

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

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

A handwritten signature in black ink, appearing to be "S. J. J.", is written over a rectangular box.

4 March 2021

Case No:61429/19

In the matter between:

CHAMDOR SERVICE STATION CC

Applicant

and

**THE CONTROLLER OF PETROLEUM PRODUCTS
OF THE DEPARTMENT OF MINERAL RESOURCES
ENERGY**

First Respondent

ARBITRATION FOUNDATION OF SOUTHERN AFRICA

Second Respondent

ARBITRATOR HENKLOUW N. O

Third Respondent

FUTURE PHAMBILI PETROLEUM (PTY) LTD

Fourth Respondent

JUDGMENT

SK Hassim AJ

Introduction

[1] Chamdor Service Station CC (“*Chamdor*”), the applicant in the main application, is a licensed retailer contemplated in the Petroleum Products Act, Act No 120 of 1977 (“*the*

Act”). Future Phambili Petroleum (Pty) Ltd (“*Phambili*”), the fourth respondent is a licensed wholesaler contemplated in the Act.

[2] Chamdor operates a filling station from erf 370 Lewisham Township, Registration Division I.Q, Province of Gauteng situated at 137 Main Reef Road, Lewisham, Krugersdorp (“*the property*”) in terms of a franchise agreement incorporating a lease agreement concluded with Phambili’s predecessor-in-title, Caltex (Pty) Ltd (“*Caltex*”). The property is owned by Phambili and let to Chamdor in terms of the franchise agreement incorporating a lease agreement.

[3] Chamdor seeks to stay the arbitration of a dispute referred by Phambili to the Arbitration Foundation of Southern Africa (“*AFSA*”) in terms of the franchise agreement (“*the AFSA arbitration*”) pending the finalisation of an arbitration requested by Chamdor under section 12B of the Act (“*the section 12B arbitration*”). Such requests are directed to the Controller of Petroleum Products (“*the Controller*”).

[4] Phambili opposes the application to stay the AFSA arbitration and counter applies for Chamdor’s eviction from the property. Chamdor opposes this.

[5] The first, second and third respondents do not oppose either of these applications.

[6] Despite seeking several orders in the notice of motion, Chamdor persists only with the following prayer:

“1.4 staying any proceeding instituted against the applicant until finalisation of the Section 12B arbitration proceedings with the [Controller] in terms of the Judgment and Order of Teffo J on 10 November 2017.”

The relationship between Chamdor and Phambili

[7] The disputes have their origins in a franchise agreement, incorporating a lease agreement, concluded between Caltex and Chamdor on 28 June 2001. Caltex granted to Chamdor a license to amongst others sell and/or dispense approved Caltex petroleum

products for fifteen (15) years from 1 August 2001¹ at the property which Caltex leased to Chamdor. The duration of the lease agreement coincided with that of the franchise agreement. The franchise agreement specifically provided that upon it being terminated for whatever reason, the right to occupy the property terminated. The franchise agreement as well as the lease would have lapsed by effluxion of time on 31 July 2016.

[8] The franchise agreement provided a mechanism for the resolution of disputes. If negotiation and mediation failed, the parties could submit the dispute for resolution by an arbitrator appointed by AFSA (*“the AFSA arbitrator”*). In the event of Caltex instituting legal proceedings in a court of law for the eviction of Chamdor from the property, the latter could in terms of clause 20.6 of the franchise agreement apply to the court for a stay of the court proceedings pending the resolution of the dispute by the AFSA appointed arbitrator.

[9] Caltex changed its name to Chevron South Africa (Pty) Ltd (*“Chevron”*) on 15 August 2005. During September 2012, Chevron ceded and assigned to Phambili its rights and obligations in terms of the franchise agreement. Phambili hence acquired, as against (and in favour of Chamdor), the rights and obligations conferred by the franchise agreement, as well as the lease agreement. Phambili has been the owner of the property since December 2012, having acquired it from Chevron.

The 2015 eviction application

[10] It is common cause that after Chevron exited the franchise agreement, disputes arose between Chamdor and Phambili.

[11] On 20 April 2015, Phambili cancelled the franchise agreement and thereby the lease and demanded that Chamdor vacates the property. Chamdor disputed Phambili’s right to cancel the franchise agreement and refused to vacate.

¹ The contract period of 15 years was divided into three periods of five years each. Chamdor could elect to extend the duration of the contract after the first and second periods for a further five years. There was no right to extend beyond the third five-year period.

