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iAfrica Transcriptions (Pty) Limited

"IN THE HIGH COURT OF SOUTH AFRICA"

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 20344/13

DATE: 2014-03-28

In the matter between

ENGEN PETROLEUM LTD Applicant

and

MIGHTY SOLUTIONS CC T/A ORLANDO SERVICE STATION Respondent

JUDGMENT

MATTHEE, AJ: I have decided to give an *ex tempore* judgment for a number of reasons. These include a need for finality for the parties. I also am aware that there are a number of other matters which are also running at the moment which involve a similar set of facts and similar legal arguments and I would not want this judgment to prevent the other ones from being finalised – from the bar I was informed that one of these matters is the subject matter of a petition to the Supreme Court Of Appeal. Also, from a workload point of view, given my acting position and that I am finishing off at the end of next week it would be desirable

to have as few reserved judgments as possible.

In this matter the applicant and the first respondent, and hereafter I will refer to the first respondent as the respondent, at my request compiled a joint practice note to assist me in adjudicating the matter. I am indebted to both of them for this combined effort which helped crystallize the issues to be determined, particularly given the voluminous nature of the record. In terms of this practice note the case concerns a petrol wholesaler's attempt, the wholesaler being the applicant, to evict the respondent, which is a fuel filling service station, from the premises where it conducts business or used to conduct business under the Engen brand. In the Notice of Motion the applicant seeks an eviction order and ancillary relief. At the hearing of the matter the applicant informed the Court that only the eviction order is being proceeded with and that if the applicant should be successful it only seeks an order in terms of paragraphs 1 and 6 of the Notice o f Motion.

Under the heading "the issues for determination" in the said practice note the parties agreed that the following issues need to be determined:

1. Whether the applicant has *locus standi* at common law to move for an eviction order.
2. Whether the respondent may rely on possessory rights arising from its fuel retail licence as read with the Petroleum Products Act as amended.

The practice note also consists of what it describes as the common

cause facts and I will read these in full using the paragraph numbers used in the joint practice note.

9. "The applicant is Engen Petroleum Limited, a licensed wholesaler and distributor of petroleum products to its nationwide network of independently operated and owned dealers, who operate Engen branded service stations. These dealers in turn sell the said products to the public through their Engen branded service stations.

10. The service stations are, by virtue of their get-up, signage, marks and colours, unmistakably part of the applicant's network and are recognised and identified by the public as such.

11. The applicant generally installs its own underground tanks and pumps and other equipment necessary to store and dispense petroleum products at a service station. It invests considerable amounts of money in developing a service station. It earns a return on its investment at a service station by supplying its network of service stations with all their petroleum product requirements on which sales it makes a profit.

12. The applicant consequently enters into expansive written agreements with its dealers.

13. There are several possible arrangements subject to which the applicant contracts with its dealers. One such arrangement as *in casu* is that:

13.1 The applicant hires a property from the registered owner of the property and in turn sublets same with the Engen Service

Station to the dealer. The dealer then conducts the Engen branded service station at the property in terms of and subject to the provisions of an agreement of lease and operation of service station (generally known as an operating lease).

14. On or about 05 September 2005, applicant and first respondent concluded such an operating lease. It was headed "agreement of lease and operation of service station".

15. The lease commenced on 01 September 2005 and was to remain in force until the sooner of the end March 2008 or terminable on a month's notice.

16. Pursuant to this lease, the applicant granted the first respondent occupation of the premises including the Engen branded service station situated thereat, and the first respondent commenced operating the service station using the applicant's equipment and the applicant's signage under its trademarks.

17. The premises comprised the immovable property where the respondent carries on business primarily as an automotive fuel filling service station and these premises are situate at corner Soweto Highway and Mooki Street, Orlando East, Soweto.

18. It is from these premises that the applicant seeks to evict the first respondent. (Hereafter I will refer to these premises as "the disputed premises").

19. For reasons that are not relevant to the current application, the aforesaid written lease was cancelled on or about 10 July 2009.

20. It is further common cause that the first respondent remained in

occupation of the premises ever since September 2005 and that it currently is still occupation of the premises. It is common cause that it no longer has any common law right to be in occupation - both the original written lease agreement referred to hereinbefore and/ or any subsequent lease arrangements have been validly cancelled.

21. The foresaid facts form the basis for the common law component of the eviction proceedings.

22. Further common cause facts relevant to the first respondent's argument that it enjoys the rights or possession capable of defeating the applicant's common law suit for eviction, are set out in what follows.

