IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 47215/12

DATE: 2014-08-05

**DELETE WHICHEVER IS NOT APPLICABLE**

**(1) REPORTABLE: NO.**

**(2) OF INTEREST TO OTHER JUDGES: NO.**

**(3) REVISED.**

**DATE**

**SIGNATURE**

In the matter between

ENGEN PETROLEUM LIMITED APPLICANT

and

SAGEWISE 1068 CC 1ST RESPONDENT
t/a KUTLOANO FILLING STATION & ANOTHER

PHINEAS MBONE MAGABE 2ND RESPONDENT

---

J U D G M E N T

---

SUTHERLAND J:

The applicant, Engen Petroleum Limited, seeks to evict the two respondents from business premises. The first respondent is styled Sagewise 1068 CC t/a Kutloano Filling Station and the second respondent is Phineas Mbone Magabe.

The Applicant relies on a contractual relationship between itself and the respondents in respect of the lease of the premises upon which the business of a petrol filling station is conducted. The relationship between them is regulated by written contracts.In the founding affidavit, allusion is made to the documentation which identifies the property clearly, sets out the provisions of the written agreements and indicates that the initial lease was concluded for a fixed period which terminated on 31 March 2009, which, in terms of a provision of that lease, continued on a month to month basis thereafter. The status of the respondents is that on monthly tenants.

It is alleged that on 25 May 2012 notice in terms of the agreement was given to cancel the lease and that the effective date of termination was 30 June 2012. On the premise of the applicant being the head lessee of these premises and on the further premise that the respondents' only rights to occupy the premises are in terms of a sub-lease, the applicant approached the Court and sought the eviction.

In the answering affidavit these particular averments were not

themselves challenged and there was no reason to suppose that there are any factual disputes about any of basis upon which the applicant seeks to assert its rights of possession. There is a challenge to the reliance on the applicants on a possessory right. In the answering affidavit a point is raised about the 'capacity', (I use that term in its neutral sense), of this particular applicant to assert its rights as the head lessee, *vis a vis* the respondents as sub-lessees. The basis of that that challenge is that the entity from which, so it is alleged, the applicant as head lessee procured its rights as head lessee has been liquidated. To that end, evidence is adduced in support thereof in the form of an annexure to its answering affidavit, being an extract from the Registrar of Companies documentation. That fact is undisputed.

That is the sole point which is put up relevant to the first of two arguments advanced by the respondents why the eviction may not be effected. The proposition of the respondents is that when a head lessee who derives its rights of occupation from a lessor finds itself in a position where the lessor is extinguished, if it is a juristic person, or dead, if the lessor is a natural person, the head lessee *can no longer assert possessory rights*. When I asked for the rationale to support that conclusion Mr Savas, who appears for the respondents, indicated that he was unable to deveop the point any further.

In my view, it seems that if one considers the predicament of a lessee of premises from a lessor-owner or a head lessee from a prior lessor, the principle of *Huur gaat voor koop* makes it quite plain that the head lessee or a sub-lessee as the case may be, derives its rights from the contractual arrangement and for the full duration of the head - lease. It is not suggested in these papers that the rights which the applicant seeks to assert as head lessee have yet to be terminate. In the absence of that assertion, in my view, there can be no legal significance to the extinction of the party from whom the applicant has derived its rights as head lessee.

The applicant may well have difficulties when the termination of its lease rights are due but that is not a matter which I am required to decide. On the narrower point about the rights of owners and/or of lessees to assert possessory rights I have been referred to the decision in *Pretoria Stadsraad v Ebrahim* 1979 (4) SA 193 (T) per Spoelstra J. That was a matter in which a question arose concerning the *locus standi* of a person in the predicament of the applicant who as lessor or head lessee seeks to assert possessory right rather than the owner. This decision is authority for the proposition that the head lessee *vis a vis* its sub-lessee is indeed vested with *locus standi* to bring such an application.

In the circumstances, subject to the respondent's second argument, I am unable to find any merit in the challenge to the cause of action upon which the applicant relies in order to approach the Court. Having disposed of that point we can turn to what is the real issue in the matter.