[12] On 14 October 2015, Phambili lodged an application under case no. 82577/2015 for Chamdor's eviction from the property (*"the 2015 eviction application"*). Chamdor opposed that application.

Chamdor's request for arbitration in terms of section 12B of the Petroleum Products Act

[13] The Controller is empowered by section 12B of the Act to refer a matter to arbitration if requested by a licensed retailer who alleges to have been subjected to an unfair and unreasonable contractual practice at the hands of a licensed wholesaler (or *vice versa*).

[14] A section 12B arbitration is limited in its scope; it does not extend to all disputes arising between a licensed retailer and licensed wholesaler. It is confined to an *"unfair or unreasonable contractual practice by a licensed wholesaler, or vice versa"*. The powers of the arbitrator of a dispute contemplated in section 12B, are limited to determining whether the alleged contractual practices concerned are unfair or unreasonable and if so, make an award deemed necessary to correct such practice and if the allegations giving rise to the arbitration were frivolous or capricious, then make an award deemed necessary to compensate the party affected by the allegations.

[15] Chamdor was of the view that it was being treated unfairly in that amongst others, Phambili in breach of the franchise agreement, refused to supply fuel to it.² On 29 July 2016 (two days before the franchise agreement lapsed by effluxion of time), Chamdor requested the Controller to exercise the powers conferred by section 12B of the Act. It complained that Phambili had indicated that it would not be renewing the franchise agreement and, had not offered value for the business.

The hearing of the 2015 eviction application on 18 March 2017 by Teffo J

² Chamdor also averred that Phambili despite having approved a sale of the franchise, frustrated the sale by refusing to enter into a lease agreement with the prospective purchaser and surreptitiously offered to the prospective purchaser a franchise and lease at another site.

[16] Chamdor disputed Phambili's right to terminate the franchise agreement. On 10 November 2017, Teffo J granted an order staying the eviction application pending the outcome of the section 12B arbitration.³ The court found amongst others that (i) Phambili had to follow the dispute resolution process provided in the franchise agreement, which it had not done; (ii) the right to evict Chamdor could not be divorced from the dispute which Chamdor had referred to the Controller in terms of section 12B of the Act; (iii) even though the franchise agreement had come to an end by 19 March 2017 by effluxion of time, Phambili could not rely on this event for the eviction of Chamdor because it occurred after the eviction application was launched.

The withdrawal of the 2015 eviction application

[17] On or about 16 September 2019, Phambili delivered a notice of withdrawal of the 2015 eviction application. No tender was made for the payment of Chamdor's costs.

The referral of a dispute by Phambili to AFSA

[18] On 12 November 2018, Phambili sent a letter of demand calling upon Chamdor to amongst others cease trading. On 30 November 2018, Phambili referred to AFSA two disputes (i) Chamdor's eviction from the property due to the franchise agreement having lapsed by effluxion of time; and (ii) Chamdor's continuing activities. The third respondent has been appointed to arbitrate the dispute. It is this arbitration which Chamdor applies to stay pending the finalisation of the section 12B arbitration.

Chamdor's application for the stay of AFSA arbitration

[19] The legal basis on which Chamdor seeks to stay the AFSA arbitration pending the finalisation of the section 12B arbitration is not entirely clear from the founding affidavit.

³ On or about 18 September 2019, Phambili withdrew the eviction application and counter-applied in this application for Chamdor's eviction from the property.

[20] There are two suggestions in the founding affidavit; I put it no higher than that. The one is that the mediation process envisaged in the franchise agreement, a precursor to the arbitration, was postponed indefinitely and the other is that “*it [is] necessary that the parties comply with the judgment and order of Teffo J and wait until the section 12B arbitration proceedings is [sic] finalised*”.

[21] In the heads of argument delivered on behalf of Chamdor, three additional reasons are advanced why the AFSA arbitration should be stayed.

- (i) An application for Chamdor’s eviction is pending before this court (i.e., the 2015 eviction application).
- (ii) The AFSA arbitration must be stayed to obviate conflicting pronouncements on whether Chamdor should be evicted from the property.
- (iii) The same issue arises in both the AFSA arbitration and the 2015 eviction application. Chamdor consequently pleads *lis alibi pendens*.

[22] It hence seems that Chamdor’s application to stay the AFSA arbitration is based on the following:

- (i) A mediation must be held before the dispute can be resolved by arbitration. The mediation process has been postponed indefinitely. It seems that Chamdor argues that the AFSA arbitration is premature. (“*the mediation postponement argument*”).
- (ii) The order of Teffo J is a bar to all proceedings against Chamdor until the pending 12B arbitration has been finalised. (“*the litigation barred argument*”)
- (iii) *Lis pendens* because:
 - (a) the 2015 eviction application is pending in this court;
 - (b) eviction is being sought in the AFSA arbitration.

