTs, however they assert that their failure to remove the bunding, pipes and other elements still triggered a Listed Activity and that the continued construction of the filling station without EA was unlawful.

[20] In terms of paragraph 8 of the October Compliance Notice, Topup was instructed by Mr Bassier in his capacity as the Director of Environmental Law Enforcement to:

> '8.1 'immediately stop with the continuation of the listed activity (this includes the development and related operation of facilities or infrastructure associated with the development of the fuelling station) and confirm such in writing within 24 (twenty-four) hours from receipt of this Compliance Notice.
>
> 8.2 Secure and safeguard the construction site to prevent unauthorised entry, and remove all mechanical and/or earthmoving equipment from the site within 3 (three) calendar days from receipt of this Compliance Notice.
>
> 8.3 Submit to the Department within 14 (fourteen) calendar days of receipt of this Compliance Notice representations on your intentions going forward by informing the Department if you are opting for rehabilitation or continuing with the voluntary s24G application.'

[21] The October Compliance Notice further provided *inter alia* that approval of the document referred to in para 8.3 above by the Department does not remedy the

unlawful commencement of the above activity, which remains unlawful in terms of section 49A(1)(a) and/or (d) of the NEMA.

[22] In flagrant breach of the instructions from the Department and the October Compliance Notice, the applicants continued with the construction of the filling station, forecourt and convenience store. Topup admits that it only ceased construction when Mr Sean Ekstrom, a director of Topup and the deponent to the founding and replying affidavits ('Mr Ekstrom'), was threatened by the Department with arrest. According to Mr Ekstrom, he did not cease construction because he believed it was unlawful, but because he believed that the Department would execute the warrant, and 'he had no desire to be imprisoned'.

[23] On 16 October 2024 Topup's attorneys advise the Department that Topup will continue with the development of the site as the site was already developed as a service station and the development is an 'expansion' and not a new development.

[24] On 25 October 2024, after TopUp sent building plans to the Municipality, the Municipality approved the plans but stated that Topup must determine whether the construction is a listed activity, as it is an offence to commence a listed activity without authorisation.

[25] On 8 November 2024 the Department requested Topup to provide the necessary information to prove that the ongoing construction was an expansion not a development, when the site was decommissioned, permitting licence of the former service station and evidence of its footprint. The Department informed Topup that no decision could be made until the information is provided. The Department reiterated that TopUp must cease developing the site.

[26] On 13 November 2024 Topup filed an objection/appeal in response to the October Compliance Notice and requested the Minister to suspend the operation of the October Compliance Notice

[27] On 18 November 2024 Topup's attorneys responded to the Department's request for information and advised they do not have the information requested.

Topup confirmed that the tanks from the former service station were removed prior to Topup purchasing the Property.

[28] On 22 November 2024 Topup and Laley, the second applicant obtained a site licence from the Department of Minerals and Energy. On the same date the Municipality informed Topup that it is not able to issue a Certification of Operation ('COO') until the Department issues the necessary environmental authorisation.

[29] The Department telephonically advised Topup's attorneys and the EAP that operations at the site must cease and failure to comply with the October Compliance Notice is a criminal offence. ('the stop works order').

[30] On 28 November 2024 the officials of the Department conducted a further site inspection and observed that since its last inspection, and after it had repeatedly instructed the applicants to cease operations at the site and to comply with the October Compliance Notice, eight petrol pumps, the forecourt, overhead canopy, and access to and from the service station has been constructed. Construction workers and equipment remained on site and the service station was fully operational. The Department's officials further observed that Integra Fusion Pump system installed on the site was configured for four storage tanks.

[31] On the same day, Topup's attorney informed the Department that it would not cease operations. The Department responded by informing them that Mr Ekstrom would be arrested should he fail to comply. Later that day, the Department was informed that Topup would stop operations if Mr Ekstrom was not arrested.

[32] On 3 December 2024 Topup sent a further objection and requested the Minister to exercise his powers under sections 31L and 31M of NEMA and confirm by close of business on 5 December 2024 that the October compliance notice was cancelled and that the filling station may be reopened, failing which Topup would urgently launch a High Court application.

[33] On 5 December 2024 the Minister informed Topup's attorney that it is not possible to determine the appeal on such short notice, but that he would, by 13 December 2024, determine whether to suspend the compliance notice.

[34] On 13 December 2024, the Minister took the decision not to suspend the October Compliance Notice issued and informed Topup that the objection would be decided on 17 February 2025.

[35] On 13 December 2024, Mr Ekstrom instructed Ms. Terry Winstanley (Ms. Winstanley'), an environmental attorney, to assist Topup by making supplementary representations to the Minister to stop or suspend the closure of the filling station. A copy of these representations was attached to the founding affidavit. in the above discussion where you discuss the sequence of events. The Minister responded, but not to Ms. Winstanley's representations. He said that he would do so by 17 February 2025. The Minister declined to suspend the operation of the October Compliance Notice and the Department's requirement that the filling station must close.

[36] Subsequent thereto, the applicants launched this application seeking the relief set forth in paragraphs 1 and 2 above. The applicants served this application electronically on 19 December 2024, and on 28 December 2024 the Minister and the Department filed their answering affidavits. On 29 December 2024 the applicants file their replying affidavit, one day before the hearing on 30 December 2024.

[37] The applicants assert that the instruction to close the filling station was issued without first hearing representations from either Topup or Laley. The applicants contend that this is a failure of *audi alteram partem* which, of itself, triggers a ground of review in section 6(2)(c) of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'). This is an issue for determination in the review proceedings but has a bearing on whether the applicants have established a *prima facie* right to the urgent interim interdictory relief sought. This aspect and the grounds of review will be briefly addressed further below.

[38] The applicants emphasised that the filling station and convenience store is now closed and has not operated since the 27 November 2024, and Laley is

suffering ongoing material prejudice as it cannot supply customers with fuel and other products which it is legally entitled to sell at the busiest time of the year. Without this income it cannot afford to pay its employees or creditors. Laley is also unable to pay its 24 employees who are being financially impacted as a result.

[39] During argument Mr Vassen, who appeared on behalf of the first and second respondents ('the respondents') informed the Court that the respondents had agreed to the applicants resuming operation of the convenience store, which the second respondent had been compelled to close in terms of the October Compliance Notice and the stop works order.

