**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG NORTH DIVISION, PRETORIA**

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED. ✓
DATE 1/8/14 SIGNATURE

**Case No 47397/14**

4/8/2014

In the matter between:

| | |
|---|---|
| **NEW INVEST 144 PROPRIETARY LTD** | **Applicant** |
| and | |
| **MORNING DEW TRADING CC** | **1st Respondent** |
| **BHARAT BULLAH** | **2nd Respondent** |
| **MAHOMED ASMAL** | **3rd Respondent** |
| **AMANALA SAYED** | **4th Respondent** |
| **SHELL SOUTH AFRICA MARKETING PROPRIETARY LIMITED** | **5th Respondent** |
| **I'M A TRADER 101 PROPRIETARY LIMITED** | **6TH Respondent** |
| **MARTIQ 1206 CC** | **7th Respondent.** |

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**JUDGMENT**

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1 The applicant seeks the urgent eviction of the first and third respondents from premises known as The City Service Station, 136 North Rand Road, Boksburg, Gauteng., together with costs to be paid by the first, second and third respondents on a punitive scale.

2 Before the merits of the application and the defences raised in respect thereof can be considered, it is necessary to identify the parties and to deal at some length with the chronology of the events giving rise to the present dispute.

**THE PARTIES**

3. The applicant is NEWINVEST 144 (PTY) LTD, a company with limited liability registered and incorporated in terms of the old Companies Act 61 of 1973 and with principal place of business at No 13, South West Building Complex, 1st Floor, "In the Tower" Shopping Centre, 136 and 237 North Rand Road, Boksburg, Gauteng.

4. The applicant is the registered owner of the immovable property from which it seeks to evict the first and third respondents.

5. The first respondent is MORNING DEW TRADING 279 CC, a close corporation with limited liability duly registered and incorporated in terms of the Close Corporations Act 69 of 84, presently occupying the disputed premises and trading therefrom as a service station. The said address is, presumably, its principal place of business.

6. The second respondent is BHARAT BULLAH, an adult businessman residing at No 3, 5th Avenue, Houghton, 2041, Johannesburg, Gauteng.

7. The third respondent is MAHOMED ASMAL, a major businessman residing at 685 Curry Road, Morningside, Durban, KZN. Although resident in a different jurisdiction, the third respondent has not objected to this court's jurisdiction and has participated in the proceedings.

8. The fourth respondent is AMANALLAH SAYED, (also referred to a '*AMANALA SAYED*'), a major businessman whose further particulars are to the applicant unknown.

9. The fifth respondent is SHELL SOUTH AFRICA MARKETING LIMITED, a company duly registered in terms of the old Companies Act and with principal place of business at Campus Twickenham Building, 57 Sloane Street, Epson Downs, Bryanston, Johannesburg, Gauteng.

10. The sixth respondent is I'M A TRADER 101 (PTY) ITD, a company with limited liability duly registered and incorporated in accordance with the old Companies Act 61 of 1973. No registered address or principal place of business was provided by the applicant in its founding affidavit.

11. The seventh respondent is MARTIQ 1206 CC, a close corporation registered and incorporated in terms of the Close Corporations Act 69 of 1984. Again, no principal place of business or registered address was provided by the applicant in its founding affidavit for this respondent.

**CHRONOLOGY**

12. On the 15th December 2008, the first respondent concluded a retail supply agreement and an equipment sale agreement with the 5th respondent, relating to equipment situated at the City Service Station.

13. On the same date the same parties entered into a retailer supply agreement for the sale of fuel, effective on 1 January 2009. It related to the same site.

14. The first respondent was issued with a site license certificate for the aforesaid site on the 12th June 2009 and with a retail licence agreement on the 12th July 2009 by the Department of Minerals and Energy.

15. The third respondent alleges that he entered into negotiations with the second respondent for the purchase of the rights to the site in March 2012 and that the applicant's deponent, Christofides, was fully aware thereof.

16. Third respondent purchased the member's interest in the first respondent from the second respondent during October 2012 for R 5,9m. The transfer of the members' interest to the third respondent was, however, only registered on the 3rd April 2014.

17. On the 1st November 2012 the fifth respondent approved the third respondent as a retailer, provided that he held the necessary licences for the conduct of a filling station.

18. The applicant as owner of the premises entered into a lease agreement with the first and second respondents as lessee. The lease was in writing and dated 7th March 2013. The commencement date of the lease was the 1st April 2013. The lessee would conduct a service station on the premises.

