IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NO: 13364/2012

In the matter between:

MUKTAR GUNNY JOONUS	Applicant
and	
BP SOUTH AFRICA (PTY) LTD	First Respondent
RICH REWARDS TRADING 619 (PTY) LTD	Second Respondent
DEPARTMENT OF MINERALS AND ENERGY	Third Respondent
MINISTER OF MINERALS AND ENERGY	Fourth Respondent

JUDGMENT : 28 JANUARY 2013

GAMBLE, J:

[1] On 3 February 2012 the Applicant (acting on behalf the company yet to be formed) concluded an agreement of sale with the Second Respondent to purchase its service station business being conducted under the name "*BP Prince George Drive*" in the Cape Town suburb of Retreat.

[2] As the service station sells petroleum products manufactured by the First Respondent ("BP") the agreement of sale was made conditional, *inter alia*, upon

BP approving the purchaser "*as an operator and franchisee*" and BP entering into a lease agreement with the Applicant in respect of the service station site.

[3] Before it would consider approval of the Applicant BP required him to complete an application form, submit a business plan, pay the requisite fee and to participate in a screening interview and assessment process by an outside party. This the Applicant did.

[4] On 3 April 2012 BP informed the Applicant in writing that his application had not been successful. In response thereto, and on 10 April 2012, the Applicant's attorneys wrote to BP and asked for reasons as to why the application had not succeeded. The attorneys said that their request was founded in the "*Promotion of administrative (sic) Justice Act 200 (sic) (Act 3 of 2000, which are (sic) also applicable to your institution.*"

[5] On 13 April 2012 BP's attorneys applied on behalf of their client and pointed out that the Promotion of Administrative Justice Act, No. 3 of 2000 ("PAJA") was not applicable because their client was a private company whose decision to refuse the Applicant's application did not constitute administrative action. They refused to furnish any reasons for their decision but went on to indicate that they had selected another candidate who had scored better in the evaluation process.

[6] Undeterred by the sound advice of BP's attorneys, the Applicant set about filing an application in this Court. That application (under case no. 8944/2012) was brought urgently without notice to BP and was struck from the roll with an order of

attorney and client costs. It was evidently an application in substantially the same terms as the present, and was based on PAJA.

[7] Quite undeterred by this initial set-back the Applicant's attorneys brought this application some two months later under case no. 13364/2012. The application was brought in the long form with truncated time periods. The relief sought, aside from condonation for abridging the rules, was far ranging and lengthy:

> *"(2) Preventing and interdicting the First Respondent of (sic) preferring or otherwise confirming any other candidate as the site operator of BP Prince George Drive, Retreat, Cape Town, pending review of Applicants with (sic) application in terms of First Respondents (sic) Application and Selection Process.*
>
> *(3) Interdicting and preventing the Second Respondent from entering into any further agreements with any third party pending the finalization of this matter.*
>
> *(4) Compelling the First Respondent to give reasons as to why the Applicant's application was not successful.*
>
> *(5) Interdicting the First Respondent from applying or otherwise persuing the transfer of the Dealer Retail Licence with the Department of Minerals and Energy.*
>
> *(6) Interdicting the First Respondent from entering into, or otherwise persuing, or confirming, any agreements with any third party in pursuance of operating the BP Prince*

George Drive, Retreat, Cape Town site.

(7) *Interdicting the Third and Fourth Respondent (sic) from granting or otherwise issuing a Dealer's Licence with the Department of Minerals and Energy.*

(8) *In the event that such a licence has been granted an order suspending the said licence pending the outcome of this matter and any subsequent action to be filed.*

(9) *In the event that such a dealer's licence had (sic) been issued an Order suspending the operation of such licence pending the outcome of this matter.*

(10) *That a rule nisi be issued calling upon all interested parties to show cause, on the 2012 why an interdict in the following terms should not be made final:*

10.1 Confirming the agreement between the Applicant and the Second Respondent, as valid and binding between the parties.

10.2 Setting aside the decision of the First Respondent to allocate the BP Prince George Drive site to a third party.

10.3 Compelling the First Respondent to appoint the Applicant as a site operator and fulfill (sic) all their obligations in terms of the Sale Agreement, and perform all actions necessary to effect the transfer and operation of the site to the Applicant.