(“*the lis pendens argument*”)

The grounds for the stay of the AFSA arbitration are the same, or at least similar, to those for opposing the counter application for eviction.

Phambili’s counter application for eviction

[23] The counter application for eviction rests on Chamdor’s right to occupy the property having ceased when the franchise agreement, which endured for a fixed period of 15 years, expired on 31 July 2016. Phambili seeks to evict Chamdor because of the demise of the *fons et origio* of the right to occupy the property after 31 July 2016.

[24] Chamdor opposes the counter application for eviction on the following principal grounds:

- (i) Teffo J stayed the 2015 eviction proceedings pending the outcome of the section 12B arbitration. (This is the same argument as, or similar to, “*the litigation barred argument*”)
- (ii)
 - (a) The issue in the AFSA arbitration is the same issue that is stayed by Teffo J. Chamdor consequently pleads *lis alibi pendens*.
 - (b) The 2015 eviction application was brought on the basis that the occupation of the property was unlawful because the agreement had lapsed by effluxion of time and the stay of the eviction application meant that the court rejected that Chamdor had to vacate the property because the franchise agreement had lapsed. I must immediately state that this is factually incorrect. The premise for the argument is thus flawed.

(This is the same argument as, or similar to, the *lis pendens* argument)

- (iii) Chamdor's right to occupy the property is derived from Teffo J's order. (*"the judicial right to occupy argument"*)
- (iv) The counter application for eviction is an abuse of the court process (*"the abuse of court process argument"*).

Discussion

The mediation postponement argument

[25] There are at least two reasons why the postponement of the mediation proceedings is no answer to Phambili's counter application for eviction. First, Chamdor does not dispute the correctness of a letter sent by Phambili's attorneys to the Controller that the mediation failed because Chamdor had failed to attend the mediation proceedings facilitated by AFSA. Second, in terms of clause 20.4 of the franchise agreement, if the dispute referred to mediation is not resolved within 21 days from the date of its submission, the dispute shall be resolved by arbitration. This period has long passed and there is therefore no bar to the arbitration proceeding.

Lis alibi pendens

[26] Chamdor contends that Phambili applied for Chamdor's eviction in the 2015 eviction application on the basis that the franchise agreement had lapsed by effluxion of time. This is incorrect. That cause of action had not arisen when the 2015 eviction application was launched. The 2015 eviction application was brought on the basis that Chamdor's right to occupy the property ended when Phambili cancelled the franchise agreement because Chamdor had breached it.

[27] Based on its incorrect assessment of the facts, Chamdor argues that the counter application must fail because Teffo J had refused to order Chamdor's eviction even though the franchise agreement had lapsed by effluxion of time. Teffo J made no such finding nor is there any basis to infer this from the judgment. To the contrary, Teffo J found that the

franchise agreement lapsed by effluxion of time after the 2015 application was launched on 14 October 2015. Thus, a cause of action on the ground that the franchise agreement (and consequently the right to occupy the property) had lapsed by effluxion of time did not exist on 14 October 2015. The court therefore refused to entertain a case for Chamdor's eviction on the ground that the right to occupy had lapsed by effluxion of time.

[28] The *causa* (ground) for the counter application (as well as the AFSA arbitration) is the termination of Chamdor's right to occupy the property by reason of the fixed term franchise agreement having expired on 31 July 2016 by effluxion of time.

[29] The *causa* (ground) for the 2015 eviction application is the cancellation of the franchise agreement due to an alleged breach of its terms by Chamdor and the resultant termination of Chamdor's right to occupy the property. From a reading of Teffo J's judgment it appears that Chamdor contended that because Phambili had refused to supply fuel to it in breach of the franchise agreement, it could not meet its obligations to Phambili. This, Chamdor contends resulted in Phambili invoking the breach clause and cancelling the franchise agreement.

[30] The central issue in the 2015 eviction application thus is the lawfulness of the act which put an end to the franchise agreement and thereby, Chamdor's right to occupy the property

[31] The issue in the section 12B arbitration goes to amongst others whether Phambili breached the franchise agreement and if so, its effect on Chamdor's obligations to it. Chamdor's conduct may impact on the issue whether Phambili lawfully terminated the franchise agreement.

