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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case number: 2022-015704

Date of hearing: 7 September 2022

Date delivered: 20 September 2022

REPORTABLE: NO

OF INTEREST TO OTHERS JUDGES: NO

REVISED

20/09/2022

In the application between:

OMEIDA TRADING 397 CC	**Applicant**
And	
STEELDALE PROPERTY HOLDINGS (PTY) LTD	**First Respondent**
ENGEN PETROLEUM LTD	**Second Respondent**
SHERIFF OF THE HIGH COURT, JOHANNESBURG	**Third Respondent**

JUDGMENT

SWANEPOEL AJ:

INTRODUCTION

[1] This application came before me in the urgent court. Applicant seeks an order against respondents in the following terms:

> [1.1] That, pending the resolution of an action under case number 21/57278, and an arbitration in terms of section 12 B of the Petroleum Product Act, 1977 ("the Act"), respondents be interdicted and restrained from evicting the applicant from Erf [....] Steeledale Township, Johannesburg ("the premises").
>
> [1.2] That, pending the resolution of the above disputes,
>
> > [1.2.1] The second respondent be directed to continue supplying applicant with petroleum products on the standard terms and conditions as existed between the parties previously; and
> >
> > [1.2.2] The second respondent be ordered to honour its obligations to first respondent arising from a head lease concluded between first and second respondents on 5 July 2013.

[2] Applicant also seeks a declaratory order that it is entitled to remain on the premises, and to conduct its business as a filling and service station at the premises. Respondents have argued in limine that the matter is not urgent. Due to the view that I take on the merits of the matter,I do not believe that it is necessary to deal with urgency.

HISTORY

[3] First and second respondents ("Steeledale" and "Engen" respectively") entered into a so-called "head lease" in respect of the premises on 5 July 2013. On 8 April 2016 applicant and Engen entered into a sub-lease agreement ("the sub-lease agreement") in respect of the same premises. Applicant has occupied the premises ever since then.

[4] On 18 April 2018 applicant requested the Controller of Petroleum Products ('the Controller") to refer certain conduct by Engen to arbitration in terms of section 12 B of the Act. The complaint related to a disputed electricity claim, and also to Engen's intention to terminate applicant's lease. The Controller confirmed on 2 December 2019 that the matter would be referred to arbitration. The arbitration has not yet commenced, and applicant has been remarkably remiss in not pursuing the matter.

[5] On 25 June 2020 Steeledale sent notice of breach of the head lease to Engen. alleging certain safety compliance issues at the premises. Engen allegedly forwarded the notice to applicant, although it has been unable to locate the correspondence. Steeledale, and in turn Engen, alleged that applicant had breached clauses 2.6, 2.7 and 7.2 of the head lease. The alleged breach was not rectified, as a result of which Steeledale cancelled the head lease on 27 July 2020, and it called upon Engen to vacate the premises. On 26 October 2020 Engen wrote to applicant demanding that it vacate the property, on the basis that the sublease had terminated by effluxion of time on 31 March 2020.

[6] On 13 May 2021 Steeledale served an application on Engen seeking its eviction from the premises. On 21 June 2021 Engen in turn launched an application for the eviction of the applicant from the premises. Applicant filed its answering affidavit in the latter application on 6 December 2021.

[7] On 3 December 2021 applicant launched an action against both Steeledale and Engen, alleging that they had colluded with one another in the cancellation of the head and sub-leases in order to allow Steeledale to take over applicant's business, and so that Engen could avoid the consequences of the arbitration. The action alleged that the termination of the head lease was fraudulent and thus void. Applicant seeks in the action (which is not yet finalized) that the eviction applications be declared to be an abuse, and that the termination of the head lease be set aside.

[8] Steeledale's application to evict Engen was heard on 7 March 2022. The application was opposed by Engen. Surprisingly, even though applicant was aware ot tne pending application against Engen, it did nothing to intervene in the matter. In argument before Malindi J Engen and Steeledale agreed that the breaches that Steeledale had relied upon to cancel the head lease had in fact occurred. It was also common cause between them that the head lease had been cancelled. The only question that remained for determination was whether an eviction order could be granted against Engen, in light of the fact that it was not in occupation of the premises. The Court held that Engen was in occupation of the premises through its sub-tenant, and ordered Engen to vacate the premises within one month, failing which the sheriff was ordered to evict "anv and all persons occupving the teased premises" (my emphasis).

DISCUSSION

[9] Engen says that the sub-lease had come to an end by effluxion of time on 31 March 2020, and although an extension of the sub-lease had been offered to applicant, it had not accepted the offer. Therefore, Engen says, applicant has no right to occupy the premises.

[10] However, even if applicant is correct, that it has a sub-lease agreement with Engen in place (which I doubt), the fact is that Steeledale has cancelled the head lease, and is entitled to possession of the property. Neither Engen nor applicant have an existing contractual right to occupy the property.