10.4 Costs of this application only in the event that it is opposed.

10.5 Further and/or Alternative relief."

[8] When the matter came before Binns-Ward J in the Motion Court on 22 August 2012 the learned Judge also struck the matter from the roll with a similar costs order. On 18 October 2012 the matter was enrolled again before the Judge President who granted an agreed order setting out a timetable for the further exchange of affidavits and referring the application for hearing on the semi-urgent roll on 26 November 2012.

[9] In my view the matter was, at the end of November 2012, singularly lacking in any urgency, particularly given the allegation by BP in the opposing papers that the business had been allocated to an unidentified third party which was then running the service station. The matter warranted being struck from the roll a third time due to lack of urgency.

[10] In addition, given the nature of the relief being sought in the notice of motion, the non-joinder of the current operator of business is also a fatal defect in the Applicant's case which warrants the removal of the matter from the roll.

[11] However, in light of certain fundamental flaws in the Applicant's case, it is necessary that a definitive ruling on the substance of the application be made rather than one of issues of procedure in order that this matter can finally be determined.

[12] In the founding affidavit the Applicant formulated his cause of action as follows:

> *"(21) On the 3rd April 2012, the First Respondent informed the Applicant (a full sixty days after the initial agreement) that his Application (sic) was unsuccessful. No reasons were furnished. On the 10th April 2012, my attorneys of record sent the First Respondent a letter requesting reasons in terms of the Promotion of Administration and Information Act 3 of 2000 (PAIA). A copy of this letter is annexed hereto as Annexure "E".*
>
> *(22) On the 12th April 2012, my attorneys of record received a response from the offices of First Respondents (sic) attorneys. The letter is hereto (sic) annexed as Annexure "F".*
>
> *(23) We submit that the contents of this letter are self-explanatory. However, and after a discussion of PAIA, the attorneys came to the astonishing conclusion that it need (sic) not furnish any reasons for what they called "*its commercial decisions*".*
>
> *(24) In our submission this is a misguided interpretation of the said Act.....*

[13] In para 29 it is further submitted that:

> *"the 'decisions' of the First Respondent does (sic) not only constitute an Administrative (sic) action but there also exists a*

contractual obligation on the First Respondent to report their (sic) findings to the Applicant and for the following reasons...

29.3...First Respondent's submission that this decision is purely a 'commercial one' and not also an administrative one rings hollow. It is submitted that the Applicant is entitled to have access to, consider, and if necessarily (sic), review the decision making process of the First Respondent"."

[14] The Applicant's allegations in para 21 of the founding affidavit are errant and misguided for two reasons. Firstly, in their letter of 10 April 2012 the Applicant's attorneys had purported to refer to PAJA, as I have shown above. Secondly, there is no legislation known as the "*Promotion of Administration and Information Act 3 of 2000*". The Act commonly referred to by the acronym "*PAIA*" is the Promotion of Access to Information Act. No. 2 of 2000, while Act 3 of 2000 is PAJA.

[15] Notwithstanding the confusion in the Applicant's mind, BP seemed to understand what he intended to advance as his cause of action in the founding affidavit and in its answering affidavit (which raised a number of substantive defences) BP dealt in detail (as had its attorneys in their letter of 13 April 2012) with the inapplicability of PAJA by virtue of its status as a private company. In my view those contentions regarding PAJA are correct.

[16] BP also dealt with the erroneous reference to PAIA and contended, for similar reasons, that that Act did not apply to a request for reasons for an administrative decision, but to the procurement of particular documents.

[17] In the replying affidavit the Applicant managed to get the reference to PAIA correct and he went on to firmly pin his colours to that mast. Any reliance on PAJA was unequivocally jettisoned by the Applicant. The cause of action was PAIA, notwithstanding the fact that the Applicant had not issued a request under either Sections 18 or 53 of PAIA, or otherwise complied with the provisions of Section 78 of that Act.

