REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

MPUMALANGA DIVISION (MAIN SEAT)

Case Number: 3295/2021

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED - NO

22 September 2021

In the matter between:

PINE GLOW INVESTMENTS (PTY) Ltd T/A
CALTEX MPUMALANGA NORTH BRANDED
MARKETER
(Registration Number: [....]) Applicant

and

BUSHBUCKRIDGE CONVENIENCE CENTRE
(PTY) LTD
(Registration Number: [....]) First Respondent

ELEGANT FUEL (PTY) LTD
(Registration number: [....]) Second Respondent

TR COMMODITIES (PTY) LTD
(Registration number: [....]) Third Respondent

The Order was given on 20 September 2021 over the Zoom Platform. This judgment will be distributed to the parties via email and published on the SAFLII website. The judgment shall be deemed to be handed down at 09:00 on 22 September 2021.

JUDGMENT

Roelofse AJ:

[1] On 20 September 2021, I granted the following order in this application:

1. *The first to third respondents are hereby ordered to cease all construction works on the immovable property known as Farm M[....] [....], Portions 2 and 3 Bushbuckridge Convenience Centre nR533, Marijane A, Bushbuckridge, Mpumalanga Province, situated at Business site [....] at M[....] 200/05/18, Provincial Road P57-2 Bushbuckridge.*

2. *The order in paragraph 1 above shall serve as an interim interdict with immediate effect pending the outcome of this application.*

3. *The oral evidence of Dr Moeen Ismael Omar and Mr. Zwelibanzi Solly Peace Ndlovu ("the deponents") shall be heard on the fulfilment of the conditions president contained in clauses 4.1.1 and 4.1.2 of the lease agreement entered into by the applicant and the first respondent on 7 February 2018 ("the issue").*

4. *The relief sought in prayer 4 of the notice of motion is postponed for determination together with the issue.*

5. *The deponents are hereby directed to appear personally before this court for purposes of giving evidence on the issue.*

6. *The applicant and the first respondent are granted leave to:*

a. *Subpoena any other person they deem meet for purposes of giving evidence on the issue;*

b. *Make discovery of such documents they deem meet in terms of the Uniform Rules.*

7. *The applicant is ordered to pay the costs occasioned by the appearance of the respondents' legal practitioners on 7 September 2021, such costs, in respect of the second and third respondents, shall include the costs of two counsel.*

8. *Save for the order in paragraph 7 above, all further costs in the application are reserved.*

9. *The applicant is hereby directed to, within 5 days of the date of this order, apply through the Registrar of this court for a date for the judicial case management of the further determination of application."*

[2] What follows is the reasons for the order.

The relationship between the first to third respondents

[3] The first respondent (*"BCC"*) holds permission to occupy[1] an immovable property (*"the property"*)[2] in Bushbuckridge, Mpumalanga. The second respondent (*"Elegant"*) trades as a wholesale supplier of petroleum products which are supplied to third parties such as the third respondent "(*TR"*). Elegant, on a regular occasion assists third parties with the development of immovable property to erect fuel stations for the supply of fuel

[1] Granted to it by Thabakgolo Traditional Council on 4 September 2017.

[2] 20000 m2 situated on business stand A413 at Maviljan 200/05/18, known as Farm Maviljan 252 Portion 2 and 3 Bushbuckridge Convenience Centre nR533.

to the general public and for profit by such third party.

[4] BCC and TR have entered into Site Lease agreement[3] on 9 February 2021 (*"the TR lease"*) in terms of which TR leases the property from BCC for the purpose of operating a fore fuel court, convenience store and fast-food outlet.[4]

[5] Elegant was appointed by TR as agent to conduct the development and/or alterations at the property as envisaged in the TR lease agreement.[5] On or about 1 July 2021, Elegant was mandated and appointed by TR to commence with the development, improvement and/or alteration of the property.[6] During or about July 2021, Elegant commenced with the required works needed for the development of the property on TR's instruction. The works in respect of the construction of the filling station is close to 50% complete. As at 31 August 2021, the total amount expended by Elegant amounted to R 2 830 368.80.[7]

[6] Elegant and TR allege that they had no reason to suspect that or believe that BCC was involved with any third party such as the applicant (*"Pine Glow"*) before they concluded the TR lease agreement.

[7] BCC alleges that it had contact with other fuel wholesalers *"…to explore the first respondent's [BCC]'s options.*[8] This was while Pine Glow and BCC were still addressing issues regarding the delay in the development of the property (set out immediately below). Nowhere does BCC say that BCC disclosed its prior contractual relationship with Pine Glow to Elegant or TR or that BCC disclosed its dealings with Elegant and TR to Pine Glow.

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[3] The agreement is annexed to Elegant and TR's supplementary answering affidavit as annexure "SAA1"

[4] Clause 1 of the TR lease agreement.

[5] Para. 2.3 of Elegant and TR's supplementary answering affidavit.

[6] Para. 3.1 of Elegant and TR's supplementary answering affidavit.

[7] Para. 3.11 of Elegant and TR's supplementary answering affidavit.

[8] Para. 60 of BCC's supplementary answering affidavit.

The relationship between the Pine Glow and BCC

[8] Pine Glow holds a few wholesale licenses and serves as wholesaler and supplier of fuel to certain filling stations in Mpumalanga and the Limpopo provinces. Pine Glow also owns and leases out filling stations which are operated by independent retailers. It earns a fuel wholesale margin for each wholesaling activities, and shares in the regulated fuel retail margin depending on the nature and extent of Pine Glow's investment in the relevant fuel station.