[32] The connection between the 2015 application for eviction and the section 12B arbitration is thus evident.

[33] In neither the AFSA arbitration nor this application does the question of the lawfulness of Phambili's termination of the franchise agreement arise. There was no act

of termination on Phambili's part; the franchise agreement died a natural death because its limited life of fifteen (15) years had expired.

[34] The *causa* (ground) for eviction in the 2015 eviction application and the *causa* (ground) for eviction in the counter application (and the AFSA arbitration) is not the same.

[35] *Lis alibi pendens* does not assist Chamdor in its application to stay the AFSA arbitration nor in resisting the counter application for eviction.

[36] Teffo J stayed the 2015 eviction application consequent upon, and as a result, of the finding that the issues arising in the 2015 eviction application were connected to those arising in the section 12B arbitration.

[37] I turn to therefore consider whether there is a connection between the 2015 eviction application, the section 12B arbitration and the AFSA arbitration.

[38] While the lawfulness of the termination of the franchise agreement and the resultant loss of the right to occupy the property is prominent in the 2015 eviction application and is connected with the complaint in the section 12B arbitration that Phambili breached the franchise agreement, it does not feature in the AFSA arbitration nor in the counter application.

[39] I am accordingly unable to find that the issues are connected. For the same reason I can see no risk of conflicting pronouncements on Chamdor's eviction.

Litigation Barred argument

[40] Whether the order by Teffo J precluded Phambili, while the section 12B arbitration was pending, from referring a dispute to AFSA in terms of the franchise agreement or applying at a future date for Chamdor's eviction depends on the terms of the order. The substantive order granted by Teffo J reads as follows:

“This application is stayed pending the outcome of the s12B arbitration proceedings”.
[emphasis inserted]

[41] It is clear that what the court intended to stay, and did stay, was the 2015 eviction application pending the outcome of the section 12B arbitration. The court did not preclude Phambili from instituting arbitration or other legal proceedings against Chamdor.

[42] Chamdor perceives Teffo J’s order as a restraint against its eviction from the property until the section 12B arbitration is finalised. It is not. Teffo J’s order simply precludes Phambili from pursuing the 2015 eviction application before the section 12B arbitration is finalised. The court did not interdict the eviction of Chamdor from the property nor did it preclude Phambili from instituting fresh eviction proceedings.

Judicial right to occupy property: Does the stay of the 2015 eviction application confer upon Chamdor the right to occupy the property?

[43] Chamdor accepts that with the lapsing of the franchise agreement by effluxion of time, the right to occupy the property also lapsed. It however disputes that its occupation of the property is unlawful. It contends that the order issued by Teffo J confers upon it the right to occupy the property. Chamdor correctly does not argue that the order expressly confers a right of occupation.

[44] Teffo J ordered no more than the stay of the 2015 eviction application. In my view the scope of the order is limited.

[45] I am unable to find any indication in the judgment that the court intended to not only stay the application before it but intended to preclude Phambili from evicting Chamdor from the property regardless of the reason therefor. The 2015 eviction application was stayed because the issues in the section 12B arbitration and the 2015 eviction application were related (or connected).

[46] The issue in the section 12B arbitration is whether Phambili's alleged refusal to supply fuel to Chamdor constituted an unfair and/or unreasonable contractual practice. Whether Phambili was entitled to terminate the franchise agreement for an alleged breach of the terms thereof by Chamdor, arose in the 2015 eviction application. Chamdor resisted the 2015 eviction application on the basis that Phambili's failure to supply fuel resulted in it not meeting its obligations in terms of the franchise agreement which in turn led to Phambili terminating the franchise agreement.

[47] The lawfulness of the termination of the franchise agreement was related to the issue whether Phambili's alleged breach of the franchise agreement by refusing to supply fuel to Chamdor constituted an unfair and/or unreasonable contractual practice as contemplated in section 12B of the Petroleum Products Act.

[48] It is thus evident that the close relationship between the issues was a factor which the court considered when it stayed the 2015 eviction application.

[49] The issue in the AFSA arbitration and the counter application for eviction is not remotely related to a breach of the franchise agreement by the parties.

[50] In the 2015 eviction application, fault on the part of Phambili and/or Chamdor would determine whether the termination of the franchise agreement by Phambili was lawful or not. Fault is irrelevant to the AFSA arbitration or the counter application.

Abuse of the court process

[51] Chamdor seeks to avoid its eviction by calling into aid the court's discretion to prevent an abuse of the court process.

