IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

9/9/16.

Case No: 72636/2015

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

9/09/2016

In the matter between:

MMTNB GENERAL TRADING (PTY) LTD	Applicant
and	
EVATON FUELS CC t/a BP EVATON NORTH	First Respondent
CONTROLLER OF PETROLEUM PRODUCTS	Second Respondent
B P SOUTHERN AFRICA	Third Respondent
THE NATIONAL EMPOWERMENT FUND	Fourth Respondent
NIENABER FAMILY INVESTMENTS CC and TRIPLE K INVESTMENTS (PTY) LTD	Fifth Respondent

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JUDGMENT

VAN DER WESTHUIZEN, AJ

1. In this application, the applicant seeks relief in terms whereof the business of the first respondent and the business premises of the fifth respondent, known as BP EVATON NORTH situated at 1892 Rabotapi Street, Evaton North, Gauteng, are to be handed over to the

applicant, together with ancillary relief against the second and fourth respondents respectively.

2. The aforesaid relief is premised upon specific performance in terms of alleged agreements between the applicant on the one part and the first, third and fifth respondents respectively on the other part.

3. The applicant is MMTNB General Trading (Pty) Ltd, a company with limited liability, initially co-owned by the deponent to the founding affidavit and presently co-owned by her husband and their son. The applicant was incorporated for the purpose of purchasing the aforementioned business. The first respondent is the owner of the business B P Evaton North, being a retailer of petroleum products, the subject of this application. The second respondent is the Controller of Petroleum Products responsible for the issuing of licences in terms of the Petroleum Products Act, No. 120 of 1977. The third respondent is B P Southern Africa, a company that *inter alia* franchises the retail of petroleum products. The fourth respondent is the National Empowerment Fund and the fifth respondent is the owner of the premises upon which the business is situated.

4. The respective relationships between the parties have a chequered history.

5. There are a number of disputes on the papers. The applicant is of the view that those disputes are not real disputes and can be decided on the papers. The applicant declined to have the disputes referred to oral evidence or trial. The first, third and fourth respondents concurred with the applicant's view. The matter is to be dealt with on what is contained in the papers filed.

6. A brief background may prove useful. In this regard the following can be gleaned from the papers.

(a) The deponent to the founding affidavit and her husband decided to purchase the aforesaid business on learning that it is for sale;

(b) In that regard they, on behalf of the applicant, entered into negotiations with the first respondent and a written agreement was concluded as contained in FA1 to the founding affidavit. Thereafter, two further agreements, relating to the sale of the business, were concluded with the first respondent; FA2 and FA3, respectively;

(c) The applicant commenced negotiations with the third respondent with a view to retailing petroleum products on the third respondent's behalf at the premises where the first respondent's business was conducted, i.e. at the aforementioned property. Those negotiations were successful to the extent that the third respondent conditionally appointed the applicant as dealer at the aforementioned property;

(d) Negotiations were also commenced with the fourth respondent for funding the aforementioned purchasing of the first respondent's business;

(e) The aforementioned negotiations were entered into during 2013;

(f) On 15 April 2014, the fourth respondent conditionally approved the funding applied for;

(g) Following on the conditional appointment of the applicant as dealer, the applicant was required to enter into agreements with the third respondent relating to franchising and to a lease agreement relating to the said property. Both these agreements were subject to conditions being complied with by the applicant;

(h) The aforementioned agreements were entered into only between the applicant and the respective respondent. The agreements were separate and distinct of one another.

7. It follows that the agreements between the applicant and the third and fourth respondents are dependant upon the continuance of the agreement in respect of the purchasing of the business of the first respondent.

8. Against the aforementioned background, matters took a turn in 2014 and the respective relationships became soured and strained. The applicant encountered various problems in complying with the conditions imposed upon it in respect of the relevant agreements entered into.

9. It became clear to the applicant that none of the respondents, i.e. first, third and fourth, had any appetite left to continue with their respective roles relating to the purchasing of the business of the first respondent.

10. In that regard, the first respondent cancelled the agreement relating to the sale of the business for want of payment of the purchase price. Only an amount of R500 000.00 was paid. The third respondent withdrew the letter of conditional appointment on the ground of non-compliance with conditions set. The fourth respondent withdrew its commitment in respect of funding, similarly for want of compliance with conditions. The applicant launched this application, contending that it had met all conditions imposed upon it by the respective agreements.

11. Mr Savvas, who appeared on behalf to the applicant, disavowed any reliance on the agreements in FA1, FA2, and FA3. He sought to rely on "bits here, bits there and the concurrences, assistance and participation" for the relief sought. No contract in that regard is

pleaded. The basis for the relief is to be inferred from the alleged "concurrences, assistance and participation".