[9] During 2017, BCC's representative, Mr Wenzel Mashele approached Pine Glow and proposed that Pine Glow and BCC conclude agreements pertaining to certain sites situated at Bushbuckridge and Mashshu which were considered suitable for filling stations and related businesses. Negotiations followed which led into certain agreements being entered into in respect of Bushbuckridge and Mashushu.

[10] The only agreement relevant for purposes of this application is the agreement pertaining to the Bushbuckridge development.

[11] On 7 February 2018, Pine Glow and BCC entered into a written agreement (*the agreement"*). In terms of the agreement:

a. The effective date of the agreement would be the date of fulfillment of the last of the conditions president;

b. The lease would endure with effect from the rental commencement for ten years;

   (As will appear from what he set out below, the rental commencement date is still to arrive).

c. The conditions president are defined as meaning the suspensive conditions set out in clause 4 of the agreement. Clause 4 contains two suspensive conditions being fulifllled by no later than 12 months from the signature date date, the relevant authorities approve a site license and retail license in

respect of the property;[9] The obligation to procure the site license rested upon BCC while the obligation to procure a retail license rested upon Pine Glow;[10]

d. BCC lets the property to Pine Glow with effect from the effective date. Therefore, BCC would be the lessor and Pine Glow the Lessee;

e. BCC agreed to construct the building on the property in accordance with certain development provisions which included certain design specifications;

f. Pine Glow was obliged to procure the installation of the lessee installations in accordance with the development provisions;

g. Pine Glow's obliged to prior to the rental commencement date, procured all licenses, consents and permits to conduct the business at the property:

h. The business Pine Glow would be allowed to conduct on the property in terms of the agreement is defined as the business of an automotive fuel filling station, a shopping including a confectionery and take-away facility, an automatic teller machine, a car wash and related retail activities incidental and ancillary thereto;

i. Pine Glow would conduct the business through an operator from time to time in terms of an operating lease concluded between such operator and Pine Glow in relation to the property;

j. The amount is also determined through provisions in the agreement but it is not of real significance in this application, save for further proposals by Pine Glow to BCC to which I shall refer later in this judgment.

Circumstances that led to this application

[9] I shall return later in this judgment to more specifically the provisions of the suspensive conditions is central to this matter.

[10] Cluses 4.2 and 4.3 of the agreement.

[12] I proceeded to summarize the circumstances that led to this application.

[13] BCC did not commence with the construction as required in the agreement even after BCC and Pine Glow had entered into discussions on the way forward and how Pine Glow could assist BCC to comply with its obligations in terms of the agreement. In the course of the negotiations, BCC's suggestion was that the agreement be amended to more favourable terms for the BCC. Pine Glow was willing to assist BCC to the extent necessary but within the scope and confines of the existing agreement.

[14] On 23 February 2021 (i.e, after the conclusion of the TR lease agreement on 9 February 2021), BCC sent an email to Pine Glow indicating that its financial cash flow problems were dire and that it wanted to terminate the lease agreement. BCC said nothing to Pine Glow over the conclusion of the TR lease agreement.

[15] Pine Glow was not willing to agree to a cancellation of the agreement. On 19 March 2021, BCC adopted a final stance and insisted on the cancellation of the agreement. BCC informed Pine Glow that *"….due to the current economic situation, we* [BCC] *are no longer in a position to continue to honour the contract* [the agreement] *we have signed*. *We therefore wish to terminate our contract……*"

[16] Pine Glow did not accept BCC's repudiation of the agreement. In a further effort to assist BCC, Pine Glow, on 9 April 2021 made a proposal to BCC that would enable BCC to perform under the lease agreement. Not even then did BCC disclose the TR lease agreement.

[17] On 22 April 2021, Pine Glow send a letter to BCC. In this letter, amongst other things, Pine Glow confirmed that the suspensive conditions regarding the procurement of the necessary rights, authorizations and licenses were met and said "*You are aware though that you are at risk of having to reapply for licenses because of efflux of time and as a consequence time is of the essence."* Pine Glow furthermore confirmed that it

remains ready to proceed with its works cope.

[18] On 4 June 2021, BCC made a further attempt to repudiate the agreement based on the stance that Pine Glow was imposing new conditions. Pine Glow's response was that it would pursue its rights should BCC refuse to comply with the lease agreements.

[19] On 25 June 2021, BCC informed Pine Glow that it intended to proceed as if the lease agreements have been canceled. BCC's repudiation of the lease agreements was not accepted by Pine Glow. Pine Glow was of the view that the lease agreements remained in force. This was confirmed in a letter dated 16 July 2021 written by Pine Glow's attorneys addressed to BCC.

[20] Up to this stage, BCC remained totally silent over the TR lease agreement and that by that time, Elegant was already appointed to do the construction on the property.

[21] Pine Glow alleges that it for the first time during the afternoon of 26 Aug 2021 learned that BCC had given access to the property to another party who was proceeding to build what appears to be a filling station on the property.

[22] Pine Glow consulted its attorneys on 26 August 2021 and caused the letter to be directed to BCC. In the letter, BCC was requested to give an undertaking that construction works will immediately stop, failing which the court will be approached on an urgent basis for an appropriate interdict.