[40] The Department has instructed the filling station to remain closed until the Rectification Application is finalised, which Mr Slabbert, says is likely to only be in August 2025.

[41] Topup asserts that it has always complied with every compliance notice and/or request that it has received from the Department, that the filling station can permissibly trade under the law, without any requirement for an Environmental Authorisation, if it uses the only the two installed storage tanks - the 2 x 14 m^3 USTs - because the storage facilities fall below the threshold of 30 m^3, and the operation of the filling station using the two installed storage tanks - the 2 x 14 m^3 USTs - poses absolutely no threat at all to the environment and this has been confirmed by an environmental expert and never disputed by the Department.

[42] That Topup has 'always complied with every compliance notice and/or request that it has received from the Department' is hotly disputed by the Department.

[43] In the limited time available to prepare this judgment, the Court having had to deal with other urgent applications on 30 and 31 December 2024, it is impossible to fully ventilate all the disputed issues or to set out all the defences raised on behalf of the respondents. I will endeavour to highlight the salient points and defences raised by the respondents below.

Urgency

[44] Rule 6(12) of the Uniform Rules is the regulatory framework that allows the bringing of an urgent application. Rule 6(12) provides:

> '(a) In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as it deems fit.
>
> (b) In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant must set forth explicitly the circumstances which is averred render the matter urgent and the reasons why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course.'

[45] In *OUTA* the Constitutional Court ('CC') held[3] as follows:

> 'Under the *Setlogelo* test, the prima facie right a claimant must establish is not merely the right to approach a court in order to review an administrative decision. It is a right to which, if not protected by an interdict, irreparable harm would ensue. An interdict is meant to prevent future conduct and not decisions already made. Quite apart from the right to review and to set aside impugned decisions, the applicants should have demonstrated a prima facie right that is threatened by an impending or imminent irreparable harm. The right to review the impugned decisions did not require any preservation *pendente lite. '*

[46] In *Luna Meubel*,[4] it was held that mere lip service to the requirements of Rule 6(12)(b) is insufficient and that an applicant must make out a case in the founding affidavit to justify the extent of the departure from the norm.

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[3] At para 50.

[47] The Court's power to condone non-compliance with the rules and to accelerate the hearing of a matter should be exercised with judicial discretion and in light of sufficient and satisfactory grounds being shown by the applicant. The prejudice suffered by having to wait for a hearing in the ordinary course is not the only consideration the Court must also take into account. It must also consider:

47.1 the prejudice that other litigants might suffer if the application were to be given preference.

47.2 the prejudice that the respondents might suffer by the abridgment of the prescribed times and an early hearing.[5]

[48] The evidence adduced by Topup in support of its contention that Part A of the application is urgent, which was also relied upon by it to show that it will suffer irreparable harm if the interim relief is not granted, is that it has invested approximately R2,5 million in capital expenditure in acquiring the Property, constructing the buildings on it, installing pumps and tanks and acquiring other equipment. It says that it had to borrow this money from the bank and its monthly finance costs associated with the servicing of the loan from the bank is approximately R80,000 per month.

[49] Topup avers that it requires rent from its tenant, Laley, who is the retail operator onsite. Without this rental income, and the owner's CAPEX portion of the permissible 285,7 cpl regulated margin, Topup will be unable to service the loan. According to Topup it will certainly not be able to carry those costs until August 2025

[50] The applicants emphasised that Laley, the tenant which operated the filling station and convenience store, employs 24 people as petrol attendants, cashiers, managers, administrative assistants and security guards.

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[4] *Luna Meubel Vervaardigers (Edms) Bpkv Makin*1977 (4) SA 135 (W) at 137E.
[5] *IL &B Marcow Caterers (Pty) Ltd v Greatermans SA Ltdandanother* 1981 (4) SA 108 (C) at 112H-113A.

[51] According to Mr Ekstrom, an inability to repay the loan puts Topup at risk of liquidation. He states that he is also personally at risk, as he has stood surety for the debts of Topup.

[52] Laley has invested approximately R5 million on equipment for the convenience store, which includes ovens, freezers and signage. This was also partly funded by a loan which requires servicing. Laley will of course, only get an income if the filling station and convenience store are permitted to re-open and operate. It needs the OPEX portion of the permissible 285,7 cpl regulated margin. An inability to repay its loan to the bank will put the company at risk of liquidation. Laley also has fixed monthly expenses, including rental of approximately R60,000 per month regardless of whether the filling station is operating or not. It also has a payroll or wages bill of approximately R215,000 per month in respect of 24 employees.

[53] Laley avers that without an income, it will not be able to pay its employees, who will all have to be retrenched, and will suffer significant financial hardship as a result. Laley is also obliged to pay a private security company approximately R20,000 per month. Laley is in dire financial straits because of the Department's closure of the filling station.

[54] According to the applicants, this will all come to pass if the application for urgent interim relief is refused.

[55] According to Topup it did not launching these proceedings as soon as practicable after receiving the October Compliance Notice, as it was awaiting until the decision of the Department regarding its objection, which was only handed down on 13 December 2024.

[56] The respondents contend that the application is not urgent and that any urgency which may exist is of the applicants' own making.

[57] The respondents emphasised the fact that the application was enrolled two Court days before Christmas, when this court operates on skeletal resources and is not able to accommodate all who seek a hearing, and when its officials were on

compulsory leave, which made it difficult to consult and obtain the necessary documents, information and instructions. The respondent pointed out that under ordinary circumstances this matter would have been one that required an early allocation due to its voluminous nature.

[58] The respondents contend that the applicants should have enrolled the application in October 2024, when it received the compliance notice. The application was in fact issued three weeks after the Department shut down the filling station and convenience store.

[59] Whilst I find myself in agreement with the submissions by the respondents' that the applicants ought to have proceeded with greater alacrity, I am mindful of the importance of the issues which the court is called upon to urgently determine. As the merits of the interim relief and urgency were intertwined, I have also had the benefit of hearing full argument pertaining to the relief sought in terms of Part A.

[60] For all these reasons it would be an unnecessary waste of court time and costs for the merits of Part A not to be determined on an urgent basis. I am of the view that this matter is urgent as the applicants run the risk of liquidation, and Mr Ekstrom of sequestration, if the matter is heard in the ordinary course.