23. The first respondent is a duly licenced retailer of petroleum products.

24. Such licence was issued to the first respondent in order to conduct the sale of petroleum products at the premises.

25. The first respondent asserts that its retail licence coupled with its possession of the site defeat the applicant's suit.

26. Against this factual background the arguments of the parties may be assessed."

Mr Van Der Spuy, who appeared for the applicant, submitted that given the common cause facts particularly as recorded at paragraphs 16, 19 and 20 above in the practice note, the onus had shifted to the respondent to raise a defence which entitled it to resist eviction. He cited various authorities for this proposition. He also quoted a number

of authorities to support his further submission that a lessee has no right in law to question the right of a lessor to occupy a property. One such authority was the matter of *Boompret Investments (PTY) Ltd & Another v Paardekraal Concession Store (PTY) Ltd 1990 (1) SA 347 (A),* more particularly at Page 351 where Van Heerden JA stated the following:

> "It is of course true that in general a lessee is bound by the terms of the lease even if the lessor has no title to the property. It is also clear that when sued for ejectment at the termination of the lease it does not avail the lessee to show that the lessor has no right to occupy the property".

In reply Mr Savvas, who appeared for the respondent, did not join issue on this. In essence he argued that with the advent of the Petroleum Products Act 120 of 1977 as amended, hereafter the Act, a whole new regime was brought into existence *apropros inter alia* lease arrangements as in the present matter. In effect he argued that the applicant was no longer able to rely on the common law as argued by Mr Van Der Spuy as the Act had fundamentally changed the common law.

At the outset I asked Mr Savvas whether his arguments in this matter were on all fours with the arguments presented in the matter of Engen Petroleum Ltd v Gundu Service Station & Others, a decision of this High Court handed down on 6 June 2013 by Bashall AJ with case number 16333/12. He confirmed that the present matter was on all fours with Gundu *supra,* save for it being common cause in that matter that there was a Head Lease, whereas in the instant matter this was not

common cause. Given the common cause facts set out above I am unable to understand this distinction Mr Savvas seeks to draw between the two matters. In any event, given the extract from Boompret *supra* I am unpersuaded that the respondent is able to question the right of the applicant to occupy the property which in effect he is seeking to do by drawing this distinction.

Furthermore, the paragraphs he referred me to to augment the respondent's view on the issue of a Head Lease, as reflected in the common cause facts set out above, do no more in effect than to question the right of the applicant to occupy the premises. Accordingly, I am of the view that the applicant has the common law right to seek the relief it seeks. This leaves the main thrust of the respondent's argument, namely "whether the respondent may rely on possessory rights arising from its fuel retail licence as read with the Petroleum Products Act as amended", as reflected at paragraph 8.2 of the said practice note.

When I put to Mr Savvas that Bashall AJ in the matter of Gundu *supra,* had in great detail dealt with his argument, he submitted that in that matter the Court had not dealt with any of his arguments as regards possessory rights. As regards Gundu *supra* he informed the Court that leave to appeal had been refused and that he was in the process of settling the petition to the Supreme Court of Appeal. I then requested him to take me through the Act to show me the provisions he relies on to sustain his argument that the Act had in effect abolished the common law right which the applicant was relying on and which gave a retail

licence holder, such as the respondent, a possessory right of premises used by him which only could be terminated when his licence was revoked by the second respondent.

In essence he highlighted the following provisions of the Act. Firstly, the definition of manufacture which he alerted me to revealed that the Act was concerned with the commercial purposes of petroleum. He then went on to highlight Section 2 A (1) (a) through to (d), 2 A (4) (a) through to (d), 2 A (5) (a), 2 (A) (7) and finally 2 B (2) through to (4). The gist of his argument can perhaps best be summed up with reference to 2 A (5) (a) which reads:

"No person may make use of a business practice, method of trading, agreement, arrangement, scheme or understanding which is aimed at or would result in - (a) a licenced wholesaler (it is common cause that the applicant is such a licence holder) holding a retail license except for training purposes as prescribed, but excludes wholesalers and retailers of liquefied petroleum gas and paraffin;"

His emphasis was on the first line of (a). He submitted that to give effect to the intention of this provision, an arrangement such as in the present matter, must not be tolerated by the Courts. He argued that in effect the lease agreement in the present matter undermined the intention reflected in the said paragraphs as the wholesaler, the applicant in the present matter, by means of the business arrangement with the respondent was in effect "holding a retail licence" in conflict with the specific provision preventing the applicant from holding a retail licence.

