REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 21/36899

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED. NO

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SIGNATURE **DATE:** 3 May 2022

In the matter between:

MOWAD CC **APPLICANT**

And

ENER-GI FUEL CORPORATION(PTY) LTD **FIRST RESPONDENT**

THE INSTER OF MINERAL

RESOURCES AND ENERGY N.O **SECOND RESPONDENT**

JUDGMENT

MANOIM J

[1] In this application, the applicant -Mowad CC (Mowad) seeks to evict its tenant, the first respondent, Ener-Gi Fuel Corporation (Ener-Gi) from a site in Benrose where it has previously run a business retailing fuel.

[2] The basis for the application is that; according to Mowad, Ener-Gi is both in breach of the lease agreement and is operating a fuel retail business illegally because it does not have the requisite licence to do so in terms of section 2A of the Petroleum Products Act, 120 of 1977(the Act). This, according to Mowad means that the contract is void for want of statutory compliance.

[3] Mowad owns a property in Benrose. It is licenced under the Act as a site holder. This means that it can permit fuel retail to be conducted on its site. But to retail fuel, the retailer requires another licence referred to as a fuel retail licence which is to be obtained from an official known as the Controller of Petroleum Products (Controller). According to Mowad's site licence, one of the conditions is that a corresponding retail licence must be prominently displayed at the place of business.[1] There is also a general obligation to comply with the Act and Regulations.

[4] In January 2019 Mowad entered into a lease agreement with Ener-Gi. The essential terms of this lease were that Mowad leased the site to Ener-Gi to conduct the business of a fuel retailer, for a period of 9 years and eleven months. In *lieu* of

[1] Case Lines 002-30 paragraph 3.

rent and in return for letting it the site, Ener-Gi would pay a percentage of the price of the fuel it sold to Mowad.

[5] The written terms of the lease are common cause. The understanding of what the agreement means and if it has been supplemented by a further oral agreement between the parties - not reflected in the agreement, is the subject of dispute.

[6] Ener-Gi does not have a retail licence. The reason for this is a matter of dispute between the parties as I discuss more fully later.

[7] On 30 June 2021 Mowad relying on a breach clause in the agreement gave Ener-Gi fourteen-days' notice to rectify what it considered - conduct in breach of the agreement. Although the letter referred to several alleged breaches, the only one relevant to this decision is its contention that Ener-Gi was trading without the requisite licence.

[8] But within the fourteen-day period Ener-Gi stopped trading. This was not due to a conscious decision on its behalf to remedy the breach but a fortuitous set of events. The unrest that affected the country in July 2021 led to looting at the service station and because of the damage Ener-Gi was forced to cease retailing. It has not traded as a retailer since. The site remains without any operations. Ener-Gi has secured its interests by deploying security guards at the site, whilst Mowad has locked an office on the site, allegedly on the instructions of its insurance company. There is thus an impasse from which neither party benefits.

[9] Ener-Gi's defence to the breach of contract claim is simple. It alleges that once it was placed in breach it remedied the breach because it stopped retailing. The fact that this may have been entirely fortuitous it argues, does not detract from the fact that it has remedied any alleged breach during the 14-day period.

[10] But it argues, in any event – that it was never in breach. This takes us to the interpretation of clause 5.4 of the lease which states as follows:-

The lessor warrants that the premises are suitable for use as contemplated in clause 5.1 of the lease agreement or in such instance where no licence is yet available, the Lessee will obtain the necessary licences.

[11] This clause is not a model of clarity on what turns out to be the most important aspect of this agreement. Mowad's interpretation is that the first phrase means that it was responsible for the site licence, whilst Ener-Gi, if it did not have a retail licence yet, would take the necessary steps to do so.

[12] Ener-Gi argues that ensuring the premises were suitable for use , meant Mowad had to do more than be in possession of a site licence; it also had to procure the necessary initial steps that would assist Ener-Gi in obtaining a retail licence.

[13] At first blush this seems nonsensical. Surely it is for the party seeking to retail to obtain a licence.