[61] I am accordingly of the view that the matter demands the urgent attention of this court.

The legislative and regulatory framework

[62] Central to the issues which arise for determination in this urgent application is the National Environmental Management Act, 107 of 1998 ('NEMA') and the Environment Impact Assessment Regulations, made under it ('2014 EIA Regulations'). Read together, they prohibit the undertaking of activities listed under NEMA which are likely to have a material impact on the environment (the 'listed activities') without prior written environmental authorisation.

[63] An EA cannot be granted without an environmental impact assessment first being undertaken.

[64] There are three lists of listed activities, all of which distinguish between development (or new) activities and expansion activities (the enlarging of an existing development).

[65] For the purposes of the determination of the urgent relief sought in Part A, Mr Hopkins SC, who appeared on behalf of the applicants, accepted that the construction and development of a filling station on the property by Topup is a so-called Development Listed Activity, which is defined[6] as:

> 'The development and related operation of facilities or infrastructure for the storage, or (storage) (please check) and handling of a dangerous good[7] where such storage occurs in containers with a combined capacity of 30 but not exceeding 80m3 ... in an [estuarine area)'[8]

[66] In terms of section 24G of NEMA, where a listed activity commences without first obtaining EA, it is possible to obtain that authorisation retrospectively, by way of an 'after the fact environmental impact assessment' which must be subject to a public participation process (a 'Rectification Application').

[67] NEMA initially did not provide for the rectification or regularisation of listed activities which commenced without obtaining an authorisation. As such in 2004, section 24G was inserted into NEMA to bring errant developers back into the regulatory loop. However, as section 24G became synonymous with act now and pay later, it was as a *fait accompli* that provided leverage for abuse by developers, and which facilitated non-compliance with the objects of NEMA.[9]

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[6] Listed Activity 11 on Listing Notice 3 of the EIA Regulations, paraphrased and referred to as the "Development Listed Activity").
[7] Which definition includes petroleum and diesel products
[8] Listed activity 11 on Listing Notice 3 of the EIA Regulations (the 'Development Listed Activity').
[9] JN Ashukem "Re-thinking Ex Post Environmental Authorisation in South Africa: Insights from the 2022
NEMA Amendment", 2024 De Jure Law Journal, p79.

[68] Section 24G of NEMA was amended several times, the latest and most onerous amendment having been effected in 2022. The 2022 amendment entered into force on 30 June 2023 and provides, inter alia, as follows:

> '24G Consequences of unlawful commencement of activity
>
> (1) On application by a person who-
>
> (a) has commenced with a listed or specified activity without an environmental authorisation in contravention of section 24F (1).
>
> (b) has commenced, undertaken or conducted a waste management activity without a waste management licence in terms of section 20 (b) of the National Environmental Management: Waste Act, 2008 (Act 59 of 2008);[10]
>
> (c) is in control of, or successor in title to, land on which a person-[11]
>
> (i) has commenced with a listed or specified activity without an environmental authorisation in contravention of section 24F (1); or
>
> (ii) has commenced with, undertaken or conducted a waste management activity in contravention of section 20 (b) of the National Environmental Management: Waste Act, 2008 (Act 59 of 2008),
>
> the Minister, (Minister) check please responsible for mineral resources or MEC concerned, as the case may be-
>
> (aa) must direct the applicant to-

[10] [Para. (b) substituted by s. 5 (a) of Act 2 of 2022 (wef 30 June 2023).]
[11] [Para. (c) added by s. 5 (a) of Act 2 of 2022 (wef 30 June 2023).]

(A) immediately cease the activity pending a decision on the application submitted in terms of this subsection, except if there are reasonable grounds to believe the cessation will result in serious harm to the environment.

(B) investigate, evaluate and assess the impact of the activity on the environment.

(C) remedy any adverse effects of the activity on the environment.

(D) cease, modify or control any act, activity, process or omission causing pollution or environmental degradation.

(E) contain or prevent the movement of pollution or degradation of the environment.

(F) eliminate any source of pollution or degradation.

(G) undertake public participation, which is appropriate to bring the unlawful commencement, undertaking or conducting of a listed, specified or waste management activity to the attention of interested and affected parties, and to provide them with a reasonable opportunity to comment on the application in accordance with relevant elements of public participation as prescribed in terms of this Act; and

(H) compile a report containing-

(AA) a description of the need and desirability of the activity.

(BB) an assessment of the nature, extent, duration and significance of the consequences for, or impacts on, the environment of the activity, including the cumulative effects and the manner in which the geographical, physical, biological, social, economic and

cultural aspects of the environment may be affected by the proposed activity.

(CC) a description of mitigation measures undertaken or to be undertaken in respect of the consequences for, or impacts on, the environment of the activity; and

(DD) a description of the public participation process followed during the course of compiling the report, including all comments received from interested and affected parties and an indication of how the issues raised have been addressed, if applicable; and

(bb) may direct the applicant to compile an environmental management programme or to provide such other information or undertake such further studies as the Minister, Minister responsible for mineral resources or MEC, as the case may be, may deem necessary.'

[69] The obligations imposed on the Minister in terms of section 24G are clearly cast in peremptory terms.

The certificate of occupation

[70] After Topup purchased the Property it submitted an official checklist to the Department to ascertain whether a proposed filling station could be constructed where the fuel tanks will hold less than $30m^3$. Based on the information provided by Topup, the Department advised Topup that the proposed filling station would not trigger a listed activity and therefore did not require an EA.

[71] Topup however instructed an architect to develop site plans to construct a filling station which contained two underground fuel storage tanks of $14m^3$, plus two above ground fuel storage tanks of $23m^3$, which cumulatively exceeded the $30m^3$ threshold by $46m^3$. Given that the Department had already confirmed and advised

Topup of the 30m^3 threshold, Topup would have been patently aware that should it wish to construct a filling station which exceeded this threshold, it would require EA.

[72] On 15 March 2024, the Department received a complaint from a member of the public that Topup was unlawfully developing a filling station in an Estuarine Functional Zone,and that there had not been a filling station on the Property for more than 36 years.