[18] In the heads of argument filed on behalf of the Applicant Mr. Basson based the argument on two grounds. Firstly, the PAIA point and secondly, by suggesting the application of the doctrine of fictional fulfillment. There are other points raised too but I must confess that they are so garbled and inconsequential that I was not able to follow them.

[19] At the hearing Mr. Basson informed the Court that he was seeking final relief in terms of prayers 10.1-10.4 as set out in para 10 above. He abandoned the PAIA argument and informed the Court that he would concentrate on the doctrine of fictional fulfillment. While doing so, however, he flirted with the idea that the sale agreement may have conferred a *stipulatio alteri* on BP, but was hard-pressed to explain what benefit the agreement conferred on BP, or whether BP had ever accepted such benefit.

[20] At some stage the argument even drifted into the realm of misrepresentation, but there too the argument went nowhere quickly.

[21] Ultimately, Mr. Basson opted for the doctrine of fictional fulfillment. He

referred to Mac Duff and Company Co Ltd v Johannesburg Consolidated Investments Co Ltd [1], Scott v Poupard [2] and a much earlier edition of Christie [3], claiming that his copy of the 6th edition had not yet been delivered to him.

[22] The argument, convoluted as it was, came down to this. BP should have been satisfied with the Applicant as the new franchisee at the Prince George Drive Service Station (notwithstanding that a competing purchaser had scored better in its internal assessment procedure) and its failure to so approve the Applicant effectively constituted a breach of the agreement upon which BP could not later rely on when challenged by the Applicant that it should have made a determination in his favour.

[23] As the Court held in Mac Duff the doctrine is an equity-based principle that precludes a party from taking advantage from his/her wrongdoing to avoid the consequences of the agreement. In Koenig v Johnson and Co Ltd [4] Wessels CJ referred to an early judgment which he had given in a matter involving the application of the doctrine [5] and said the following:

> *"In my judgment in that case I said:*
>
> > *'The Court must hold that if a contract is made subject to a casual condition, then if the person in whose interest it is*

---

[1] 1924 AD 573,
[2] 1971 (2) SA 373 (A)
[3] Law of Contract 4th ed
[4] 1935 AD 262 at 272
[5] Gowan v Bowern 1924 AD 550

> *that it should not be fulfilled deliberately does some act by which he hinders the accomplishment of the condition, he is liable as if the condition had been fulfilled. But a party cannot be said to frustrate a condition unless he actively does something by which he hinders its performance. There must be an intention on his part to prevent his obligation coming into force.'...In other words if it is the fault of the person in whose favour a condition is inserted that the condition cannot be fulfilled, or if he intended to prevent the condition from being fulfilled, the law considers the condition to have been fulfilled as against him. The nature of the contract is always an important element. In some cases the person benefited by the non-performance of the condition can sit still and do nothing to assist in its fulfillment; in other cases it is his legal duty to assist in the condition being fulfilled, and in all cases if he deliberately and in bad faith prevents the fulfillment of the condition in order to escape the consequences of the contract, the law will consider the unfulfilled condition to have been fulfilled as against the person guilty of bad faith."*

As appears from the aforementioned authorities the doctrine is usually applied with reference to the parties to the agreement and in respect of their particular obligations, and it is difficult to conceive how fulfillment can notionally be attributed to an outsider to the contract such as BP. When asked if there was any authority in support of the contention that deemed fulfillment could be imposed on outsiders, Mr. Basson said (not surprisingly) that he had not been able to find anything.

[24] There is a long line of cases dealing with the doctrine of fictional fulfillment. All of them, as I could find, involved parties immediate to the contract. The

matter was well summarized by Holmes JA in Scott v Poupard, *supra* at 378G-H to the following affect:

> *"The principle may be stated thus: Where a party to a contract, in breach of his duty, prevents the fulfillment of a condition upon the happening of which he would become bound in obligation and does so with the intention of frustrating it, the unfulfilled condition will be deemed to have been fulfilled against him."*

[25] There is a useful summary of the application of the doctrine by Wunsch J in Thanolda Estates [6]. All of those authorities make it clear that the frustration of the contract must be attributable to a defendant who is customarily a debtor in terms of the contractual arrangement. In the present circumstances there was no obligation on the Second Respondent to procure BP's approval of the Applicant as a new franchisee, nor was there any obligation on BP under the contract to approve the Applicant, as oppose to another competing party for franchise rights.