[14] But the regulatory scheme for retail licences is more complicated than this. The Act says there can only be one license issued per site.[2]

[15] It has been impossible because of this provision for Ener-Gi to obtain a licence because the previous lessee of the site, Shakeel Shafi still owned the retail licence despite having vacated the site. Shafi has a commercial dispute with Mowad and for that reason was unwilling to relinquish the licence.

[16] In the normal course an erstwhile licence holder would in the language of the Act surrender the licence.[3] It is common cause that Shafi had not done so when the lease commenced.

[17] Here is where the dispute of fact arises. In his founding affidavit, Saleem Wadee, the proprietor of Mowad claims that he was unaware that Ener-Gi did not have a licence or at least a temporary licence, until March 2021 (recall the lease commenced on February 2019), when he received an unsolicited letter from Shafi

[2] Section 2B(4) says the Controller of Petroleum products must issue only one retail licence per site.

[3] See section 28 of the Regulations GN

stating *inter alia* that he was willing to surrender the licence if he was paid R 80 000. This led him to instruct his then attorney to make enquiries as to whether Ener-Gi had a licence. The attorney enquired and the response was in the negative.

[18] This then led Mowad to instruct his attorney to give notice of breach on 30 June 2021.

[19] Ener-Gi maintains that Wadi was fully aware at the time that it did not yet have a retail licence. According to Feinblum, its deponent, he could not have obtained the surrender as he did not know the identity of Shafi at the time of the signing of the lease. The only person who did was Wadee. This was the reason Wadee had undertaken to approach Shafi to surrender the licence. But Wadee never did, despite being requested on many occasions to do so by Ener-Gi. Eventually, Ener-Gi got in touch with Shafi, once it ascertained his identityand after paying him R 125 000, got his undertaking to surrender the licence.

[20] The status quo at present is that Ener-Gi does not have a licence and the Controller has refused to give Energ-Gi a licence pending the outcome of this litigation. Presumably the Controller does not want to give a licence to a party who might be evicted, although this is not stated as its reason.

[21] Ener-Gi's position is that Mowad is not seeking to cancel the lease because it does not have a licence but for its (Mowad's) own commercial reasons. Similarly, Mowad's unresolved commercial dispute with Shafi means it has been unwilling to obtain the surrender of the existing licence.

[22] For this reason, Ener-Gi seeks in a counterclaim, the following relief aimed at rectifying the lease by inserting as a new clause 5.4 A the following clause: *"The Lessee's obligations in terms of clauses 5.2, 5.2.1 and 5.4 (inasmuch as they relate to the obtaining of a retail licence) were conditional upon the Lessor first procuring from the previous licence holder (Shafi Service Station CC) its original retail licence and the Declaration to Surrender same in respect of the Premises."*

[23] In the alternative, Ener-Gi argues that there are so many disputes of fact in this matter that it should be referred to oral evidence.

[24] Mr Bhima for Mowad argued that the only reasonable interpretation of clause 5.4 was that it was for Ener-Gi as the lessor to take responsibility for obtaining the retail licence. This was the only sensible interpretation to give to this clause since Mowad could not obtain a licence on its behalf.

[25] Since the licence had not been procured by as late as June 2021 when it came to the attention of Mowad, it was entitled to rely on the breach clause which it did. As for the fact that it had ceased trading during this period, his contention is that Ener-Gi has always retained the intention to continue trading. It had thus shown by its intention that it was not intent on rectifying the breach and the fact it had ceased trading was an entirely fortuitous event caused by external factors.

[26] But independently of this cancellation in terms of the contract he argued, Mowad was entitled to cancel the contract on the basis that the contract was void because it is illegal to retail petrol without a licence.

[27] If Mowad has a compelling argument, it might be this latter one. The following features of the contact are noteworthy:

- The purpose of the lease is to rent the site for the retail of fuel
- The rental payable is calculated as a percentage of the fuel sold
- The agreement makes no commercial sense if the site was not used for fuel retailing as otherwise Ener-Gi cannot earn a living and Mowad does not get rent. Therefore, one cannot sever the activity of retailing which would be unlawful from the purpose of the lease, which is to do just that.