[73] On 17 April 2024, the Department conducted a site visit and established that Topup had installed the two underground fuel storage tanks and two 23m^3 above ground fuel storage tanks, bringing the total storage capacity to 76m3. As this exceeded the 30m^3 limit by 46 m^3, it triggered a listed activity for which Topup did not have requisite authority. This also constituted criminal conduct. During the site visit the Department advised Topup that their conduct was unlawful and further development must cease.

[74] It is clear from the aforegoing that the applicants were fully aware that they required an environmental authorisation to develop a facility that could store more than 30m^3 of fuel, however and despite this, they proceeded with the said construction even though at the time they did not have a building plan approved by the Municipality.

[75] On 17 April 2024, 16 May 2024, 15 August 2024, the Department advised Topup that their conduct was unlawful and that all development had to stop. Topup continued to develop and construct the filling station and commenced its operation, undeterred.

[76] Even after the Department issued a compliance notice on 15 October 2024 instructing Topup to cease construction and to remove all construction equipment off site, they continued with the construction.

[77] On or about 22 November 2024 Topup unlawfully completed the construction and started selling petrol and diesel to the public, notwithstanding the fact that it did

not have authority from the Municipality to occupy the site, a fact of which it would have been acutely aware.

[78] Topup submitted building plans to the Municipality for the material alteration of a building and for the installation of infrastructure, including the fuel storage tanks ('the works') under the National Building Regulations and Building Standards Act 103 of 1977 ('the Building Act').

[79] On completion of the construction of the filling station and convenience store, Topup applied to the Municipality for its COO. The Municipality is required under section 14 of the Building Act to issue a COO within 14-days of the request to issue one, if it is satisfied that all applicable provisions of the Building Act and building plan approval conditions have been met.

[80] According to Topup on 21 November 2024, Mr Ekstrom received a phone call from a building inspector employed by the Municipality confirming that approval had been given for a COO.

[81] However, late on 22 November 2024, Topup received an email from a certain Mr Shaun Westerberg of the Municipality, advising that it was unable to issue a COO because the Department had contacted it and requested the Municipality to suspend the issuing of a COO, pending the Department's enforcement investigation and the Rectification Application process.

[82] It is common cause that to date the Municipality has not issued a COO.

[83] For safety reasons, a new building may only be formally occupied once a certificate of occupancy has been issued. If the work has been completed in respect of the approved plan, granted in terms of Section 7 of the Building Act, a COO will be issued.

[84] Section 7 of the Building Act provides that if a local authority is satisfied that the application in question complies with the requirements of this Act and any other applicable law, it shall grant its approval in respect thereof.

[85] It is clear in the present matter that the Municipality ultimately decided not to grant its approval and issue a COO precisely because it was not satisfied that the applicants had complied with the applicable law, namely compliance with NEMA and more specifically the compliance notice.

[86] Put differently, the Municipality rendered a decision which may or may not be reviewable, but which cannot simply be disregarded or substituted by an order to the contrary without a judicial review of such decision.

[87] Extraordinarily the applicants have not included a review of the Municipality's decision not to issue a COO in Part B of the application, and yet they effectively have sought a *mandamus* against the Municipality, in circumstances where it clearly has not had an adequate opportunity to oppose the final order sought and without a proper case having been made out for such relief. The applicants should have sought an order reviewing the Municipality's decision to not to issue the COO. Mr Hopkins pressed for this relief at the hearing.

[88] Furthermore, the Municipality cannot reasonably have been expected to provide Topup with the COO when there is non-compliance with NEMA and the applicable Regulations.

[89] In the seminal judgment of *National Treasury and Others v Opposition to Urban Tolling Alliance and Others*[12] (*'OUTA')* the apex court emphasised that:

> 'A court must also be alive to and carefully consider whether the temporary restraining order would unduly trespass upon the sole terrain of other branches of Government even before the final determination of the review grounds.19 A court must be astute not to stop dead the exercise of executive or legislative power before the exercise has been successfully and finally impugned on review. This approach accords well with the comity the courts owe to other branches of Government, provided they act lawfully.'

[12] 2012 (6) SA 223 (CC) at para 26.

[90] In my view and for these reasons the relief sought against the Municipality in paragraph 1.4 of Part A must accordingly fail.

The respondents' defences

***Ex turpi causa non oritur actio* - The doctrine of unclean hands**

[91] In the matter of *Essop v Abdullah and Another*[13] where the applicant sought an interim interdict, this Court dismissed the matter with costs in line with the above maxim and held as follows:

> 'In the present case, the enquiry is not whether the contract in question was prohibited by statute… The attack made on the contract here is that it was made to carry out an unlawful purpose, and it is contended that accordingly no action can be based thereon because *ex turpi causa non oritur actio.* In *Jajbhay v Cassim,* 1939 AD 537, STRATFORD J.A. (with whose judgment DE WET, J.A. concurred) said that this maxim 'is complete and unquestioned in our Courts and in the Courts of England .
> . . . (I)t reigns supreme . . . . ' In our law, it has been accepted that the maxim is inflexible and leaves no room for equitable discretion, whether it relates to contracts expressly declared void by statute (see, e.g. *Cape Dairy and General Livestock Auctioneers v Sim*, 1924 AD 167; *Myburgh v Neethling* 1948(2) SA 515 (C) at 521) or considered illegal because they set out to do what is forbidden by statute (see *Mathews v Rabinowitz* 1948(2) SA 876 (W) at 878)….In the present case, if the contract is inevitably to be categorised as a *turpis causa* because it provides for the doing of an act prohibited by statute, then it must follow that I cannot assist applicant to obtain the relief he seeks. But even if I retain some measure of discretion, as to whether the contract should be so categorized, I would reach the same conclusion. I am concerned with a contract in which one party undertook to do for the other something which was prohibited by the section.

[13] *Essop v Abdullah and Another* [1986] 2 All SA 234 (C).

> Moreover the statutory prohibition is absolute; no provision is made for a permit which can legalise the acquisition or holding of property on behalf of a disqualified person. The act which first respondent undertook to do could not be done legally. …. If a court were to recognize the validity of the contract then, to adopt the words which FAGAN, JA (as he then was) used in *Pottie v Kotze* 1954(3) SA 719(A) at 726, in explaining implied statutory prohibitions, it would 'bring about or give legal sanction to, the very situation which the legislature wishes to prevent'. Bearing in mind the objects of the legislation and the clear language of s. 36, I am of the view that this is the type of contract which is undoubtedly contrary to public policy, and which the courts should not assist applicant to enforce.' (emphasis added).