19. Third respondent alleges that during September 2013 he, Christofides and the second respondent held a site meeting to discuss the transfer of the business to him.

20. Third respondent appointed one Danka to manage the site on 1 November 2013. He alleges that Christofides was aware of this fact as he, the third respondent, discussed the appointment orally with him.

21. The applicant allegedly observed an unknown male person engaged upon the business of the service station during January 2014 and raised a complaint about this fact with the lessee, adding that there was a strong smell of diesel and oil surrounding the premises. It is common cause that the allegedly unknown person is the third respondent who was appointed, as set out above, as early as 1 November 2012 as retailer at the City Service Station by fifth respondent, subject to certain conditions such as obtaining the necessary license and the provision of a bank guarantee.

22. On the 13 January 2014 the applicant addressed a letter to the lessee, placing on record that it had been rumoured that the business had been sold to a third party, in contravention of the terms of the lease, without prior written approval by the lessor. Complaints about the smells of diesel and fuel were raised as well.

23. The parties are agreed that the site experienced a fuel leak in January 2014. According to the first respondent, the leak was repaired prior to 25th March 2014, on which date the repairing company submitted its invoice.

24. When the lessor allegedly received no reaction to the letter dated 13 January 2014, a meeting was arranged for the 5th February 2014, at which the applicant alleges warnings were issued about late payment of rent and the security risk of the alleged fuel spillage. These warnings were apparently conveyed orally.

25. On the 7th February 2014 the lessor confirmed this discussion in a letter, threatening termination of the lease if rental was not paid timeously and recording that the service station was not kept in a tidy or safe condition.

26. The third respondent alleges that a further meeting between Christofides and himself took place on the 28th February 2014 at the Ballito Mall to discuss further repairs and improvements to the site. Christofies allegedly commented that the third respondent should have been more diligent in investigating the state of the site prior to purchasing the same. Third respondent indicated his willingness to effect the improvements and repairs as he had bought the site voetstoots. Christofides then, according to the third respondent, adverted to the need to draw up a new lease, requesting third respondent's identity document to be able to draw up a new contract. Third respondent handed the identity document to him.

27. Third respondent is adamant that he was not informed of any need to obtain the landlord's prior written consent to the sale and avers that Christofides conveyed his approval of third respondent's acquisition of the member's interest in first respondent at this meeting.

28. On the 17th March 2014 the fifth respondent ceased to supply the first respondent with fuel because the first respondent did not have a valid licence

according to fifth respondent's responsible employee, Mr Shoo. The landlord, however, was informed, according to Christofides, that the fifth respondent stopped supplies because of the fear that it would not be paid.

29. As a result of the first and second respondents' alleged failure to rectify the issues raised by the landlord, another letter was addressed to the lessee on the 26th March 2014, in which the lessor's deponent records that numerous personal meetings had taken place and telephone calls had been made to address the problems without effect. In addition, the service station had run dry on two occasions, allegedly because Shell was unwilling to supply stock as they feared that payment would not be forthcoming. The applicant recorded that it was consulting its lawyers and, depending upon advice, might declare a breach of the agreement.

30. According to the applicant another meeting took place on the same day the letter was dated, 26th March 2014, to discuss the matters raised in it. Another letter followed on the 28th March 2014, recording a persistent shortage of fuel and reiterating that the applicant's lawyers were studying the matter to '*...establish whether a Breach of Contract has been occurred.*' (sic)

31. On a date prior to the 28th March 2014 the landlord allegedly was informed that the third respondent had purchased the business (and presumably had been placed in possession thereof), which the landlord was not willing to accept. On the said date the third respondent telephoned the applicant's deponent and referred to an e-mail allegedly sent on the 25th March 2014, which the landlord denies having received. In this e-mail third respondent

records the meeting at the Ballito Mall and the alleged oral acceptance of the members' interest having been transferred to him.

32. On the 1st April 2014 the landlord forwarded a letter to the lessee containing a quotation for repairs that were required and which the landlord would effect at the lessee's cost. On or about the same date Christofides met with Shell and explored the possibility of letting the site to the fifth respondent if the lease with first respondent were to be cancelled. He also informed them of intended renovations and repairs to the site at the estimated price of R 248 000, 00 which fifth respondent was willing to effect at its cost if it became the lessee.

33. On the 8th April 2014 Shoo met with third respondent on the site and expressed interest in acquiring same.

34. On the 7th May 2014, the fourth respondent contacted the third respondent and expressed a similar interest in the site. The two met on the 9th May 2014 to inspect the service station. The fourth respondent made an offer of R 1 million to acquire the site, which offer was rejected.