[52] Chamdor contends that the judgment by Teffo J unequivocally stayed the 2015 application. However, to bypass the court order Phambili withdrew the 2015 eviction application by notice on 18 September 2019 to open the way for a fresh application for eviction based on the same grounds. It also complains that the withdrawal of the 2015

eviction application is invalid because Phambili could not unilaterally withdraw the application and had to seek the leave of the court to do so. In response, Phambili in its replying affidavit in the counter application, sought leave to withdraw the 2015 eviction application.

[53] If Chamdor was of the view that the notice of withdrawal was irregular or that it was wanting because the costs of the application had not been tendered, it was entitled to invoke the procedure in rule 30 and apply to set aside the notice of withdrawal as an irregular step. It did not do so.

[54] On the authority of SW v SW⁴ Chamdor argued amongst others that the notice of withdrawal was invalid and therefore ineffective with the result that the *lis* had not been terminated. Whether it is ineffective or not, is of no moment. If it is ineffective, it is pending. I have found that the defence of *lis alibi pendens* is not available to Chamdor.

[55] Chamdor's further argument why the counter application constitutes an abuse of the court process is that it is brought on the same grounds as the 2015 eviction application. I have discussed this earlier in the judgment. There is no substance to the argument that the counter application for eviction is brought on the same grounds as the 2015 eviction application.

[56] Notwithstanding the existence of the 2015 eviction application and the order made in terms thereof staying it, I find that neither the order nor the application are a bar to fresh proceedings for the eviction of Chamdor from the property. The *causa* (ground) for the counter application is not the same as the *causa* (ground) for the March 2015 eviction application. When the franchise agreement lapsed by effluxion of time on 31 July 2016, a fresh cause of action for the eviction of Chamdor from the property arose because the right to evict was independent and unrelated to whether Chamdor had breached the franchise agreement and Phambili had lawfully cancelled the lease.

⁴ 2015 (6) SA 300 (ECP)

[57] Whether the 2015 eviction application is alive or not, is irrelevant. It did not and does not prevent the eviction of Chamdor on the ground that the right to occupy lapsed on the termination of the franchise agreement by effluxion of time.

[58] The order issued by Teffo J does not disentitle Phambili from bringing a fresh application for Chamdor's eviction. What is not permitted is a determination of the 2015 eviction application while the matter referred to arbitration in terms of section 12B of the Act remains unresolved.

[59] Phambili was entitled in law to bring an application for Chamdor's eviction from the property on the basis that the franchise agreement had lapsed resulting in the right to occupy the property lapsing.

[60] Where a party exercises rights conferred by law a charge that the exercise of the right constitutes an abuse of the court process is ill-advised.

Phambili's application to withdraw the 2015 eviction application

[61] Having found that the 2015 eviction application was no bar to the counter application for eviction, Phambili's application for leave to withdraw that application has become moot.

Conclusion

[62] I consequently find that Chamdor's application to stay the AFSA arbitration pending the outcome of the section 12B arbitration falls to be dismissed. Insofar as the counter application is concerned Phambili is entitled to the eviction order.

[63] I am not inclined to authorise the South African Police Service to assist the Sheriff in the eviction. The South African Police Service is not before the court and it is inappropriate to burden it with the task of giving effect to court orders between private persons. This is not its function. Even if it was, the South African Police Service has apart

from other things human resource constraints. I do not know what the cost of giving effect to the eviction will be, but it is unreasonable and unfair to burden the fiscus with the cost.

[64] I am not prepared to grant an order requiring Chamdor to forthwith vacate the property. It should be allowed a reasonable time to do so.

Order

In the result the following order is made:

1. The application by, Chamdor Service Station CC ("*Chamdor*"), is dismissed with costs.
2. Chamdor, and all persons occupying the immovable property through, it must vacate the property, Erf 730 Lewisham Township, Registration Division I.Q, Province of Gauteng, situated at 137 Main Reef Road, Lewsham, Krugersdorp ("*the property*"), within one month of the service of this order.
3. The Sheriff is authorised and directed to evict Chamdor and all persons occupying the property through it, from the property.
4. The Sheriff may request any person to assist in giving effect to this order.
5. Chamdor is to pay the costs of the counterapplication.



S K HASSIM AJ
Acting Judge: Gauteng Division, Pretoria
(electronic signature appended)
4 March 2021

This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the plaintiff's legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 5 March 2021.

Appearances:

For the applicant: Adv T Moretlwe

For the fourth respondent: Adv L Hollander