Self-evidently, the dispute has arisen within a particular context. There is, apparently, a widespread grievance on the part of entrepreneurs who have engaged in the distribution of petroleum and there is a sense amongst them, which may or may not be justified, that petroleum companies who supply petrol for the purposes of retail trade oppress them, impose unfair terms upon them, behave in anti-competitive ways and generally treat them badly. It is unnecessary for me to express any view about whether the grievance is justified. It is clear from the brief summation I give that *prima facie* one would have thought that the grievances lie in the realm of competition law and of the competition tribunal and the machinery of the Competition Act.

The applicants have sought to approach the High Court for relief. The respondents have addressed their arguments in this forum and it is incumbent upon me to resolve this dispute without regard to any competition principles because there is no jurisdiction vested in this court to do so.

There are two legs to the analysis necessary in order to assess the respondents' resistance.

The critical argument advanced on behalf of the respondents is that a proper appreciation of the Petroleum Products Act 120 of 1977 as amended by the Amendment Act 58 of 2003 and subsequently, has had a profound effect on the law relating to common law possessory rights. The effect of this impact, in short, is that the applicant, which is the head lessee of these premises and of many other premises, is no longer in law vested with a possessory right and cannot invoke its common law rights to evict sub-lessees because those common law rights have, in these particular circumstances, where the Petroleum Products Act 120 of 1977, as amended,(PPA) applies, been extinguished.

I was taken to the provisions of the PPA In support of the proposition that the PPA has had the effect of changing the common law remedies which a party in the position of the applicant might have had. I had my attention drawn to section 2, particularly section 2A (4), section 2A (5) and the definitions in section 1 of 'Hold', 'site', 'manufacture', 'retail' and 'retail licence'. I have also had my attention drawn to the impact of section 25 of the Constitution in relation to the question of goodwill as a form property deserving of legal protection.

The argument which has to succeed in order for the respondents' argument to have any traction is that upon a proper interpretation of the PPA the common law has been changed. It has been our law for a very long time that the mere fact that a statute might seek to regulate particular subject matter where the common law previously regulated it is not to be interpreted to mean that the common law is extinguished willy-nilly simply because statutory authority has now trespassed into a realm hitherto regulated by the common law alone.

10

The approach of our law is that one needs to examine the statute in order to determine whether or not the common law is affected and if so to what extent and only to the extent that the statute indeed does so. The position is that if it can be found that the common law has been changed the presumption is that the Legislature sought to change the common law as little as possible.

This leads logically to the next premise of the analysis which requires a Court not to be too hasty to interpret a statute as changing
20 the common law. In short, when one looks a statute which it is contended has changed the common law, one must be in restrictive mode and it cannot be presumed that a common law right has been extinguished, compromised or modified unless one can read from the provisions of the statute a clear intention to effect that change.

I have read the sections to which I have been referred and I am unable to detect from the provisions in the least degree an intention which is aimed at undermining the common law possessory regime. What I do read from these sections and from the PPA as a whole is the intention of the Legislature to introduce a very extensive regulatory regime in regard to trading in petroleum, including a regulation, not only of its distribution but also of the places from which it may be sold. I do not see a basis provided for in the PPA to support the contentions of the respondents.

10

As a result of that finding, I am unpersuaded that there is a basis for the conclusion that the applicant's possessory rights are extinguished.

However, this is not the first time that this argument has been put before a Court. The parties themselves have drawn my attention to two decisions in this Division. Both are unreported. The first is a matter in which Bashall AJ gave judgment on 6 June 2013 under case 2012/16333 in the South Gauteng High
20 Court. That matter is *Engen Petroleum Ltd v Gundu Service Station CC, Lokotela Felicia Sebiko*, as the second respondent and BNM Petroleum Products CC as the third respondent. Subsequent thereto, Matthee AJ in this Court gave a judgment on 28 March 2014 under case 2013/20344. He had the benefit of the judgment of Bashall AJ which dealt with virtually the identical arguments.

An examination of these judgments and of the papers put before me in this matter, which, again, involves Engen Petroleum Ltd and the identical standard documentation, demonstrates that the arguments on the meaning of the PPA which have been articulated before me, have been articulated previously before other judges in this Division.