[28] However, the law on voiding contracts based on statutory illegality is far from clear.

[29] In the *locus classicus* **Schierhout v Minister of Justice**, Innes CJ held:

[30] "It is a fundamental principle of our law that a thing done contrary to the direct prohibition of the law is void and of no effect. The rule is thus stated: 'Ea quae lege fieri prohibentur, si fuerint facta, non solum inutilia, sed pro infectis habeantur;

licet legislator fieri prohibuerit tantum, nec specialiter dixerit inutile esse debere quod factum est.'" (Code 1.14.5). So that what is done contrary to the prohibition of the law is not only of no effect, but must be regarded as never having been done - and that whether the law giver has expressly so decreed or not; the mere prohibition operates to nullify the act."[4]

[31] Noteworthy here is, that the Act does contain a penalty provision in section 12, for trading without a licence. But it also goes on to state, in a *proviso*, that if a directive issued in terms of sections 2(A) (2))c) or (3) has been complied with, within the specified period - the person concerned would be absolved from criminal liability.(Section 12)

[32] Courts have also, in later cases, suggested that where a statutory provision contains both a prohibition and a penalty for contracting illegally, this may mean that the legislature was content to remedy non-compliance in this manner and it was not necessary to add to the severity by voiding the contract in question.[5]

[33] Nevertheless Van Huysteen *et al* observe that the consequences of illegality vary.[6]

[34] It is certainly arguable that, if a contract involved the direct sale of fuel, then it would be void, based on the cases.[7]

[35] However, it is less clear when the contract sought to be impugned is indirect as in the case of this lease. Here, the contract is not to sell fuel but to lease a site to sell fuel. It is thus ancillary to the regulated activity.

[36] It is entirely possible for the parties to enter into this lease without the existence of a retail licence and without it being illegal, if it contained a suspensive condition that the agreement was subject to the lessee (Ener-Gi) obtaining a licence or temporary licence within a reasonable or stipulated time period. The agreement

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[4] 1926 AD 99 at 109
[5] See for instance Pottie v Kotze 1954(3) SA 719 @ 727.
[6] Van Huysteen et all *Contract General Principles,* 6th Edition, page 223
[7] In *Thomas v Head of the Department of Agriculture, Conservation, Environment & Tourism, North West Province and others* [2008] 1 All SA 392 (T) at para [56] the court granted an interdict against a party retailing without a licence

might also have provided that one of the parties would undertake, - if necessary, to procure from Shafi - the notice of surrender.

[37] The agreement does not say any of these things in express terms. But the key provision, paragraph 5.4, contains language and two phrases that are open to several interpretations. Given our courts' more recent approach to the interpretation of contracts, this means that context and purpose become important considerations in resolving the dispute. [8]

[38] For this reason, I am not persuaded that the contract when properly interpreted is necessarily illegal.

[39] Nor is it clear-cut that the breach, if there was one has not been remedied by the cessation of trade during the 14 days; albeit the occurrence was fortuitous and we cannot divine what the lessee might have done had this not transpired and the 14 days run its course.

[40] As for the counterclaim;I have the same reservations about the disputes of facts. Mr Bhima correctly points out that here Ener-Gi as the counterclaiming party bears the *onus*.

[41] I am thus in agreement with Mr Korf that due to material disputes of fact which go to the root of the contract, this matter must be referred to trial. The disputes are too numerous to be referred to oral evidence on any one aspect.

[42] As for costs, since neither party has been entirely successful and it is not known what the outcome of the trial will yield, costs should be determined by the trial court.

ORDER

[8] See *Natal Joint Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) 18

1. The matter (including the application and the counter-application) is referred to trial.

2. The Notice of Motion shall stand as a Simple Summons.

3. The Applicant shall deliver a Declaration within 20 days.

4. Further proceedings shall be conducted in accordance with the Uniform Rules of Court

5. That costs to date shall be reserved for determination by the trial court.

N MANOIM

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 3 May 2022.

Date of Hearing:	19 April 2022
Date of Judgment:	3 May 2022

Appearances:

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