[23] Pine Glow learned that the construction works on the property were affected by "the Elegant group", and more specifically TR. Pine Glow's attorneys directed a letter to the Elegant group on 27 August 2021. In the letter, the Elegant Group: was made aware of Pine Glow's right in respect of the property and the unlawfulness of construction works on the site; was invited to confirm whether it is indeed involved in the relevant construction works; requested to cease the construction works and confirm that it will not proceed there with, and should the requested undertaking not be forthcoming the

court will be approached on an urgent basis.

[24] On 30 August 2021, BCC's attorneys replied to Pine Glow's letter. In its reply, BCC confirms having concluded a new lease agreement with another party and for the first time alleged that the agreement with Pine Glow was invalid due to the non-fulfillment of one of the suspensive conditions being the approval of the retail license in respect of the property in terms of clause 4.1.2 of the agreement.

[25] Elegant replied to Pine Glow's attorney's letter on 30 August 2021. in this letter the Elegant: confirmed that it is assisting TR with construction works on the property; alleged that it has been unaware of Pine Glow's lease; confirmed that the construction works have reached an advanced stage; declined to give an undertaking to stop the works and invited Pine Glow show that the lease agreement is valid in that the suspensive conditions have been fulfilled.

[26] On 31 August 2021, Pine Glow responded to the letters of BCC and Elegant's attorneys and attached proof that the suspensive conditions have been fulfilled. To Pine Glow's attorney's letter is attached copies of the approval of a retail and site license that was issued on 21 December 2018 by the Controller of Petroleum products in terms of the Petroleum Products Act 120 of 1977. The approvals were addressed to Mr W Mashele, who is a director of BCC.

[27] In response, and on 31 August 2021, BCC's attorneys replied to Pine Glow's attorney's letter reiterating the stance that they believe that the agreement is invalid for one of these suspensive conditions, being clause 4.1.2 of the agreement not having a been fulfilled.

Relief sought by Pine Glow

[28] In its notice of motion, besides the usual prayer in terms of Rule 6(12), Pine Glow seeks relief as follows:

"2. *That it is declared that the conditions president, contained in clauses 4.1.1 and 4.1.2 of the lease agreement (annexure "FA 5" to the founding affidavit) have been fulfilled and that delete agreement is binding on the parties thereto.*

3. *That the first to third and respondents are ordered to cease any and all construction works on the immovable property known as Farm M[....] [....], Portions 2 and 3 Bushbuckridge Convenience Centre nR533, Marijane A, Bushbuckridge, Mpumalanga Province, situated at Business site [....] at M[....] 200/05/18, Provincial Road P57-2 Bushbuckridge ("the property").*

4. *That the first to third respondents are jointly and severally ordered to cause the site and/ or property to be vacated and restore to the state it was in before the second and/or third respondent effected any works there on, within 30 days, alternatively such time period as the Honorable Court may determine;*

5. *Alternatively to prayers three and four above, that prayer three be granted as an interim order with immediate effect pending finalization of prayers 3and 4 in the ordinary course, alternatively pending an action to be instituted by the applicant against respondents for final relief.*

6. *That the first responded and/or all respondents opposing the relief sought herein be ordered to pay the costs of this application joints in severally, the one to pay the other to be absorbed on an attorney and client scale including the costs of two counsel.*

7. *That such further and/or alternative relief be granted to the applicant as the Honorable Court deems meet."*

[29] The declaratory order sought in prayer 2 of the notice of motion will constitute a final finding in respect of the continued existence of the agreement. This may entitle Pine Glow to a final interdict in terms of prayers 3 and 4 of the notice of motion if Pine Glow has satisfied the requirements for a final interdict. If the declaratory order sought in prayer 2 of the notice of the notice of motion is not granted, Pine Glow may still be entitled to the interim interdict sought in prayer 5 of the notice of motion if Pine Glow has satisfied the requirements for an interim interdict.

Urgency

[30] The application was issued 2 September 2021. The respondents were directed by Pine Glow to notify Pine Glow's attorneys of their intention to oppose the application by no later than 15:30 on Thursday 2 September 2021 and to deliver their answering affidavits by no later than 12:00 on Friday 3 September 2021.

[31] The application was served upon the respondents by email sent at 11:25 on 2 September 2021.

[32] It is therefore clear that the application was required to be heard on an extreme urgent basis and that the respondents were given extremely short notice of the application and an extremely short time to respond to the application.

[33] All the respondents opposed the application. BCC's answering affidavit was deposed to by Mr. Zwelibanzi Solly Peace Ndlovu. BCC's answering affidavit was delivered on 4 September 2021. Elegant and TR delivered a single answering affidavit that was disposed to by Mr. Ockie Andries Gabriel Strydom. Their answering affidavit was delivered on 3 September 2021. Pine Glow delivered both its replying affidavits on 6 September 2021.

[34] All the respondents objected to the extremely short period they were afforded to respond to the application in their answering affidavits and challenged the urgency of

the application.

[35] In this regard, the BCC says:

> *"….. The applicant is not restricted to a choice between a hearing in the ordinary course and a helter-shelter urgent application. Urgency, I am advised is a matter of degree. As a party should not seek the relaxation of the order rules for the conduct of applications more extensive than what the emergency of the case demands."*[11]
>
> and
>
> *"The applicant's interests herein are purely commercial. I am advised that commercial urgency is generally not a justification for departing from the rules of court; certainly not to the degree that the applicant seeks this matter to depart from the rules."*[12]
>
> and
>
> *"Even if assuming, in the applicant's favor, that its principle allegation establishes some notional urgency, it does not establish a degree of urgency that justifies the unreasonable curtailment of the first respondent's right to place its case before the court."*[13]
>
> and
>
> *"The applicant's timelines hamstrung the first respondent to such an extent that it complains of being unable to present its case fully. This, we submit, must be borne in mind when considering the cogency of the first respondent's case."*[14]

[11] Para. 7 of the BCC's answering affidavit.
[12] Para. 9 of the BCC's answering affidavit.
[13] Para. 5 of the BCCs heads of argument.
[14] Para. 7 of the BCC's heads of argument.