What Bashall AJ has to say about these arguments can be captured from two passages which I wish to quote about the contention that the provisions of the Petroleum Products Act have the effect that respondents argue for.

The following appears at page 7 of the judgment of Bashall AJ:

> "As to the earlier submissions on licensing issues the respondents have misconceived the intention and effect of the licensing provisions of the Act as amended. The affidavits have laid no basis for the contentions advanced. Indeed many of the contentions submitted in the heads of argument of which but a few I quoted above have no foundation in law or fact."

Later, in a passage on page 29, having dealt with further arguments he deals with the contentions advanced to him there in the following passage:

> "*Non constat*, however, the startling proposition contended for on behalf of the respondents, there is no warrant therefore. The provisions of Act 55 of 2003 including section 2 (d) the Charter of the South African Petroleum and Liquid Fuels Industry in which the Charter, the applicant, is itself listed as a participant, all the regulations R286 of 27 March 2006, *let alone the original Act contemplate, countenance or intend a displacement of the applicant's rights flowing from the contraction of real rights vested in it.* The licensing provisions do not stultify the applicant's rights nor bar its entitlement to access to the courts for relief. It is on these rights the relief is sought and to which it is on the papers entitled." (Italics supplied)

That learning was available to Matthee AJ. In the subsequent judgment, at page 7ff, it enjoyed endorsement where Mathee AJ dealt with virtually the same argument.

In substance, the argument before me is no different. What that leads to is the self-evident conclusion is that even if I were, as I am not, impressed by the argument advanced on behalf of the respondents and were I of the view that there is indeed a proper basis upon which to unsuit the applicant I am faced with the fact that two judgments in this Division have held otherwise. By the doctrine of precedent I am not at liberty to ignore those judgments unless I am in a position to articulate that they are clearly wrong.

What precisely is required of a Judge in determining whether another one or more judgments is clearly wrong is not on the researches, which I have conducted, something which has enjoyed any particular formulation or test. Indeed it has been largely left to the common sense of judges to determine what it must be. My sense, based on common sense I trust, is that it is not open to a Judge, if he has to show fidelity to the doctrine or precedent, to depart from an earlier decision in the Court which is binding on him unless if it is possible to articulate that the rationale advanced in support of the competing proposition is untenable. I do not propose to give the use of the word ‘untenable’ any particular context other than to suggest that it must bear its ordinary meaning of unsustainable plainly misconceived or indeed preposterous.

Given the lengthy and careful judgment given by Bashall AJ dealing with the very arguments which have been before me I am at pains to find a basis to conclude that the rationale he offered for dismissing that application, as did Matthee AJ in the other matter, are untenable. In support of the proposition that these judgments ought to be departed from as being clearly wrong, several arguments were advanced; namely, that they ignored various arguments advanced about section 24 and 25 of the Constitution. The contention was that there would be an inequity relating to the goodwill that would be forfeited by a lessee who would be obliged to vacate premises on the whim of the head lessee. In particular, the provisions of section 2A (1), (4) and (5) were said to be crucial to the argument that comprised the *locus standi* of a head lessee in the position of the applicant.

I am unable to detect in the treatment given to that argument and those sections in particular, any premise upon which I could conclude that either Bashall AJ or Matthee AJ in the two matters they have heard were clearly wrong. The upshot is that, as alluded to earlier, even if I were not myself convinced that the argument was unsustainable it would not be open to me to find in the face of two competing judgments that I could hold so.

Having regard to all of these considerations, in my view, the defence, which has been offered, to the relief sought must fail. In

consequence of that, the relief which is sought must be granted. The notice of motion before me seeks various prayers and an application has been made for costs. In my view, the prayers in the notice of motion paragraph 1, 2, 3, 4 including 4.1, 4.2, 4.3, 4.4 and paragraph 5 including paragraph 5.1 and 5.2 should be granted. An order is so made.

_____

Roland Sutherland

Judge

(Edited 30 March 2015)

- - - - - - - - - - - - - - -