12. On behalf of the applicant much reliance was placed upon the franchise agreement and the lease agreement with the third respondent. In respect of the first respondent, the applicant relies upon the *"essentialia"* relating to the purchase price and the alleged jettisoning of the stipulated date for payment thereof. The applicant alleges that all the conditions imposed upon it by the fourth respondent were met. Hence the relief sought is competent.

13. It is conceded by Mr Savvas that if the applicant is not successful in respect of the relief sought relating to the handing over of the business of the first respondent and the premises at which it is conducted, the applicant would have no *locus standi* in respect of the remaining relief sought. That being so, in view of the findings that follow, it is not necessary to deal with the underlying reasons for that relief.

14. In the founding affidavit, the purchase price of the business is stated to be R3 000 000.00 of which an amount of R500 000.00 was paid. However, in FA1, the initial agreement, it was recorded to be R3 800 000.00. In the replying affidavit the applicant accepts that the purchase price is R3 660 000.00. Disavowing any reliance on either of FA1, FA2 or FA3, it is not clear what the *essentialia* in respect of the purchase price is.

15. The first respondent alleges that the agreements in FA1 and FA2 were superseded by FA3, the latter constituting the underlying agreement for the purchase of the first respondent's business.

16. Mr Savvas submitted that the first respondent jettisoned the condition set for payment of the purchase price when it did not enforce

compliance therewith. Hence, Mr Savvas submitted that accordingly there was no time set for payment of the purchase price.

17. On the first respondent jettisoning the time for performance in respect of payment of the purchase price, Mr Savvas submitted that no reliance for cancellation of the agreement could be placed on the non-compliance thereof. The submission begs the question. If no specific date was then agreed upon, it is trite that a reasonable time within which payment is to be effected is to be implied, alternatively that it is to be performed on demand.[1] In that regard the first respondent addressed a letter of demand for compliance with payment of the purchase price. There was no compliance with the demand. The agreement in FA3 was cancelled following on the non-compliance with the letter of demand. That cancellation has a domino effect. All other agreements that flowed from the sale agreement were of no consequence or effect.

18. Furthermore, the third respondent withdrew its conditional appointment of the applicant as trader. Mr Savvas submitted that such withdrawal was of no consequence. The concluding of the franchise and lease agreements had superseded that conditional appointment. Hence there was nothing to withdraw. There is no merit in that submission. The letter of conditional appointment refers to the concluding of a franchise agreement and a lease agreement. Both those agreements refer to and incorporate the letter of conditional appointment as trader. Those agreements depend on the continued conditional appointment as trader. It follows that non-compliance with the conditions contained in the letter of conditional appointment affect all subsequent agreements that flow there from. Once the letter of conditional appointment as trader is withdrawn, the franchise and lease agreements have no continuance and no consequence and effect.

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[1] *Laljee v Omadutt* (1883) 4 NLR 117

19. It follows that once the purchase agreement falls away and the letter of conditional appointment as trader has no status, nothing remains to be funded.

20. The party asserting that a contract exists is obliged to prove that contract.[2] In the absence of the applicant pleading a contract of purchase with clearly discernable terms, it is trite that it is not for the court to determine what the contract was and to determine the terms thereof. It is not clear what constitutes the alleged "concurrences, assistance and participation" that is to constitute the agreement between the parties. Mere assistance in concluding an agreement does not impart any obligations on the party assisting.

21. On the principles enunciated in the judgment of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[3] the version of the first respondent is to be accepted in respect of the agreement to purchase the business. I have referred above to the first respondent's allegation that FA3 constituted the agreement of sale and that it was cancelled. I find that the agreement to purchase the business of the first respondent, and the terms and conditions thereof, is contained in FA3. That agreement was cancelled.

22. Consequently, it is not required to consider the applicant's contentions in respect of the withdrawal of the conditional appointment as trader or those relating to the fourth respondent withdrawing from the funding of the purchase price. Suffice to say that the applicant knew what conditions it had not complied with *vis-à-vis* the fourth respondent. That appears clearly from its own e-mails attached to the papers. In respect of the obtaining of the retail licence *vis-à-vis* the third respondent, the applicant seeks specific relief against the second respondent in that regard.

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[2] *McWilliams v First Consolidate Holdings (Pty) Ltd* 1982(2) SA 1 (1)

[3] 1984(3) SA 623 (A)

23. It follows from the foregoing that the application cannot succeed.

I grant the following order.

(a) The application is dismissed with costs.

C J VAN DER WESTHUIZEN
ACTING JUDGE OF THE HIGH COURT

On behalf of Applicant:	B Savvas
Instructed by:	Venn & Muller Attorneys
On behalf of First Respondent:	H M Viljoen
Instructed by:	Metcalfe Attorneys
On behalf of Third Respondent:	C T Vetter
Instructed by:	Nortons Inc
On behalf of Fourth Respondent:	K T Mokhatla
Instructed by:	C Ngubane & Associates Inc.