[36] In this regard, Elegant and TR says:

> *"2.3 The time periods imposed on the Respondents:-*
>
> *2.3.1 Does not allow for a well considered, proper and comprehensive opposing affidavit;*
>
> *2.3.2 Constitutes such short service (reckoned from the time and date imposed to file an opposing affidavit) that it is 10 to mount to a fragrant disregard of the Second and Third Respondent's constitutional and procedural rights to be heard properly;*
>
> *2.3.3 Constitutes a clear abuse of both the rules of this court and its practice directives relating to urgency and clear authorities establishing principles of the approach of an urgent court and the commitment rights afforded to once opponent in urgent applications….."*[15]
>
> and
>
> *"The Second Respondent is simply not in a position to fully deal and comprehensively with the contents of the application and is prejudiced thereby, but in order to comply with the unreasonable time period imposed, the Second Respondent exerts its best efforts for such purposes."*

[37] The matter was heard and partly argued on 7 September 2021.

[38] After hearing the parties' initial argument, I deemed it in the interest of justice and

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[15] In the second and TR's answering affidavit.

in the interest of a speedy resolution of the despite to grant the parties an opportunity to supplement their papers because the respondents all lamented the extremely truncated period given to them by Pine Glow to properly respond to the application. I postponed the application to 17 September 2021 in order for the parties to file and deliver further papers if so advised. All the parties filed and delivered supplementary affidavits. The respondents delivered supplementary answering affidavits and Pine Glow delivered supplementary replying affidavits. Because of the view I had taken regarding the resolution of the real dispute, this court simply sought a way to allow the parties to get to the essence of the dispute absent technical objections over procedure if those objections had failed.

[39] Pine Glow argues that the urgency arose when Pine Glow for the first time knew that BCC had given access to the property to another party and that they were construction works going on being on Thursday 26 August 2021. There after Pine Glow acted reasonably by requesting that the construction works seize and also requested an undertaking to cease with the construction work spending the application. The refusal of such undertaking on 30 and 31 August 2021 caused the application to become necessarily urgent. In addition, BCC for the first time on 30 August 2021 alleged the non-fulfillment of the suspensive conditions.

[40] Elegant and TR allege that, given the unreasonable adoption of truncated time periods to the extent that it is that amount to an abuse, the application falls to be dismissed resulting from an abuse of the court's process, alternatively, struck from the roll due to lack of agency and self-created urgency which is obvious from the set of papers and defiance of established rules in terms of the Practice Directives of this court.

[41] The respondents nowhere deny that construction work had commenced, was at an advanced stage and that the undertakings that were sought by Pine Glow were not met.

[42] In my view, having regard to all the facts before me, the undertaking that was sought was reasonable and would have prevented this application being brought on an urgent basis. The urgency was not self-created but was as a result of the respondents' conduct. BCC did not disclose to Pine Glow the TR lease agreement or the involvement of Elegant or that the construction works had begun.

[43] Pine Glow alleges that it will not be afforded substantial redress if the matter is heard in due course. I agree having regard to the undisputed allegations that the construction works were continuing and will in all likelihood be completed soon. I agree with Pine Glow that, the further the construction works proceeds, the less likely it will be that a court will grant the relief sought in prayer 3 and 4 of the notice of motion which would ultimately result in the demolition of that which was already constructed.

[44] I agree that Pine Glow might have been over enthusiastic in the time periods it gave to the respondents to answer the application. However, I gave the respondents an opportunity to redress their complaints that the time periods afforded to them by Pine Glow to respond to the application was extremely little. In my view, the basis of this objection being one of the grounds advanced by the respondents that the urgent application should be entertained fell away.

[45] I therefore find that the Pine Glow has satisfied the requirements of urgency, and I enroll the matter as such.

The real dispute

[46] The parties agree that the continued existence of a valid and binding agreement between the Pine Glow and first despondent is dependent upon the question whether the suspensive condition in clause 4.1.2 of the agreement was fulfilled or not.

[47] The suspensive conditions are provided for in clause 4 of the agreement as follows:

*"**4. CONDITIONS PRESIDENT***

4.1 Save for clauses 1 to 4, and clauses 27 to 35, all of which will become effective immediately, this agreement is subject to the fulfillment of the Conditions President that-

4.1.1 by no later than 12 (twelve) months from Signature Date the Relevant Authorities approve the Site License in respect of the Property; and

4.1.2 by no later than12 (twelve) months from Signature Date the Relevant Authorities approve the Retail License in respect of the Property.

4.2 The Lessor shall, at its expense, use its best endeavors to procure the fulfillment of the condition president in clause 4.1.1, as soon as reasonably possible after the Signature Date and shall to the extent that such Conditions President have been fulfilled, prior to the expiry of the relevant time period set out in that those [sic] clauses, furnish the Lessee documents evidencing the fulfillment of such Condition President. The Lessee carries the risk of non- approval of the aforesaid applications. The Lessee shall bear all cost incurred by it to procure fulfillment of such Condition President.