35. On the 15th May 2014 Sayed terminated all contact with the third respondent, after allegedly having been informed by fifth respondent that he should deal with the second respondent in any negotiations regarding the first respondent.

36. On the 16th May 2014 the landlord entered into a new notarial lease with Shell which was to commence on the 1st June 2014. It is common cause that Shell agreed to pay a higher rental than the first respondent was paying.

37. On the 19th May 2014, fourth respondent and Shoo arrived at the service station and purported to take it over '*...on Shell's instructions and authority*'.

Third respondent attempted to negotiate with Sayed, who he alleges was threatening and unwilling to recognise the error of his ways. Third respondent consulted his lawyers and the site was returned on the 28th May 2014.

38. In the meantime, on the 21st May 2014 the applicant sent a letter to the lessee, stating that the lease was terminated with immediate effect ' *on advice of Shell...*' and based on numerous written and oral warnings. The letter furthermore recorded that the lessor had entered into a new lease with Shell.

39. On the 28th May 2014 Christofides addressed an e-mail to the third respondent in which he claimed that they had agreed that the landlord was fully justified to terminate the lease, with particular reference to a clause therein that the landlord must approve any intended change of members' interest in writing before it is effected and that actions in conflict with this provision would be regarded as a material breach of the agreement. The third respondent disputes that there ever was any agreement to cancel.

40. On the 2nd June 2014 the fourth respondent again took control of the site, apparently at the behest of, or in agreement with the fifth respondent. The first respondent regarded this step as a spoliation and on the 19th June 2014 a spoliation order was granted by the Gauteng Local Division, Johannesburg restoring possession of the site and business to the first respondent at the fourth respondent's cost, which the third respondent alleges are paid by the fifth respondent.

41. The first and third respondents charged the fifth respondent and the applicant with ant-competitive behaviour in a letter dated the 17th June 2014. This

charge was hotly disputed in ensuing correspondence on the 20th and 24th June 2014.

42. On the 25th June 2014 first respondent issued a cancellation notice of the retail supply agreement to Shell through its attorneys, which did not result in a resumption of fuel supply by fifth respondent, which had refused to supply fuel to the first respondent since the 20th June 2014. From the 26th June 2014 until the present the first respondent is sourcing fuel from alternative suppliers.

43. A formal complaint was filed with the Competition Commission by the first respondent against the applicant and fifth respondent on the grounds of alleged anti-competitive behaviour and an unauthorised large merger between them.

**THE DISPUTED ISSUES**

44. The principal issues that arise for determination are, firstly, whether the first respondent is guilty of a breach of the agreement of lease that would entitle the applicant to cancel the lease; secondly whether the applicant did in fact validly cancel the lease in the manner prescribed by the parties' agreement; thirdly whether the applicant and the first respondent agreed to cancel the lease and fourthly, whether the first and third respondents are correct in their submission that the court has no jurisdiction to decide this matter as the dispute between the applicant and the fifth respondent on the one side and

first and third respondents on the other has been properly referred to the Competition Tribunal by way of a complaint that is neither frivolous nor vexatious and is such that the present application cannot be decided without resolving the same. The first and third respondents accuse the applicant of colluding with the fifth respondent to effect a merger with the applicant to take over the filling station site. For this charge they rely upon the fact that the applicant and the fifth respondent concluded a notarial lease in respect of the disputed site while the first respondent's lease was still in existence, describing it as a fraudulent preparatory manoeuvre to deprive the first respondent of its business. With particular reference to the fifth respondent's involvement in the dispute between the applicant and the first and third respondents, the repeated spoliation of the first respondent's possession of the site at the instance of the fifth respondent with the tacit acquiescence of the applicant, and the fifth respondent's failure to honour the retail agreement they charge the fifth respondent with anti-competitive actions, exclusionary acts and abuse of market dominance with the ulterior motive of unlawfully obtaining control of the filling station site and business. Possession and ownership of the equipment is also in issue between the parties and first and third respondent accuse the fifth respondent of attempting to obtain the first respondent's equipment free of charge through the nefarious collusion with the applicant. They find further support for the alleged collusion and anti-competitive behaviour in what they term applicant's dishonest denial of any knowledge of or consent to the third respondent's involvement with and investment in the first respondent.