[92] The respondents' argument was that as the applicants were fully aware that they required an EA to develop a facility that could store more than $30m^3$ of fuel, and despite this, they proceeded with the said construction even though at the time they did not have a building plan approved by the Municipality, they embarked on an unlawful course of conduct and resorted to self-help.

[93] The respondents emphasised that on or about 22 November 2024, Topup unlawfully completed the construction and started selling petrol and diesel to the public, even though it did not have authority from the Municipality to occupy the site. The actions of the applicants therefore not only infringe the rights contained in section 24 of the Constitution and the provisions of NEMA but are contrary to the rule of law.

[94] Placing reliance on Section 1(c), a founding provision of the Constitution proclaims that South Africa is founded on the rule of law and the decision in *City Council of Pretoria v Walker*[14] where Constitutional Court held that 'self-help' was contrary to the rule of law and 'carries with it the potential for chaos and anarchy and can therefore not be appropriate. The kind of society envisaged in the Constitution

[14] *City Council of Pretoria v Walker* 1998 (3) BCLR 257.

implies also the exercise of responsibility towards the systems and structures of society".[15]

[95] In the recent decision of *Villa Crop Protection (Pty) Ltd v Bayer Intellectual Property GmbH*[16] ('*Villa Crop Protection')* the Constitutional Court affirmed that the doctrine of unclean hands forms part of our common law. The Constitutional Court held that the doctrine 'holds that where a party seeks to advance a claim that was obtained dishonestly or mala fide, that party should be precluded from persisting and enforcing such a claim.'

[96] In *Villa Crop Protection* the Constitutional Court noted that the while the doctrine must be used sparingly it is nonetheless valid. The court stated:

> 'Our courts have long recognised their power, in exceptional circumstances, to prevent an abuse of process. That power has more recently been affirmed [in Beinash v Wixley 1997 (3) SA 721 (SCA) at 34D-G, cited with approval by this Court in Lawyers for Human Rights v Minister in the Presidency 2017 (1) SA 645 (CC) at para [20] and an abuse of process may include a litigant who comes to court with unclean hands. The power is an incident of the court's inherent power to ensure that those who use the process of law do not do so for ulterior ends that undermine what the courts are established to secure. It is a power most sparingly used. That is so because the exercise of the power prevents a litigant from having their dispute resolved before the courts, the very essence of their right under section 34 of the Constitution. But the authorities do bear out the proposition that to dismiss a claim that a litigant would pursue before the courts on the grounds of abuse is not precluded because that claim exists in law.'[17]

[97] The applicants readily admitted that the installation of the ASTs without the necessary approvals from the Department was unlawful.

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[15] Ibid at para 93.
[16] *Villa Crop Protection (Pty) Ltd v Bayer Intellectual Property GmbH* 2024 (1) SA 331 (CC).
[17] At para 72.

[98] During the hearing, Mr. Hopkins informed the Court that his clients tendered to remove the bunding, pipes and any other infrastructure pertaining to the ASTs, pending the outcome of the Rectification Application. This should have been done already.

[99] In my view the applicants have deliberately resorted to self-help and are the architects of their own misfortune. They knew what they did was wrong, and yet they only ceased their illegal activities when Mr Ekstrom faced imminent arrest. They were repeatedly told to cease with the unlawful construction but persisted with their illegality.

[100] In summary, no cause of action can arise from an illegal cause. In my view the doctrine therefore applies, and the applicants are not entitled to the relief they seek.

Failure to exhaust internal remedies

[101] After the Department issued the October Compliance Notice, the applicants lodged an objection/appeal to the appeals authority. The Minister informed Topup on 13 December 2024 that as the objection is processed in terms of the National Appeals Regulations, the objection/appeal can only be determined on 17 February 2025. Unsatisfied, the applicants approached this Court on an urgent basis before the objection/appeal had been determined.

[102] The Minister's decision to determine the appeal by 17 February 2025 is in accordance with NEMA's National Appeal Regulations, 2014 and the timelines set out therein.

[103] At the court's request, Counsel provided further brief written submissions regarding whether it was premature for the applicants to approach the urgent court seeking interim relief when the Minister still must decide, in an internal appeal, whether he is going to suspend the Department's instruction to cease all activity on the site, including shutting down the businesses of the filling station and convenience store. The Minister is due to make his decision on 17 February 2025.

[104] The respondents contend that by launching these proceedings before the appeal has been determined, the applicants failed to exhaust the internal remedies available to them. Reliance was placed by the respondents on the decision of Supreme Court of Appeal in *MEC for Local Government, Environmental Affairs and Development Planning, Western Cape & another v Hans Ulrich Plotz NO & another*[18] where the SCA considered an appeal in respect of section 24G of NEMA wherein the applicant was levied with an administrative fine. The SCA dismissed the matter as the appellant failed to exhaust internal remedies where the Minister was supposed to decide an appeal of a decision by a Director in the Department.

[105] In *Koyabe and Others v Minister of Home Affairs and Others*[19] (‘***Koyabe’)*** the Constitutional Court (‘CC’) emphasised that:

> ‘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 and circumstances of the particular case. Thus, the need to allow executive agencies to utilise their own fair procedures is crucial in administrative action.’

[106] In *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and others*[20] (‘***Dengetenge’)*** the CC cited the above dictum in *Koyabe* with approval, and not only held that the failure to exhaust internal remedies will only be condoned in exceptional circumstances but also that a member

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[18] (495/2017) [2017] ZASCA 175 (1 December 2017).
[19] 2010 (4) SA 327 (CC) at para 36.
[20] 2014 (3) BCLR 265 (CC)

of the Executive may not waive her or his right to decide the matter in an internal appeal.