4.3 The Lessee shall use its best endeavors to procure the fulfillment of the condition president referred to in clause 4.1.1, as soon as reasonably possible after the Signature Date and shall, prior to the expiry of the relevant time period set out in that clause, furnish the Lessor documents evidencing the fulfillment of such Condition President. The Lessee shall bear all cost incurred by it to procure fulfillment of such Condition

President.

4.4 The Party responsible for the fulfillment of a Condition President shall at all times keep the other Party fully informed of progress and, in particular, shall in writing immediately report to such other Party anything significant which may from time to time impede or delay the fulfillment of the Condition/s President. In the event that and approval by the Relevant Authority is delayed, the relevant professional consultant appointed by the Party responsible for the fulfillment of the relevant Condition President to procure such consent or approval, will assist the prospects of successfully achieving the approval by the Relevant Authority and if the professional consultant is of the view that, save for the administrative delays, there is no legitimate reason preventing the approval by the Relevant Authority, the Parties will be negotiate a further extension of the time period for fulfillment of the relevant Condition President/s in good faith.

4.5 Unless the Conditions President have been fulfilled by not later than the relevant date for the fulfillment thereof, inclusive (or such later date or dates as may be agreed in writing between the Parties) the provisions of this Agreement save for clauses 27 to 35, which remain in full force and effect, will never become of any force and effect and the status quo ante will be restored as near as may be and neither of the Parties will have any claim against the other in terms hereof or arising from the failure of the Conditions President."

[48] In its founding papers, Pine Glow alleges that the suspensive condition in clause 4.1.2 where factually fulfilled by virtue of a retail license was already approved on 21 December 2017 as per the written approval confirmation from the Department of Energy.

[49] BCC challenged Pine Glow's allegation that the suspensive condition in clause

4.1.2 have been fulfilled. It alleges that it was never intended that BCC (to whom the retail license was issued already on 21 December 2017), would operate the business as defined in the agreement. As such, a filling station business could not be operated on the property upon a retail license in BCC's name. Properly construed, so BCC contends, clause 4.1.2 refers to the retail license required by the operator who would conduct the filling station business. Therefore, on BCC's interpretation of the condition president in clause 4.1.2 was never fulfilled and consequently, the agreement never came became of any forced or effect.

[50] Elegant and TR challenge Pine Glow's allegation that the condition president in clause 4.1.2 was fulfilled by virtue of the retail licence that was already issued on 21 December 2017 (i.e prior to the conclusion of the agreement) because even if Pine Glow had no contractual duty imposed upon it in in terms of clause 4.1.2 because a retail licence had already been issue to BCC, such retail licence is not transferrable, therefore the business could not lawfully be conducted by Pine Glow.

[51] Pine Glow meets the respondents' challenge in reply by stating that: clause 4.1.2 of the agreement does not specify as part of the condition by whom the retail licence should be applied for and in whose name it must be issued; the agreement was only suspended until a retail licence is issued and therefore if a retail licence is issued, the condition has been fulfilled; the suspensive condition had already been fulfilled and there was no obligation on Pine Glow to obtain another retail license; and, the agreement became immediately binding.

[52] In addition, in reply, Pine Glow alleges that the agreement had come into existence, alternatively, there was quasi-mutual assent in that regard and that the delay in the construction has led to a fictional fulfilment of the suspensive condition.

[53] Elegant and TR, in response to Pine Glow's reliance upon quasi-mutual assent and the fictional fulfilment of the suspensive conditions, in reply, argued in their first set of heads of argument that in relying upon quasi-mutual assent and fictional fulfilment of

the suspensive conditions, Pine Glow sought to make out a case in reply and applied that the relevant portions of the replying affidavit be struck. This is what Elegant and TR argue in their first set of heads of argument:

> *"It is a trite principle in our law of civil procedure that all essential averments must appear in the founding affidavits, for the Courts will not allow an Pine Glow to make or supplement his case in his replying affidavits and will order any matter appearing therein we should have been in the founding affidavits."*

I take it that Elegant and TR meant that new matter must be struck for this is what is said in Titty's Bar and Bottle Store (Pty) Ltd v A.B.C Garage and Others,[16]:

> *"It has always been the practice of the Courts in South Africa to strike out matter in replying affidavits which should have appeared in petitions or founding affidavits, including facts to establish locus standi or the jurisdiction of the Court.*[17]

However, Rule 6(15)[18] still leave the court with a discretion whether or not to strike out offending material. Afterall, in the preceding paragraph referred to above in Titty's Bar and Bottle Store (Pty) Ltd, the following is said:

> *"I agree with Mr. Van der Spuy that the use of the word "may" merely indicates that the Court has a discretion but, in spite thereof, the sub-rule was, in my viwe, not intended to be exhaustive. The Court still has an*

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[16] 1974(4) S.A. 362 (T) at p. 368H.

[17] Para 5.7 of the second and TRs' first set of heads of argument.

[18] Which provides:

> *"The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant with an appropriate order as to costs, including costs as between attorney and client. The court shall not grant the application unless it is satisfied that the Pine Glow will be prejudiced in his case if it be not granted."*

inherent jurisdiction to grant relief where the Rules of Court make no provision therefor. Cf. Neal v Neal, 1959 (1) SA 828 (N).”

[54] Nevertheless, Elegant and TR proceed to argue that:

> *“The Court has discretion to allow new matter to remain in a replying affidavit, giving the respondent opportunity to deal with it in a second set of answering affidavits. This indulgence, or ever, will only be allowed in special or exceptional circumstances.”*[19]

I agree with Elegant and TR’s argument and having regard that in terms of the provisions of Rule 6(15), offensive matter shall only be struck if the party who laments the new material is prejudiced thereby. It is for this very reason that I granted the respondents an opportunity to file and deliver supplementary answering affidavits so that their potential prejudice would be averted.