45. Turning to the alleged breach of the agreement of lease first, it is clear that the alleged transfer of the members' interest in the first respondent to the third respondent by the second is respondent is a bone of contention. The relevant clause of the written agreement is clause 7:

> *'**SUBLETTING AND CESSION***
>
> *7.1 The Lessee shall not –*
>
> *7.1.1 Cede, assign, mortgage, pledge or in any manner deal or purport to deal with any of its rights or obligations under this Lease;*
>
> *7.1.2 Su b-let the leased premises or any portion thereof; or*
>
> *7.1.3 Give up occupation of the leased premises or part thereof, or place anyone else, whether as licensee, agent, occupier, custodian, or otherwise, in occupation of the lease premises or any part thereof on ny terms whatsoever or for any reason whatsoever without the Lessor's prior written consent.*
>
> *7.2 No transfer of shares, or transfer of a member's interest, in the Lessee shall be affected without the prior written consent of the Lessor nor shall control of the Lessee be transferred directly or indirectly to any person other than those vested with or entitled to such control at the commencement date without the Lessor's prior written consent. Any transfer of such shares or member's interest or change of control without such consent shall be deemed to be a material breach of the Lease…'*

46. In spite of the somewhat verbose protestations in the third respondent's affidavit to the contrary, it was virtually common cause that the first and third respondents were, at all relevant times, in breach of this clause. It was clearly for this reason that the third respondent went to great lengths to demonstrate that the applicant's Mr Christofides was aware of the third respondent's involvement in the first respondent's affairs as soon as the former appeared

on the scene and failed to raise any objection thereto. In addition, the third respondent advances the argument that he was never informed of the fact that the landlord's written prior consent was required before the change of membership of the first respondent could be validly effected.

47. Neither of these arguments can hold any water. If the third respondent was indeed unaware of the provision in first respondent's written lease that a change of members' interest required the landlord's prior written consent, he must have approached the acquisition of such interest with remarkable sanguinity by failing to inform himself of the terms of the lease with the landlord. He certainly has only himself to blame if he did act to his detriment because of his *laissez-faire* approach. There is no basis for the suggestion that the applicant is estopped from relying on the express terms of the agreement the first respondent entered into while represented by the second respondent. It is common cause that the landlord did not approve of the transfer of the members' interest in writing at any stage. The agreement of lease contains an express non-variation clause that prohibits any oral amendment of the lease, with the result that any reliance on an (disputed) acceptance of the third respondent's acquisition of the members interest is misplaced and ineffective.

48. There can therefore be no doubt about the fact that the first respondent is in breach of the parties' written agreement.

49. The next question to be considered is whether the first and third respondents' conduct of the filling station's business and the maintenance of the site and equipment was such that the applicant is entitled to rely upon the failure to do

so properly as a breach of the agreement. The first problem in this regard is the fact that virtually every allegation put forward by the applicant is disputed by the first and third respondents. Respondents assert that they repaired any fuel leak and conducted a profitable business until the fifth respondent, in cahoots with the applicant, stopped the fuel supply to force the first respondent off the site. The allegation that the sale of fuel rendered a monthly profit approximating half a million Rand has not been disproved. The fact that the fifth respondent is evidently very keen to obtain control of the site supports the assertion that first respondent could conduct a profitable operation as long as it received fuel from the fifth respondent. The position is complicated by the fact that the applicant's Mr Christofides has been reluctant to fully disclose all his interactions, contacts and discussions with the third and the first respondents, and even more so in respect of his negotiations with the fifth respondent. The founding affidavit is a model of sparseness and terseness that results in an incomplete picture being presented. The consequence thereof is that the first and third respondents' version has to be accepted whenever it conflicts with that of the applicant. As neither party sought a reference to oral evidence (leaving aside the tender of an inspection in *loco* tendered by first and third respondents to demonstrate the cleanliness and efficiency of the site, which tender was not greeted with any enthusiasm by the applicant), the court is unable to determine these factual disputes on paper.

50. The applicant has therefore failed to establish a breach of the lease agreement other than the transfer of the members' interest to the third respondent without its prior written approval. In addition, there is no evidence

of a clear notification to the first and second respondents that their conduct of the business on the site, unless rectified within a reasonable time, would lead to a cancellation of the agreement. The first and second respondents were never placed *in mora* by the various letters the applicant directed to them, as is evident from the correspondence quoted above.