[11] Applicant has launched arbitration proceedings in terms of section 12 B of the Act, and has also launched the action referred to above, in an attempt to have the head and sub-leases restored. Section 6 of the Arbitration Act, 1965 provides for legal proceedings to be stayed pending an arbitration. Any party to such legal proceedings may apply to court at any time after entering an appearance but before delivering any other steps in the proceedings. Applicant relied upon the Constitutional Court judgments in Business Zone 1010 CC t/a Emmarentia

Convenience Centre v Engen Petroleum Ltd[1] and Crompton Street Motors CC t/a Wallers Garage Service Station v Bright Idea Projects 66 (Pty) Ltd t/a All Fuels.[2]

[12] Both of those matters are distinguishable from this case on the facts. In *Business Zone* the Constitutional Court was concerned with an appeal in a review application where the applicant sought an order in the High Court reviewing the Controller (and the Minister's) decision not to refer a complaint to arbitration. In Crompton Street the Constitutional Court considered a refusal to stay legal proceedings pending an arbitration in terms of section 12 B of the Act. In both those cases the dispute was directly between the petroleum wholesaler and the retailer, No third party was involved in the dispute.

[13] It is in this distinction that applicant's problems lie with regard to its argument that the arbitrator may decide to reinstate the head lease. Section 12 B allows the licensed retailer to lodge a complaint only against the licensed wholesaler who has committed an unfair or unreasonable contractual practice. Section 12 B cannot apply to Steeledale, and whatever finding the arbitrator makes, he/she cannot reinstate the head lease. the absence of a head lease, Engen cannot be ordered by the arbitrator to reinstate the sub-lease.

[14] This is also not an application to stay proceedings in terms of section 6 of the Arbitration Act. The proceedings which have resulted in the applicant's eviction from the premises have been concluded. The only conceivable manner in which applicant would be able to prevent the eviction order from being executed would be if it could show that Engen and Steeledale had colluded in a fraudulent scheme in order to deprive applicant unlawfully of its business, and that they should be interdicted from giving effect to the order that resulted from their fraudulent conduct.

[15] I sincerely hope for applicant's sake that applicant finds some evidence for its theory before the action goes to trial, because these papers are completely

[1] [2017] ZACC
[2] [2021] ZACC 24

devoid of any evidence that substantiate applicant's collusion claims. Applicant claims that it was never advised of the alleged breach of the agreement that caused Steeledale to cancel the agreement with Engen. Therefore, applicant argues, Engen and Steeledale had colluded in cancelling the agreement. Engen alleges that it did in fact send the notice of breach to applicant, but it cannot locate the document. Even if Engen had been remiss in forwarding the notice, that fact alone is not, in my view, a basis to believe that there was some form of collusion. Engen denies any collusion and alleges that its dealings with Steeledale were at arms-length. If one has regard to the fact that Engen opposed the eviction application brought against it, that averment seems to be correct. In my view applicant's argument that there was collusion between Engen and Steeledale is not supported by the facts.

[16] Applicant must show that it has a clear right to the relief sought, or at least a prima facie right, though it may be open to some doubt. There is nothing to remotely suggest that applicant may be successful in having the head lease reinstated. Consequently, I cannot find that applicant has even a prima facie right to the relief sought.

[17] Furthermore, should the order that applicant seeks be granted, I would be imposing a new trade agreement upon Engen that would force it to do business with applicant. I would be imposing an occupier on Steeledale that it does not want on its property. I would also be imposing a new contractual relationship on Engen and Steeldale in circumstances where they both agree that their contractual relationship has come to an end. This I cannot do. Consequently, the application must fail.

[18] A final issue that must be dealt with is the issue of costs. The application consisted of 864 pages. The directives governing urgent applications are clear. The papers must be concise and focused. That was not the case in this matter. Applicant included in the papers a large number of annexures which were utterly irrelevant to the matter.

[19] I seriously considered crafting a costs order that would penalize the applicant's attorney, as it is not the applicant itself who elects which annexures to include. It acts on the advice of its attorney. On reconsideration I decided not to do so. As was said in Waar v Louw [1]the attorneys' profession (and by implication that of counsel) is a responsible one. An attorney is required to show great skill and knowledge in the performance of his duties- Where an attorney or counsel have made a mistake, it should not be easily disregarded. However, one must also take cognisance of the fact that the legal profession is a difficult one, and even the most experienced of practitioners can make mistakes. Therefore, one should not have too much of a lenient attitude towards mistakes which result in unnecessary costs, but one should also not apply the whip too strenuously.

[20] I therefore make the following order:

[20.1] The application is dismissed.

[20.2] Applicant shall pay the costs of the application, which shall include the cost of senior counsel where so employed.

SWANEPOEL AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION OF THE HIGH COURT,
JOHANNESBURG

COUNSEL FOR APPLICANT:	**Adv R Booysen**
ATTORNEY FOR APPLICANT:	**De Kooker Attorneys**
COUNSEL FOR FIRST RESPONDENT:	**Adv C Georgiades SC**

[1] 1977 (3) SA 297 (O.P.A.)

ATTORNEYS FOR FIRST RESPONDENT:	**Vining Camerer Inc.**
COUNSEL FOR SECOND RESPONDENT:	**Adv S Aucamp**
ATTORNEYS FOR SECOND RESPONDENT:	**Mathopo Moshimane Mulangaphuma Inc.**
DATE HEARD:	**7 September 2022**
DATE OF JUDGMENT:	**20 September 2022**