[55] Elegant and TR delivered a notice in terms of rule 6(15) on 16 September 2021 in terms of which they sought an order:

> *“That paragraphs 5.11, 5.12 and 5.13 of the Applicant’s replying affidavit (and concomitant allegations in the second replying affidavit) are struck out for one, more or all of the following reasons:-*
>
> *1.1 The factual allegations herein constitutes new evidence, alternatively factual allegations sustaining a <u>new cause of action</u>, which is <u>inadmissible</u> as it should have formed part of the Pine Glow's founding affidavit; and*
>
> *1.2 It constitutes <u>speculative, argumentative allegations</u> alternatively <u>hearsay evidence, which in itself is inadmissible</u>, absent proper*

[19] Para 5.8 of the second and TRs’ first set of heads of argument.

averments for preliminary allowing of hearsay evidence as an exception in terms of Section 3 of the General Law of Evidence Amendment act, 1986; and

*1.3 It constitutes inadmissible evidence contrary to the parole evidence principle, relating to evidence of an intention prior and on entering and agreement, together with collateral years evidence post the entering of such agreement **(s)**.*

2.

The previously mentioned are all irreparably prejudicial to the Second Respondent and Third Respondent's (and even to the First Respondent) to the extent that the allegations cannot be responded to, either procedurally or substantively within the time period allowed in the Applicant's notice of motion. (Elegant and TR's emphasis)

[56] Instead of seizing the opportunity when they filed and delivered their supplementary answering affidavits, the respondents chose not to deal with the issues of quasi-mutual assent or fictional fulfilment of the suspensive conditions.

[57] BCC states in its supplementary answering affidavit as follows:

"I do not intend herein to deal with the applicant's new causes of action in any detail. Be that as it may, from what follows it will be clear that the foundational facts reporting to support the conclusions of quasi mutual ascent, fictional fulfillment and fraud are in dispute."[20]

[58] The only evidence that to my mind remotely raises a dispute to the "*applicant's*

[20] Para. 9 of the BCC's supplementary answering affidavit.

new causes of action" is that *"[T]he fulfilment or not of suspensive conditions is purely a factual determination which is ascertained by reference to objective evidence – the parties' subjective interpretations, utterances or intentions are simply irrelevant to this factual enquiry."*[21]

[59] Although I agree that a determination of whether or not a suspensive condition has been fulfilled is ascertained by reference to objective evidence, I do not agree that subjective interpretations, utterances or intentions are irrelevant for these factors ultimately informs and contributes to a party's outward manifestation which forms part and parcel of the factual determination that may be required.

[60] Elegant and TR do not directly meet the quasi-mutual assent and fictional fulfilment issues. This is how far Elegant and TR go in their supplementary answering affidavits:

> *"…..The position of the third respondent was simply that it had a valid lease agreement and accordingly, it did not act unlawful any sense."*[22](the deponent's underlining)
>
> and
>
> *"The information at the disposal of the Second Respondent at the time of receipt of the letter of demand (27 August 2021) and shortly thereafter, was that two (2) lease agreements were apparently concluded for the same site and one (1) of the lease agreements was clearly disputed by the party thereto, i.e the First Respondent in re the lease agreement of the Applicant."*[23] (the deponent's underlining)

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[21] Para. 74 of the BCC's supplementary answering affidavit.

[22] Paragraph 3.14 of the second and TRs' supplementary answering affidavit.

[23] Paragraph 3.15 of Elegant and TRs' supplementary answering affidavit.

[61] In their supplementary heads of argument, Elegant and TR argue that: the court granted leave to Elegant and TR to supplement their answering affidavits and not to file a rejoinder; Pine Glow's averment that, because Elegant and TR refrained from addressing the issues in Pine Glow's replying affidavit, same must be taken to be admitted is untenable and wrong because the respondents were not afforded leave to file a rejoinder and no leave was obtained from the court to file and deliver a rejoinder. This argument is totally at odds with the Elegant and TR's initial stance namely that the court has discretion to allow new matter to remain in a replying affidavit, giving the respondent opportunity to deal with it in a second set of answering affidavits. This court gave them the opportunity. They did not utilize same.

[62] Therefore, although having been afforded the opportunity to address the quasi-mutual assent and fictional fulfilment issues, the respondents deliberately failed to do so, albeit for different reasons.

[63] In view of the aforesaid evidence and having regard to the argument that was presented on behalf of the respondents and in circumstances where the respondents did not use the opportunity given to them to address any real prejudice, I am of the view that the respondents have failed to satisfy the requirements of rule 6(15) in order for the alleged offending material referred to in Elegant and TR's rule 6(15) application be struck out.

[64] The rule 6(15) application is dismissed.

Quasi-mutual assent

[65] I consider the issue of quasi-mutual assent against the background of the parties' undisputed conduct after the date for the fulfilment of the suspensive conditions expired.

[66] It is common cause that the development of the property was hamstrung due to

an inability to secure anchor tenants. This in turn delayed the execution of the agreement. Over the period 18 June 2020 to 8 January 2021, various proposals were made regarding the way forward in respect of the agreement. The proposals are borne out by the correspondence between Pine Glow and BCC that was attached to the papers. It will serve no purpose to set out the detail of that correspondence.

