THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Appeal no: A319/2014
Case no: 11561/2013

In the matter between:

FULLOUTPUT 7(PTY) LTD t/a PETROPORT TOUWS RIVER **Appellant**

and

TOTAL SA (PTY) LTD **Respondent**

Coram: **BOZALEK, STEYN JJ et BLOMMAERT AJ**

Heard: **29 AUGUST 2014 & 12 SEPTEMBER 2014**

Delivered: **21 OCTOBER 2014**

JUDGMENT

BOZALEK J:

[1] This is a full bench appeal, heard on an urgent basis, against the judgment of Cossie AJ, delivered on 29 May 2014, dismissing the appellant's application for an interim interdict *pendente lite* by discharging a rule nisi that had been in operation by agreement between the parties. Cossie AJ also dismissed a counter-application

brought by the respondent and, also with her leave, that order is the subject of a cross-appeal by the respondent.

BACKGROUND

[2] The appellant has been trading as a Total service station outside Touws River for more than 10 years. The property on which it conducts its business is owned by the respondent, a major oil company. I shall refer to the parties throughout as the appellant and the respondent. The appellant also conducts two other subsidiary businesses on the premises, a convenience shop and a franchised restaurant.

[3] From at least 2009 onwards difficulties arose between the parties. The appellant was dissatisfied with aspects of the business relationship including the respondent's pricing and discount structures and its arrangements with large customers which, the appellant felt, had the effect of reducing the volume of petrol products it sold. Much correspondence passed between the parties, most of it emanating from the appellant and having an increasingly urgent tone.

[4] It would appear that at the same time the appellant was falling into arrears with what were agreed to be its virtually concurrent payments to the respondent for the purchase of its petrol and/or diesel products sold on the appellant's forecourt. Attempts to resolve the differences between the parties failed. Finally, on 11 July 2013, the respondent's regional representative wrote to the appellant's owner, Mr K Dippenaar ('Dippenaar'), confirming an immediate suspension of the respondent's supplies to the appellant by reason of its alleged breach of the dealer agreement ('the agreement'). In so doing the respondent purported to act in terms of clause 10.6 of the agreement.

[5] On 19 July 2013 the respondent's legal representatives wrote to Dippenaar stating that its client had *'validly cancelled the agreement … as a result of (the appellant) having breached the agreement by failing to make the payment due by it.'*

[6] At around the same time the appellant invoked an arbitration clause in the agreement with a view to referring various disputes for arbitration. Ultimately it was agreed between the parties that these disputes would be determined in an action in the High Court. However, the appellant also launched an urgent application for relief *pendente lite* in the form of an order compelling the respondent to restore delivery to it of petroleum products subject to the appellant paying for these on a cash on delivery basis.

[7] The parties thereafter agreed to a rule nisi in terms whereof, pending the hearing of the urgent application, the respondent would supply petroleum products to the appellant on a cash on delivery basis. The respondent filed a counter-application for certain declaratory relief and for an order evicting the appellant from the premises. The applications were argued before Cossie AJ on 8 October 2013 and on 29 May 2014 judgment was handed down dismissing both the application and the counter-application.

[8] In regard to one of the requirements for relief *pendente lite*, namely, a well-grounded apprehension of irreparable harm, Cossie AJ held that the termination of fuel supplies by the respondent could not be relied upon by the appellant inasmuch as there was an existing Court order providing for the purchase and sale of petroleum products pending the main action. In making this finding Cossie AJ clearly misconceived the situation since that Order, taken by agreement, was no more than a temporary arrangement pending the outcome of the urgent application. In the

circumstances this Court must look afresh at the matter and consider whether the appellant established the requirements necessary in order to obtain interim relief.

[9] In dismissing the counter-application Cossie AJ found that the dispute between the parties was riddled with material factual disputes concerning the terms of the agreement which could not be resolved in application proceedings and accordingly that the ejectment order could not be granted.

[10] In view of the fact that the appellant remains in possession of the premises but does not enjoy the supply of petroleum products to it by the respondent, the parties agreed to obtain an urgent date for a Full Bench hearing. Argument was duly heard on 29 August and 12 September 2014.