[26] The authorities referred to by Wunsch J in Thanolda Estates make it clear too that a party relying on the doctrine of fictional fulfillment must establish that the debtor with whom the obligation to perform lies has acted willfully. It is trite that in motion proceedings a party's affidavits constitute not only the evidence but also its pleadings [7].

[27] Perusal of the Applicant's founding papers contain, amongst a veritable

---

[6] Thanolda Estates (Pty) Ltd v Bouleigh 145 (Pty) Ltd 2001 (3) SA 196 (W) at p204-209
[7] Transnet Limited v Rubenstein 2006 (1) SA 591 (SCA) at 600 G-H

hodge-podge of poorly drafted and conceptualized allegations, a fleeting reference to the doctrine of fictional fulfillment:

> *"13. I submit that two preliminary observations are pertinent when one considers these conditions precedent;*
>
> *13.1 Firstly, the agreement was done inter partes between the Applicant and Second Respondent. The First Respondent was not a party to this agreement. The relevance of this submission appears from submissions made hereunder.*
>
> *13.2 Secondly, the conditions precedent was (sic) included as protective measures for the Applicant vis a vis the Second Respondent The First respondent (sic) cannot rely on the fulfillment or non-fulfillment of these conditions precedent. The relevance of this submission shall also be explained more fully hereunder."*

[28] As I have said the "*focus*" of the founding affidavit (if that be the correct verb in the circumstances) was on PAJA and administrative review as a cause of action. And notwithstanding the promise made at the conclusion of para 13 thereof, the relevance of the promised submission never saw the light of day. Most certainly, however, the founding affidavit made out no case for the application of the doctrine of fictional fulfillment, given that the act of frustration of fulfillment would ordinarily have to have come from the Second Respondent and not BP.

[29] But even if the Applicant's argument is correct and BP can be looked to

for frustrating the agreement of sale, the Applicant has certainly not shown that BP acted with the requisite degree of malice or intention in the form of *dolus* to frustrate the condition precedent in clause 5.1 of the agreement between the Applicant and Second Respondent. In my view therefore the application cannot succeed.

[30] Mr. Smalberger for BP, asked for costs of suit on the scale as between attorney and own client basing his submission on the *dictum* of Gardiner JP in *in re* Alluvial Creek Limited [8] to the following effect:

> *"An order is asked for that he pay the costs as between attorney and client. Now sometimes such an order is given because of something in the conduct of a party which the Court considers should be punished, malice, misleading the Court and things like that, but I think the order may also be granted without any reflection upon the party where the proceedings of vexatious, and by vexatious I mean where they have the effect of being vexatious, although the intent may not have been that they should be vexatious. There are people who enter into litigation with the most upright purpose and a most firm belief in the justice of their cause, and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear."*

In my view, that situation applies to the manner in which the Applicant's case has been conducted and presented. [9]

---

[8] 1929 CPD 532 at 535
[9] See also Hattingh v Ngake 1966 (1) SA 64 (O) at 68 E-F

[31] There are two concluding remarks that need to be made. In the first place, Mr. Basson, seemingly no longer a member of the Cape Bar, appeared in Court without an attorney. When asked where the attorney of record was Mr. Basson said he was tied up in another Court. Such a situation is unacceptable, particularly where the matter has been set down by agreement for a fixed date. The attorney should not, in such circumstances, be permitted to recover any fees in relation to the hearing on 26 November 2011.

[32] The second remark relates to the presentation of the Applicant's case. As I have indicated, the Applicant's case was extremely poorly drafted, prepared and presented in Court. Some of the allegations in the affidavit are illogical and others nonsensical. The argument was of a similar nature. Practitioners who waste their client's money by presenting such cases should know that the awarding of costs orders *de bonis propriis* may not be too far off.

[33] **The following order is made**:

A. The application is dismissed with costs on the scale as between attorney and own client.

B. The Applicant's attorneys are not to recover from their client any fees relating to the actual hearing of the matter on 26 November 2012.

P.A.L. GAMBLE