[67] In Pillay and Another v Shaik and Others[24], the following is set out over quasi-mutual assent:

> *"[50] I do not agree with the court a quo's conclusion that there could be no binding contracts between the parties unless each was signed by or on behalf of the buyers and the sellers. In my opinion it is clear from Goldblatt v Freemantle, supra, and the authorities cited therein that, in the absence of a statute which prescribes writing signed by the parties or their authorised representatives as an essential requisite for the creation of a contractual obligation (something that does not apply here), an agreement between parties which satisfies all the other requirements for contractual validity will be held not to have given rise to contractual obligations only if there is a pre-existing contract between the parties which prescribes compliance with a formality or formalities before a binding contract can come into existence. That this is so is clear, for example, from C W Decker's annotation on Van Leeuwen's Roman Dutch Law 4.2 sec 1 (not sec 2 as Innes CJ says at 129) where he pointed out (Kotzé's translation, 2 ed, vol 2, p 12) that we no longer uphold the distinction drawn in Roman law between real, verbal, literal and consensual contracts because all contracts with us are made with consent. With regard to written contracts he referred to an observation by Samuel Strykius (Modern Pandect 2.14.7) as follows:*
>
> *'. . . we must regard the written contracts as distinct, in so far as we should bear in mind that although the writing does not constitute the essentiality of the contract, which is contained in the mutual consent of the parties, they may nevertheless agree that their verbal agreement shall be of no effect until reduced*

[24] [2009] 2 All SA 435 (SCA).

to writing, in which case the agreement cannot before signature have any binding force, although there exists mutual consent; and it cannot be said that the writing served not in perfecting the transaction, but only as proof thereof . . ., since here it is agreed that the consent should not operate without the writing, which must be observed as a legitimate condition.'"

and

"[53] This raises the question as to whether the doctrine of quasi-mutual assent can be applied in circumstances where acceptance does not take place in accordance with a prescribed mode but the conduct of the offeree is such as to induce a reasonable belief on the part of the offeror that the offer has been duly accepted according to the prescribed mode. Viewed in the light of basic principle, the question must surely be answered in the affirmative because the considerations underlying the application of the reliance theory apply as strongly in a case such as the present as they do in cases where no mode of acceptance is prescribed and the misrepresentation by the offeree relates solely to the fact that there is consensus."

[68] In applying the reliance theory as was done in Pillay, I find that there is a real possibility that there was consensus that the agreement remained in full force and effect even after 8 February 2019 until, on 23 February 2021, when BCC pronounced that it wants to cancel the agreement.

[69] The reason BCC pronounced that it wanted to cancel the agreement was not the non-fulfilment of the suspensive conditions. The reason advanced was BCC's financial inability to perform its bargain. I am further fortified in this view because both parties attempted to keep the agreement alive and sought to secure its further operation as set out above after the expiry date for the fulfilment of the suspensive conditions as provided for in clauses 4.2 and 4.3 of the agreement.

[70] The parties conducted themselves as if the non-fulfilment of the suspensive

conditions in the manner provided for in the agreement was of no moment. The conduct of the parties *prima facie* demonstrates that they considered themselves bound to the agreement notwithstanding the non-fulfilment of the suspensive conditions in the manner provided for in the agreement. Why else would BCC seek to cancel the agreement if the agreement had lapsed long ago for want of compliance with the suspensive conditions being fulfilled in the manner provided for in clauses 4.2 and 4.3 of the agreement and why would BCC only raise the alleged non-fulfilment of the suspensive conditions when it was confronted with a possible claim for specific performance of the agreement by Pine Glow.

Fictional fulfilment

[71] In Scott and Another v Poupard and Another[25], Holmes JA set out what a plaintiff must prove to successfully invoke the doctrine of fictional fulfilment. These are: non–fulfilment of the condition; the defendant's breach of his duty with an intention to frustrate the fulfilment, and a causal link between the non-fulfilment and the defendant's intentional frustration of the fulfilment of the condition.

[72] Even accepting for the moment that the existing retail and site licences does not constitute fulfilment of the suspensive conditions, I am of the view that, having regard to the conduct of the parties prior to 23 February 2021, none of the parties intentionally frustrated the fulfilment of the suspensive conditions. It did not even come to the fore between the parties before the non-fulfilment of the suspensive conditions was raised for the first time on 30 August 2021.

[73] Even having regard to what is set out above, the effect of the respondents' failure to properly or at all address the issues of quasi-mutual assent and fictional fulfilment leaves these disputes unresolved and, in my view impossible to be resolved on the evidence presently before me. The consequence of this finding is that I am unable to grant the declaratory order sought in prayer 2 of the notice of motion.

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[25] 1971 (2) SA 373 (A) at 378.

[74] In order to consider granting prayers 3 and 4 of the notice of motion, the declaratory order in prayer 2 would establish a clear right for the Pine Glow, one of the requirements for the granting of a final interdict. Because I am unable to grant the declaratory order, I am also unable to grant the relief in prayers 3 and 4 of the notice of motion. Pine Glow is not entitled to final relief on the evidence presently before me.

Interim relief

[75] What therefore remains to be considered is whether Pine Glow is entitled to interim relief being the alternative relief that is sought by Pine Glow in prayer 5 of the notice of motion. The requirements for an interim interdict are trite. Pine Glow must establish: a prima-facie right; an injury committed or reasonably apprehended; that the balance of convenience favours him or her; and that the Pine Glow has no alternative satisfactory remedy.