THE REQUIREMENTS FOR AN INTERDICT PENDENTE LITE

[11] In *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (C) at 267B – D Corbett J (as he then was) set out the requirements an applicant must prove to obtain an interdict *pendente lite viz:*

> *'(a) that the right which is the subject-matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is prima facie established, though open to some doubt;*
> *(b) that, if the right is only prima facie established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;*
> *(c) that the balance of convenience favours the granting of interim relief; and*
> *(d) that the applicant has no other satisfactory remedy.'*

THE APPELLANT'S CASE

[12] The appellant pointed out that there were several main disputes between the parties which they had agreed to adjudicate, not by way of arbitration as the agreement provided, but by way of action in the High Court. In due course the respondent had, as plaintiff, issued and served summons in an action for an order confirming its cancellation of the dealer agreement and for the appellant's ejectment from the premises. The appellant, as defendant, filed a special plea, a plea and several counter-claims thereto. That case has yet to come to trial.

[13] The appellant's case is that, notwithstanding the disputes awaiting determination, the respondent took the law into its own hands and, without any prior warning, terminated all fuel supplies to the appellant on 11 July 2013. This caused an immediate crisis for the appellant since fuel sales are the life blood of its service station business as well as the subsidiary businesses which it operates on the premises.

[14] The primary dispute between the parties relates to the appellant's alleged indebtedness to respondent principally for petroleum products already supplied. In this regard the appellant avers that it made out a very strong case casting serious doubt on the reliability and correctness of the respondent's calculations and, in particular, the accuracy of a certificate issued by the respondent in terms of the agreement certifying that the appellant was indebted to it in the sum of approximately R8mil as at August 2013. The appellant also pointed to further disputes between the parties which led to it seeking a declaratory order in the action that certain clauses in the agreement were against the public interest or in conflict with statutory provisions and should be declared null and void.

[15] Amongst the provisions in the agreement challenged by the appellant is clause 10.6, on the basis that it gives the respondent an unfettered discretion to be the sole decision-maker as to whether the dealer's conduct constitutes a breach of the agreement thereby entitling it to stop the supply of fuel.

THE RESPONDENT'S CASE

[16] The respondent's case is that by reason of the appellant's failure to pay amounts due in respect of fuel products supplied, the respondent eventually invoked its contractual right to suspend the supply of such products to the appellant and cancelled the agreement. Its case further is that the amount due and payable by the appellant as at 5 August 2013 was some R8.5mil as confirmed in a certificate of balance it issued in terms of clause 25 of the agreement.

[17] The respondent cited correspondence from the appellant contending that it demonstrated that, irrespective of the exact amount owing, on the appellant's own version it was substantially in arrears with its payments. It pointed out that on the appellant's own papers it had suffered losses and its cash flow had been negatively affected allegedly by various steps taken by the respondent and that as a result the appellant had fallen into arrears with its rent and petroleum payments to the respondent.

[18] In the premises, the respondent contended, it was entitled to stop petroleum supplies to the appellant in terms of clause 10.6 of the agreement and, in terms of clause 23, to eject it from the premises. The respondent contended that the appellant was free to prosecute any counter-claim it might have, but in the interim it had to pay its account without deduction or set off failing which the respondent was entitled to stop supplies, cancel the agreement and eject the appellant from the

premises. In conclusion the respondent contended that no prima facie case had been made out for interim relief by the appellant, which, moreover, had an adequate alternative remedy in the form of its claim for damages as a counter-claim in the main action.

[19] As regards the counter-application the respondent argued that its dismissal on the basis that there were major factual disputes between the parties concerning the terms of the agreement was unfounded. It contended that there was no dispute in regard to clause 13.1.3 which prevents set-off and clause 23 which entitled the respondent to cancel the agreement due to non-payment; further that the relevant terms of their agreement were common cause although their interpretation was obviously a question of law. Overall, the respondent contended, once it was accepted that the appellant was indebted to the respondent for fuel supplied, that such debt was due and owing but unpaid and that as a result thereof respondent had stopped the supply of petroleum and cancelled the agreement, there was no answer to the counter-application for an eviction order and it should have been granted.

THE TERMS OF THE AGREEMENT

[20] Whether the appellant was able to prove that the right which it sought to protect by interim relief was clear or, if not clear, was prima facie established depends in no small part upon an interpretation of the terms of the agreement. The following are some of the relevant terms.

[21] Clause 6, ***'Acknowledgment'***, records the dealer's (the appellant) obligation to sell the respondent's petroleum products and lubricants exclusively and to

conduct at the designated premises the business of a fuel-filling and service station with such additional business activities as are reflected in the annexures.

[22] Clause 7 records the dealer's undertaking and agreement to conduct the business in accordance with the policies and procedures of the company (the respondent) from time to time as well as a myriad other obligations which are not presently relevant.