51. This leaves the question whether the applicant has succeeded in proving a cancellation that complies with the express terms of the lease. Clause 13 is the relevant clause:

> '***13. BREACH OF LEASE***
>
> *Should the Lessee –*
>
> *13.1 Fail to pay any amount due by the Lessee in terms of the Lease on the due date thereof or commit any other breach of any term of the Lease or fail to observe same and fail to make such payment or to remedy such breach within a period of seven days of the giving of written notice to that effect to the Lessee by the Lessor; or*
>
> *13.2 Consistently breach any one or more of the terms of the Lease in such manner as to justify the Lessor in holding that the Lessee's conduct is inconsistent with the lessee's intentions or ability to carry out the terms of the lease;*
>
> *13.3 Permit or allow or have a consent judgement entered against him and fail to satisfy or note an appeal against same within fourteen days of same coming to hi notice,*
>
> *Then and in any of such events the lessor shall be entitled, without prejudice and in addition, to all other rights available to the Lessor in law as a result of such event forthwith cancel the lease, ….'*

52. The *lex commissoria* that is dictated by clause 13.1 of the lease agreement is applicable to an alleged breach of the provisions of clause 7.1 of the contract. It therefore requires strict compliance, in other words an express written notification by applicant to first and second respondents that the unauthorised transfer of the members' interest to the third respondent must be rectified within seven days after the notice being given to avoid the cancellation of the

agreement on that ground. Failure to give the requisite notice results in an ineffective attempt to cancel the agreement.

> *'In order for the appellant to succeed in this regard it had to show that it complied strictly with the peremptory provisions of clause 14. The appellant was obliged in terms of the said clause to notify the respondent in writing, of the breach complained of. The appellant further had to prove that the respondent received such notice. If the notice was despatched by registered post, the appellant could rely on clause 12.2 as it would deem the respondent to have received the notice within 7 days of posting….*
>
> *Moreover on a closer analysis of the notice itself, it is evident that it entirely fails to indicate, and call on the respondent to remedy, any particular breach complained of It thus fails to comply with the requirements of clause 14…..*
>
> *In my view the non-compliance with clause 14 prevents the appellant from relying on any of the three breaches on which it purported to rely to cancel the agreement.'*

Per Erasmus AJA in *Hano Trading CC v J R 209 Investments (Pty) Ltd* [2012] ZASCA127 (not yet reported).

53. The applicant could not, and did not, suggest that a notice in terms of the contract had ever been given to the first and second respondents, calling upon them to rectify the material breach of the agreement. It follows that there has been no valid cancellation of the lease. The application must therefore be dismissed on this ground alone unless there is proof that first and third respondents did in fact agree with the landlord that the lease had been validly cancelled

54. This alleged oral agreement confirming that the landlord had validly cancelled the lease does not stand up to scrutiny. Not only is it vigorously disputed, but on the probabilities it is highly unlikely that third respondent would make such a concession, given the history set out above. No request was made to refer this issue to oral evidence. Given the very real dispute raised by the first and

second respondents on the papers, no finding can be made in the applicant's favour in this respect. The application must therefore fail.

55. This finding renders any enquiry into the question whether the matter should be referred to the Competition Commission, or, in this case, be postponed *sine die* to await the outcome of the complaint to the Competition Tribunal, unnecessary. Section 65 (2) of the Competition Act 89 of 1998 decrees the following:

> *'(2) If, in any action in a civil court, a party raises an issue concerning conduct that is prohibited in terms of this Act, the court must not consider that issue on its merits, and –*
>
> *(a) If the issue raised is one in respect of which the Competition Tribunal or Competition Appeal Court has made an order, the court must apply the determination of the tribunal or the Competition Appeal Court to the issue; or*
>
> *(b) Otherwise, the court must refer that issue to the tribunal to be considered on its merits, if the court is satisfied that –*
>
> *(i) The issue has not been raised in a frivolous or vexatious manner; and*
>
> *(ii) The resolution of that issue is required to determine the final outcome of the action.'*

56. As the applicant has failed to prove the cancellation of the agreement, the issue of whether it and the first respondent have transgressed the provisions of the Competition Act by anti-competitive behaviour, exclusionary acts or by an alleged unauthorised merger is not required to determine the outcome of the application. The present litigation is brought to finality once the purported cancellation is held to be invalid.

57. The application to evict the lessee must therefore be dismissed. The costs must follow the result.

The following order is made:

1. The application is dismissed with costs, such costs to include the costs of two counsel.

Signed at Pretoria on this 1st day of August 2014.

E BERTELSMANN

Judge of the High Court.