Even if I were to be generous to the respondent, the common cause facts in the present matter simply do not support such a submission, not least of all as the common cause facts do not disclose the sort of business arrangement upon which the respondent's argument is based. Furthermore, no matter how generous an approach I take to the sections relied on by Mr Savvas, I simply cannot find any support for an interpretation which would take away the common law rights the applicant is relying on and give the respondent a possessory right *vis a vis* the disputed premises which only the second respondent could terminate by taking away the respondent's retail licence.

In this regard, when asked by the Court, on his argument what the remedy of a lessor or landowner would then be against such a lessee as the respondent, Mr Savvas responded that the relief open to such a person would be for the owner to approach the controller, that is the second respondent, by way of administrative action and ask for the retail licence to be revoked and that when such retail licence was revoked then the owner or the lessor would be able to get their property back. In effect it would be to create a new type of lessee, a sort of super lessee, with rights far in excess of rights of other lessees. The sections in the Act relied on by Mr Savvas simply do not support such an argument.

Mr Savvas also relied on Sections 22, 24 and 25 of the Bill of Rights as part of his argument. On the common cause facts in the present matter I am unable to see the relevance of these sections of the Bill of Rights. Furthermore he referred me to two matters, the one a

decision of the Constitutional Court of South Africa namely The Fuel Retailers Association of Southern Africa v The DG of Environmental Management, & a number of other respondents with case number CCT67/06 and also a decision of the Supreme Court of Appeal namely, the MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (PTY) Ltd & Another with case number 368/04. I have read both these matters and I also am unable to see the relevance of these two decisions to the present matter.

I pause to make the following observations. If one were to accept that notionally there is some merit in the thesis of Mr Savvas, as I indicated to Mr Savvas during his argument, I am of the view that there would be more appropriate methods and fora to test the thesis than is the case in the present matter. The Act itself provides for arbitration in terms of Section 12 B. I quote parts of it:

(1) "The controller of petroleum products may on request by a licensed retailer (that would be the respondent in the present matter) alleging an unfair or unreasonable contractual practice by a licensed wholesaler, (namely the applicant), or visa versa, require, by notice in writing to parties concerned, that the parties submit the matter to arbitration.

(2) An arbitration contemplated in (1) shall be heard - (a) by an arbitrator chosen by the parties concerned and (b) in accordance with the rules agreed between the parties."

Then finally in paragraph 5 of that section;

(5) "Any award made by an arbitrator contemplated in this section

shall be final and binding upon the parties concerned and may, at the arbitrator's discretion, include any order as to costs to be borne by one or more of the parties concerned".

When this was put to Mr Savvas he sought to argue that the arbitration provision would not apply to the dispute arising from Section 2 A (5) (a) namely that:

"No person may make use of a business practice, method of trading, agreement, arrangement, scheme or understanding which is aimed at or would result in – (a) a licensed wholesaler holding a retail license....".

I disagree with Mr Savvas. It is also important to note that in terms of this arbitration provision, if there is a measure of a lack of confidence in the ability of the controller to hear this sort of argument, the parties are at liberty to appoint an arbitrator, chosen by the parties, with the necessary expertise and experience.

Furthermore, if we look at Section 12 C of the Act we see that it empowers the minister to make regulations to give effect to the intention of the Act. Thus, for example, retail licence holders could approach the department with their grievances, for example about the lease arrangement complained about by the respondent, with a view to the minister making the appropriate regulations. Other options would include going the competition tribunal route and or approaching the High Court for a declaratory based on a pleaded set of facts. As regards the latter, I would have thought seeking a declaratory on whether the sort of lease agreement referred to by Mr Savvas is in conflict with the Act or

not would be a better option than arguing that the Act has changed the common law on leases.

In the present matter, although not in any way determinative of my decision, the respondent relying in any way on a *contra bonos mores* argument, which was alluded to by Mr Savvas at one stage, does not ring true if one has regard to the facts of the present matter. It is common cause that for at least the past 4 to 5 years the respondent has been using the disputed premises without paying any rent for it and has been selling the petrol of a retailer other than the applicant. Indeed, from the Bar, Mr Savvas himself used the description of the respondent having been squatting on the premises for this period. During this period there also has not been a tender by the respondent in the interim to pay the applicant or anyone else for that matter if one has regard to the landowner, any rental for the use of the property.

I return from my digression. In the light of my conclusions set out above I am of the view that the respondent has not raised a defence which entitles it to resist eviction. Accordingly I make an order in terms of paragraph 1 and 6 of the Notice of Motion.

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