[107] The Constitutional Court in *Dengetenge*[21] held that 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.
> 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.
>
> This is the law as pronounced in decisions of the Supreme Court of Appeal and this Court. In *Nichol*,[22] the Supreme Court of Appeal construed section 7 of PAJA and proclaimed: "It is now compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies unless exempted from doing so by way of a successful application under section 7(2)(c). Moreover, the person seeking exemption must satisfy the court of two matters: first, that there are exceptional circumstances, and second, that it is in the interests of justice that the exemption be given.'[23]

[108] Section 7(2) of PAJA provides:

> '(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.

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[21] At para 116.
[22] *Nichol and another v Registrar of Pension Funds and others* [2005] ZASCA 97; 2008 (1) SA 383 (SCA) (*Nichol)*
[23] At para 117. Footnote omitted and emphasis added.

(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 exhaust 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.' (Emphasis added.)

[109] The CC in *Dengetenge* affirmed that Section 7(2)(c) empowers a court to grant an exemption from the duty of exhausting internal remedies if, as observed by the Supreme Court of Appeal in *Nichol,* two pre-conditions are established. These are exceptional circumstances and the interests of justice.[24]

[110] The meaning assigned to section 7 by the Supreme Court of Appeal in *Nichol* was endorsed by the CC in *Koyabe,* where the CC held that 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.

[111] The applicants contend that as the urgent interdictory relief sought in Part A is not a review of administrative action, but rather relief sought pending a review in terms of Part B thereof, the duty to first exhaust the internal appeal to the Minister does not therefore apply.

[112] Even if they are wrong on this point, so the applicants' argument went, the CC made it clear in *Koyabe* that a review applicant's duty extends to him/her taking 'reasonable steps to exhaust the internal remedy' and that the requirement should

[24] *Ibid* at para 120.

'not be rigidly imposed' nor be permitted 'to frustrate the efforts of an aggrieved person or to shield the administrative process from judicial scrutiny.'[25]

[113] The applicants' supplementary note goes beyond the remit of what was requested and what is permissible. As contended by the respondents, the applicants for the first time attempt to make out the case that it was not necessary to exhaust the internal remedies available as 'it will be futile because the Minister has already expressed his view on the matter and his view is dead against the applicants.'

[114] In the recent decision of *De Beer and Another v Director General, Home Affairs and Another*[26] ('*De Beer')* the applicants sought to urgently interdict and suspend the decision to declare the applicant to be a prohibited person in terms of the Immigration Act 13 of 2002. The Department raised as a point *in limine* that the applicant failed to exhaust the existing internal remedies.

[115] As in the present application, the applicants in *De Beer* lodged an internal appeal but made application to court for an urgent interim interdict before the appeal was decided.

[116] The Court in *De Beer* dismissed the application for an interdict on the following basis:

> '[15] … it is premature to review the respondents' decision as no decision has been made with regard to the decision to be taken by the Director General in terms of section 29(2) of the Act. There is no right which is to be protected in the interim and where irreparable harm will ensure. This is not ascertainable on the facts herein.
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> [16] The Court in *Koyabe* said at:

[25] At para 38.
[26] *De Beer and Another v Director General, Home Affairs and Another* (049991/2022) [2023] ZAGPJHC 711
(19 June 2023).

> ‘[35] Internal remedies are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilise its own mechanisms, rectifying irregularities first, before aggrieved parties resort to litigation. Although courts play a vital role in providing litigants with access to justice, the importance of more readily available and cost-effective internal remedies cannot be gainsaid.
>
> [36] First, approaching a court before the higher administrative body is given the opportunity to exhaust its own existing mechanisms undermine the autonomy of the administrative process. It renders the judicial process premature, effectively usurping the executive role and function.’
>
> [17] The applicants should have exhausted the internal remedies available to them prior to approaching any court. The respondents should be permitted to make the decisions they are entrusted with, with deference accorded to them prior to a judicial review. Fraudulent travelling documents, particularly passports and visas, attack the national security of any country and so too South Africa. The only way the respondents can address the issue of rogue agents and fraudulent passports is to prosecute the agents and discourage persons who utilise such agents. The legislation does have a process which affords unsuspecting persons who have fallen prey to rogue agents to review their declarations of prohibition.’

[117] I am not persuaded that awaiting the outcome of the pending appeal will be futile because the Minister has already expressed his view against the applicants on the matter, nor that it will be ineffective because the applicants cannot wait until 17 February 2025 (to get the Minister’s decision) or when the review is determined.

[118] I agree with the respondents that should the interim interdict be granted, it renders the role of the Minister nugatory by excluding him from determining the matter administratively whereas the decision is a complex polycentric decision which requires specialist expertise.

[119] The applicants knowingly and deliberately ignored lawful orders issued by the Department. The investment made by the applicants in such circumstances was at their own peril. Even if the order by the Department to cease operations is flawed, this can be dealt with in review proceedings, which may be expedited, if necessary, and on proper grounds.

[120] In my view the applicants have failed to show that any exceptional circumstances exist, which were not clearly foreseeable and of their own making, nor that it is in the interests of justice that they should be granted interdictory relief without first exhausting all available internal remedies.

Have the applicants made out a case for the interdictory relief sought?

[121] The requirements for the grant of an interim interdict as set out in *Setlogelo*[27] and in *Webster*[28] are well known. The test requires that an applicant that claims an interim interdict must establish *(a)* a prima facie right even if it is open to some doubt; *(b)* a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted; *(c)* the balance of convenience must favour the grant of the interdict; and *(d)* the applicant must have no other remedy.

[122] An interim interdict has been described by the SCA in *Tau v Mashaba*[29] as 'an extraordinary remedy within the discretion of the court.'

[123] In an urgent application of this nature, which involves the separation of powers, it does not suffice for the applicants to contend that they has good prospects on review.

***Prima Facie* Right**

[124] The CC in *OUTA* held that the *prima facie* right that an applicant for an interim interdict pending a review must establish is not merely the right to approach a court

[27] *Setlogelo v Setlogelo* 1914 AD 221.
[28] *Webster v Mitchell* 1948 (1) SA 1186 (W).
[29] 2020 (5) SA 135 (SCA) at para 21.

to review an administrative decision, it is a right that is subject to the threat of imminent irreparable harm if an interdict is not granted. The Court stated as follows:[30]

> 'An interdict is meant to prevent future conduct and not decisions already made. Quite apart from the right to review and to set aside impugned decisions, the applicants should have demonstrated a prima facie right that is threatened by an impending or imminent irreparable harm. The right to review the impugned decisions did not require any preservation pendente lite.'