Prima facie right

[76] Although there is some doubt whether the agreement is still in force and effect, valid and therefore binding due to the issue over the fulfilment of the suspensive conditions either factually or fictional or whether the parties considered themselves bound to the agreement through mutual assent, I am of the view that, *prima facie*, based on the evidence before me, the agreement may still be in force and effect. Whether my *prima facie* view is correct or not is to be finally determined as contemplated in the order that I have granted.

Injury or real apprehension of injury

[77] On the admitted facts, the construction conducted by Elegant has commenced and would be continuing until completion if they it is not stopped. From Pine Glow's perspective, Pine Glow who entered into the agreement for gain will lose the opportunity

in the filling station if the filling station is completed and operated by another party. Therefore, I find in favour of Pine Glow that harm has already commenced and will endure if the interim relief Pine Glow seeks is not granted.

[78] Pine Glow contends that the respondents are acting unlawfully by infringing upon Pine Glow's contractual rights that flows from the agreement (and unlawfully competes with it) and that if the interim relief is not granted, the respondents' unlawful actions will perpetuate. Absent a final finding that the agreement is in full force and effect and therefore still binding, it cannot be found at this stage that the respondents are acting unlawfully. However, if it is ultimately found that the agreement is *in esse*, their actions would have been unlawful. In light of the possibility that it may be found that the respondents have acted unlawfully, I am of the view that Pine Glow is entitled to protection against the possible unlawful infringements upon his rights in terms of the agreement.

Balance of convenience

[79] This part of the enquiry requires the weighing up of prejudice to each of the parties if an interim interdict is granted or not granted. Where the prejudice is the greatest, that is where the balance of convenience lies. If the interim relief is granted, the respondents will be forced to temporarily halt the construction until the matter is resolved. It is Pine Glow's case that it seeks specific performance of the agreement. If the interim interdict is not granted, the construction will proceed to finalization no doubt. In that event, Pine Glow would have no way of securing specific performance of the agreement, which I have earlier indicated, may still be valid and binding. In my view, Pine Glow's potential prejudice outweighs that of the respondents. In order to limit the respondents' prejudice, I resolved to refer the question over the fulfilment of the suspensive conditions and the result of a finding upon the fulfilment of the suspensive conditions to evidence and ordered the matter to proceed to judicial case management within 5 days of the date of the order. In doing so

[80] I am confident that delays would be prevented to the advantage of all the parties. This is also the reason why I did not grant an order that the interim relief shall stand until the Pine Glow institutes proceedings. In my view, due to the limited dispute, the oral evidence of the controlling minds of the Pine Glow and the BCC together with the discovery of further relevant documents will be all that is necessary to resolve the real dispute.

[81] I am mindful of the fact that Elegant and TR have already invested substantially on the construction of the filling station and that they stand to be prejudiced by a delay in the completion of the filling station. It will be in the hands of the parties to manage the effective resolution of the dispute through the court. This will limit the respondents' prejudice.

No alternative satisfactory remedy

[82] The Pine Glow contends that the relief prayed for by it is the only remedy that will ensure that BCC complies with its contractual obligations. Well, I am unsure if BCC will ever comply with its contractual obligations. It has said that it is unable to do so. Nevertheless. Pine Glow's proposals already made to facilitate the final execution of the agreement stands. Perhaps that will assist BCC in its alleged predicament. It may therefore still be possible for Pine Glow to get BCC to perform, either through judicial intervention or through agreement. According to Pine Glow, the loss of its opportunity to construct, brand, sublease and to supply petroleum products will lead to immediate damage to Pine Glow.

[83] Elegant and TR alleges and argues that Pine Glow falls short of satisfying the requirements for an interdict. BCC denies that Pine Glow has made out a case for interdictory relief, whether final or interim. I disagree.

<u>Paragraphs 5 and 6 of the order</u>

[84] Rule 6(5)(g) empowers the court in instances where application cannot properly be decided on affidavit to either dismiss the application or make such order as to it seems meet with a view to ensuring a just and expeditious decision. The court it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear and be examined and cross-examined as a witness. I have decided to do the latter for there was no grounds to dismiss the application outright.

Costs

[85] Pine Glow succeeded in being granted the alternative relief it sought. However, Pine Glow was over-confident that the matter could be resolved with the extremely truncated time periods given to the respondents to meet its case. I am therefore of the view that it would be proper to penalize Pine Glow with an order that it is responsible for the costs associated with the respondents' legal practitioners' appearance on 7 September 2021. In the case of Elegant and TR, two counsel was necessary given the extent of the application and the time that was afforded to answer. The remainder of the costs I resolved to reserve for costs should normally follow the result which will only be known when the application is finalized as envisaged in the order. I grant no costs order in the rule 6(15) application despite it being dismissed because Pine Glow only in reply raised the issues of quasi-mutual assent and fictional fulfilment. Elegant and TR was procedurally entitled to challenge Pine Glow's stance in reply.

Roelofse AJ
Acting Judge of the High Court

DATE OF HEARING: 7 and 17 September 2021
DATE OF JUDGMENT: 22 September 2021

DATE OF ORDER: 20 September 2021

APPEARANCES

FOR THE APPLICANT:	Adv R Du Plessis SC together with Adv G Bench
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FOR THE FIRST RESPONDENT:	Adv H Viljoen
INSTRUCTED BY:	Harris Marcus Mahlangu Attorneys
FOR THE SECOND AND THIRD RESPONDENTS	Adv Roux SC together with Adv Jacobs
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