[125] The applicants have set out their grounds of review in great detail in their heads of argument. It is not for this court to anticipate the decision of the review court by determining or expressing a view on the merits of the review grounds. It may well be that the decision to suspend the operation of the filling station which may no longer trigger a listed activity is reviewable, however that is not a decision this court is called upon to make.

[126] The applicants' grounds of review are the following: That the October Compliance Notice was taken for a reason not authorised by the empowering provision; that the Department issued the October Compliance Notice without first issuing a pre-compliance notice; that the Department's decision and instruction to close the filling station was issued without affording Topup (and Laley) an opportunity to make representations in accordance with the principle of *audi alteram partem;* that it is irrational to stop the filling station (and convenience store) from operating given that no listed activity is triggered and no foreseeable harm to the environment has been identified; that the Department did not consider relevant circumstances when it should have, in particular it did not consider the principles animating balanced decision-making; and, lastly, that the Department exceeded its powers by instructing the closure of the business of a filling station and convenience store and is so doing acted *ultra vires.*

[127] In *OUTA* the CC held[31] as follows:

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[30] At para 50.

> ‘Under the *Setlogelo* test, the prima facie right a claimant must establish is not merely the right to approach a court in order to review an administrative decision. It is a right to which, if not protected by an interdict, irreparable harm would ensue. An interdict is meant to prevent future conduct and not decisions already made. Quite apart from the right to review and to set aside impugned decisions, the applicants should have demonstrated a prima facie right that is threatened by an impending or imminent irreparable harm. The right to review the impugned decisions did not require any preservation *pendente lite. ‘*

[128] The applicants appear to rely for their *prima facie* right foremost on the fact that they wish to resume trading. In the applicants’ heads of argument its prima facie right is described as follows:

> ‘The applicants want to trade, i.e. they want to operate a filling station. One thing that we all accept, which is not disputed, is that anybody can operate a filling station without Environmental Authorisation provided the filling station has a storage tanks with a capacity of less than 30m3. The applicants’ filling station fits perfectly into this mould. It is beyond doubt that the applicants have a right to operate it as is, i.e. as a filling station with two single below-ground storage tanks that have a combined capacity of 28m3 and without any other additional storage tanks (because the two aboveground tanks were uninstalled and have been completely removed from the site. This point, I respectfully submit, is unassailable. This is the prima facie right.’

[129] The applicants appear to have lost sight of the fact that, in terms of *OUTA,* this simply does not suffice. The applicants have not shown that such right is threatened with impending or irreparable harm. Mere financial loss, which would clearly have been foreseeable by the applicants when they proceeded initially to install the ASTs, and to occupy and trade on the premises without a COO from the Municipality, is not enough.

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[31] At para 50.

[130] The applicants contend as their storage capacity currently fall below the 30m^3 threshold 'it is beyond doubt that they have a right to operate.'

[131] The applicants submit they can establish such right by showing that there is a probability that the court hearing its review application may find they are entitled to the relief sought, even though their entitlement is open to some doubt.

[132] In considering whether the applicant has established a *prima facie* right as contemplated in *OUTA* it is helpful to consider the following. NEMA is one the primary legislative instruments which gives effect to the constitutional right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures.[32]

[133] Section 2(4)(vii) of NEMA requires that 'a risk averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions.'

[134] Section 24F(1)(a) of NEMA reiterates that no person may 'commence an activity listed or specified in terms of section 24(2)(a)… unless the competent authority… has granted an environmental authorisation for the activity….'

[135] In terms of section 1 of NEMA, for the purposes of section 24, 'commence,' means 'the start of any physical implementation in furtherance of a listed activity or specified activity, including site preparation and any other action on the site or the physical implementation of a plan, policy, programme or process…' (emphasis added)

[136] *In casu,* TopUp commenced a listed activity when it began the 'site preparation and any other action on site or the physical implementation of a plan.' According to the applicants' replying affidavit, this began in February 2024.

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[32] Section 24(b) of the Constitution.

[137] As set out in detail above, in terms of NEMA the filling station was developed and constructed unlawfully.

[138] In addition, the filling station was not only built without the plans being approved by the Municipality, Topup started operating the filling station illegally as the Municipality refused to issue it with a certificate of occupation.

[139] In terms of Section 24G(1)(c)(i)(aa)(A) of NEMA, where a listed or specified activity has commenced without an environmental authorisation in contravention of section 24F (1) the Minister must direct the applicant to 'immediately cease the activity pending a decision on the application submitted in terms of this subsection, except if there are reasonable grounds to believe the cessation will result in serious harm to the environment.'

[140] I agree with the submissions made on behalf of the respondents that the rule of law and the rule against self-help are important considerations which are deserving of this Court's protection. These principles will be irreparably harmed if the Court condones and rewards the applicants' unlawful actions.

[141] The Department therefore did not act *ultra vires.* Whether the Department and/or the Minister committed a reviewable irregularity by ordering the cessation of all operations after the ASTs (both not the bunding and pipes etc) had been removed is an issue for the review court to determine.

[142] It is apparent that if interim relief is not granted the applicants' investments will be at risk, and that they have created further employment expectations which have been jeopardised by the cavalier approach which they have adopted. They did so at their own peril. Until the determination of the appeal or the review, expedited if it is deemed necessary, the employees working in the convenience store will resume such employment.

[143] In an orderly society citizens cannot be permitted to act first and comply later. They must first seek and obtain all the necessary approvals and only then undertake the regulated activities.

[144] The applicants ought to have complied with the regulatory requirements before commencing the operations of the filling station. If they wanted to challenge the refusal of the Municipality to issue a COO they should have done so timeously and on proper grounds and should have given the Municipality adequate opportunity to respond.

[145] Based on the aforegoing I am of the view that the applicants have not established a *prima facie* right to the relief sought in Part A, as the filling station was constructed unlawfully. They may also not bring a PAJA review before exhausting internal remedies.

Balance of convenience

[146] A court must be satisfied that the balance of convenience favours the granting of a temporary interdict. It must first weigh the harm to be endured by an applicant if interim relief is not granted as against the harm a respondent will bear, if the interdict is granted. A court must assess all relevant factors carefully to decide where the balance of convenience rests.[33]

[147] The Court in *OUTA*[34] held that:

> '..the balance of convenience enquiry must now carefully probe whether and to which extent the restraining order will probably intrude into the exclusive terrain of another branch of government. The enquiry must, alongside other relevant harm, have proper regard to what may be called separation of powers harm. A court must keep in mind that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimant's case may be granted only in the clearest of cases and after a careful consideration of separation of powers harm. It is neither prudent nor necessary to define 'clearest of cases'. However, one important consideration would be whether the harm apprehended by the claimant amounts to a

[33] *OUTA* at para 55.
[34] At para 47.

breach of one or more fundamental rights warranted by the Bill of Rights. This is not such a case.'

[148] In *OUTA* the CC further emphasised that:

'.there is yet another and very important consideration when the balance of convenience is struck. It relates to separation of powers. In *ITAC* we followed earlier statements in *Doctors for Life*[35] and warned that:

"Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers.'

[149] In view of my finding that the applicants have failed to establish a *prima facie* right it is not necessary to determine whether the other requisites for interim relief have been met. However, for the sake of completeness, I intend to deal with the other requisites, in case I am incorrect in my finding above.

[150] The applicants allege that the balance of convenience favours the granting of interim relief as there is no identified threat of harm to the environment and 'no laws will be broken because no listed activities requiring an EA are implicated if the filling station and operates using only the USTs with a total storage capacity of 28m^3.

[151] In the absence of establishing a strong prima facie case, the onus on the applicants to establish the grant of interim relief is even greater. The balance of convenience test in the present matter does not favour the granting of an interim interdict as the law does not come the assistance of those who resort to self-help or who act unlawfully.

Irreparable harm

[35] *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC).

[152] The alleged irreparable harm is set out in some detailed above. Much of this alleged harm has now been ameliorated by the respondents' tender at the hearing of the matter to permit the reopening of the convenience store pending the outcome of the review proceedings.

[153] On the applicants' version, the capital expenditure by Laley is in respect of equipment for the convenience store. More importantly, it appears that several of the employees are employed to work in the convenience store.

[154] In my view the applicants have failed to show that absent an interim interdict they will suffer irreparable harm and have failed to meet the threshold set forth in *OUTA.*

No alternative remedy

[155] Should the Department's decision to issue the compliance notice be reviewed and set aside, the applicants will have the right to claim any damages arising therefrom in due course.

[156] The applicants have failed to exhaust their internal remedies and must await the outcome of the objection / appeal against the Department's decision to issue the compliance notice, which appeal will properly be decided by 17 February 2025. This is, and the review, are adequate alternate remedies.

[157] I am further of the view that, in all the circumstances, that the applicants are not entitled interdict sought, as they have failed to show that their rights are subject to imminent or irreparable harm even if the review ultimately succeeds, as contemplated in OUTA. Put differently an applicant cannot merely rely on a right of review because review rights do not require preservation *pendente lite*. To succeed with interim interdictory relief, some right other than a right to review must be threatened with irreparable harm.

[158] This approach is in line with the recent decision of Lekhuleni J in this division *Greenpoint Residents and Ratepayers Association and Others v Gartner and Others*

('*Gartner')*,[36] where the applicants asserted their right to a review as their anchor prima facie right in their founding papers.[37] The Court stated:

> 'Simply put, there could be no consideration of irreparable harm without a prima facie right to be protected from future irreparable harm.'

[159] The Court in *Gartner* considered itself bound by *Khoin and Others v Jenkins and Others*[38] a full court decision of this division, and *Joostenbergvlakte Community Forum v Montana Development Company (Pty) Ltd*[39], where it was stated that to interdict building work pending a review, a prima facie right is not established merely if grounds of review show prospects of success.

[160] The applicants ought to have complied with the regulatory requirements before commencing the operations of the filling station. If they wanted to challenge the refusal of the Municipality to issue a COO they should have done so timeously and on proper grounds and should have given the Municipality adequate opportunity to respond.

[161] In all the circumstances I am of the view that the applicants have failed to make out a case for the urgent interdictory relief sought.

Costs

[162] Costs are always within the court's discretion, subject to such discretion being exercised judicially.[40]

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[36] (4859/2024) [2024] ZAWCHC 159 (3 June 2024).
[37] The Court granted the applicants leave to appeal in a judgment delivered on 10 September 2024, after finding that the appeal in that matter involves a question of law of public importance because of its general impact on future cases. Lekhuleni J was of the view that an authoritative judgment from the SCA will be in the interests of (a) owners seeking to exercise their fundamental property right to build under municipal approval, (b) objectors who may be contemplating an interim interdict application, and (c) the City and other municipalities who face the risk of interference with their constitutionally assigned powers.
[38] [2023] 1 All SA 110 (WCC).
[39] Case Number: 12205/2023 ZAWCHC (28 December 2023).
[40] *Ferreira v Levin NO and Others; Vreyenhoek and Others v Powell NO and Others* [1996] ZACC 27; 1996 (2) SA 621 (CC).

[162] As alluded to above, at the hearing the respondents tendered for the convenience store to be operated pending the review. The applicants however insisted on proceeding, whilst placing the respondents and the court under considerable pressure to oppose and adjudicate a matter where the record is voluminous and the issues complex.

[163] In this matter, there are no reason for a departure from the normal rule that costs follow the event. The applicants must pay the costs of this application, and in view of the complexity of the matter, the volume of the record, the circumstances in which the matter was brought and the fact that the applicants deemed it necessary to brief senior counsel from Johannesburg, in my view Scale C is the appropriate scale.

Order

[164] The following order is made:

164.1 The applicants' application for an interim interdict in terms of Part A of the Notice of Motion is dismissed, including the relief sought in paragraph 1.4 thereof; and

164.2 The applicants are ordered to pay the costs of this application jointly and severally, on Scale C.

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HOLDERNESS J

JUDGE OF THE HIGH COURT

APPEARANCES

For the applicant: Adv K Hopkins SC

Instructed by: Mr. H Brummer

Herbie Oosthuizen & Associates

For the First and Second Respondents: Adv M Vassen

Instructed by: Mr. L Manuel
The State Attorney
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