[23] Clause 10, headed ***'Petroleum Products for sole use and display on the designated premises'***, records the terms upon which the respondent supplies petroleum products to the dealer. Clause 10.6 provides that *'The Company shall be under no obligation to supply the dealer with the Company's Petroleum Products or any product or service if the Dealer is, in the Company's opinion, guilty of conduct which constitutes a breach of this agreement.'* It is to be noted that this last cancellation clause is widely cast, on the face of it not restricting the Company's right to cease supplies to the dealer only to breaches of clause 10.

[24] Clause 23, dealing with '***Cancellation'***, includes the following:

> *'23.1 Should the Dealer:*
>
> *23.1.1. fail to pay any amount due by the Dealer in terms of the Agreement on the due date;*
>
> *23.1.2. commit any other breach of any term of the Agreement and subject to clause 23.2 fail to remedy any such other breach or observe such term within a period of three days of the giving of written notice to that (sic) by the Company to the Dealer or*
>
> *… then*
>
> *'the Company shall be entitled in addition to all other rights available to it, to forthwith cancel the Agreement, without prejudice, and provided that: Should the breach refer to in clause 23.1.2 be one which is not reasonably capable of remedied within the said period of three days,*

the Dealer may be allowed at the sole discretion of the Company such additional period as is reasonably required therefore;

23.2. The Dealer agrees that it shall vacate the designated premises within three business days of receipt of notice of cancellation. The dealer acknowledges that this clause is necessary in view of the difficulty in assessing damages that may arise from the aforementioned cancellation (if any), to preserve the continuity of the Company's business and to mitigate the damage to the goodwill arising or which may arise, in consequence of such cancellation.

23.3. Should the Company cancel this Agreement and the Dealer disputes the company's right so to do and remain in occupation of the designated premises, then until the Dealer vacates the designated premises the dealer shall continue to perform all of its obligations under this Agreement, including paying all amounts due by it in terms of the Agreement on the due dates thereof. The Company shall be entitled to recover sue for and accept these payments, and at its sole discretion, to continue to make deliveries of the Company's petroleum products to the Dealer, without prejudice to and without affecting the Company's cancellation of the Agreement or its rights or any claim of any nature whatsoever.

23.4. Should the dispute between the Company and the Dealer be determined in favour of the Company the payments made to the Company in terms of clause 23.3 shall be regarded as damages for holding over.

23.5. Should the dispute between the Company and the Dealer be determined in favour of the Dealer, the Company shall compensate the Dealer for any proven damages. The Company's liability to the Dealer shall, in absence of wilful bad faith on its part at no time exceed the cost directly and reasonably incurred by the Dealer in vacating the designated premises and shall not include any consequential damages, including loss of profit or goodwill.

23.6. Upon cancellation of the Agreement for any reason whatsoever the Company shall not be liable to pay any compensation for goodwill, cost of business or any other consideration benefits or the like to the Dealer or its successors in title.'

[25] Of particular relevance to the present appeal is clause 23.3 which clearly envisages a situation where the dealer disputes the company's right to cancel and remains in occupation of the premises. During that period, presumably pending the determination of that dispute, the dealer has to perform all of its obligations under the agreement including paying all amounts due by it. In this period it lies within the company's sole discretion to continue to make deliveries of petroleum products to the dealer. If it does so this does not affect its cancellation of the agreement. In terms of clause 23.5 should the dispute be determined in favour of the dealer the company shall compensate it for any proven damages but these do not include consequential damages, only the costs directly and reasonably incurred by the dealer in vacating the designated premises. It is thus potentially highly prejudicial for the dealer to have to vacate the premises since, even if it disputes the cancellation and prevails in a subsequent arbitration or litigation, its damages may well be limited to direct costs incurred.

[26] Reverting to the agreement, clause 12 deals with transactions and provides inter alia as follows:

> *'12.7. subject to clause 12.8 hereunder and the Company's SOC programme, the Dealer shall pay cash on delivery for all the company petroleum products and goods so delivered.*
>
> *12.8. any credit facility granted by the Company shall be in writing and … same may be withdrawn or varied by the Company with immediate effect in the event of any payment due by the Dealer to the Company at any time not being made on due date …*
>
> *12.9. neither the granting of credit facilities nor failure to enforce the terms thereof rigidly shall prejudice the Company's right to cancel this Agreement and eject the dealer from the premises for failure by the Dealer to pay for the Company petroleum products supplied.'*

[27] Under the heading ***'Payments',*** clause 13.1 read with 13.1.3 provides that:

> *'All payments to be made by the Dealer without the cost of transfer of funds … and without the right of deferment or avoidance by virtue of any counter-claim or set-off unless such right of deferment, avoidance or set-off is expressly permitted in this agreement.'*

[28] Clause 21 deals with dispute resolution and provides that:

> *'All disputes between the parties shall, when all efforts to resolve such dispute by negotiation have failed, be referred to arbitration as envisaged in clause 22 save if the parties agree to refer the dispute to the High Court of South Africa.'*

THE DISPUTES WHICH AROSE

[29] In the appellant's founding papers Dippenaar stated as follows regarding the respondent's alleged unilateral steps over the past few years:

> *'[5.9] Dit het in die proses vir die applikant geweldige finansiele skade veroorsaak en het die applikant se kontantvloei onder sterk druk geplaas.*
>
> *[5.10] 'n Noodwendige gevolg hiervan was dat die applikant 'agterstallig' begin raak het met sy huur en brandstof rekening aan die respondent (die fyner werking waarvan hieronder bespreek sal word).'*

[30] Dippenaar went on to blame the respondent for this state of affairs and continued:

> *'Die huidige beweerde agterstallige bedrag is nie 'n werklike agterstallige skuld nie. Applikant aanvaar nie die respondent se rekeninge nie. Maar meer nog, die syfers waarmee die respondent werk is ernstig skeef getrek deur die respondent se erg benadelende en onregmatige optredes teen die applikant geneem wat die applikant se besigheid ondermyn het en nou op die punt staan om dit te ruineer weens die afsny van brandstof toevoer aan applikant. 'n Dispuut is daaromtrent verklaar.'*

[31] In paragraph 7 Dippenaar continued:

> *'[7] Onverwags en sonder vooraf waarskuwing het die respondent op Donderdag 11 Julie 2013 om 12h04 'n e-pos aan die applikant gestuur waarin die respondent eensydig aankondig dat dit, met onmiddelike effek, die*

verskaffing van enige verdere produkte aan die applikant sonder meer staak …

Die applikant ontken dat dit enige gelde aan die respondent verskuldig is. Die applikant het wesenlike eise vir regstelling van die foutiewe berekeninge tot op datum deur die respondent gemaak. Hier benewens het die applikant ook eise vir skadevergoeding teen die respondent waarna hieronder verwys sal word. Die bedrae wat die respondent beweer aan dit verskuldig is word vêr oorskadu deur die bedrae wat die respondent aan die applikant verskuldig is. [my emphasis]

[7.3] Dit is inderdaad juis hierdie dispute tussen die partye wat volgens die handelaarsooreenkoms gesluit, op arbitrasie (of by eenkoms, in die Hooggeregshof), besleg moet word'.

[32] Dippenaar sets out a lengthy list of complaints regarding the respondent's business conduct which, he alleged, were also, a breach of the contract in various respects. On the basis of these allegations, backed up by some further detail, the appellant alleged that it had claims totalling some R1mil against the respondent for the loss of sales of diesel, for losses suffered as a result of reduced turnover in its subsidiary businesses as a result of the aforementioned loss of petroleum sales and in respect of the reduced market value of the appellant's business.

WAS THE APPELLANT IN ARREARS TO THE RESPONDENT?

[33] Reviewing the correspondence attached to the appellant's founding and replying affidavit there are a number of indications that the appellant was indeed in arrears with its payments to the respondent. On 18 June 2012 the appellant sent an e-mail to the respondent attaching proposals *'Re: The way forward for Touws River.'* In those proposals it stated:

'Present

We are experiencing a severe cash flow situation as a result of our diesel procurement network to the extent that it is has impacted on our ability to service the Total account and hence the AOD we have agreed to.'

AOD was clearly an acronym for an acknowledgment of debt.

[34] In the covering email Dippenaar stated:

> *'I have had a discussion with Vanessa de Vries about the financial situation of Touws River because I am concerned (scared?!) that a memo ends up on the General Manager's desk and she decides to pull the plug. I have indicated to her that we can now only pay the AOD and still have serious cash flow issues or improve our cash flow and keep on trading and repay the AOD as soon as we are in a better position regarding cash flow and/or sales.*
>
> *We have since received some bridging (sic) from our arrangements. I have, however, made the call to save our cash flow to an extent and we have started to repay the AOD, albeit in relatively small amounts currently.'*

[35] On 21 February 2013 the respondent emailed the appellant as follows:

> *'We cannot wait until the meeting for you to confirm if you are in agreement with AOD that was presented to you as the amount has been outstanding for some time …*
> *Please can you advise if you have completed your reconciliation if you are in agreement with the outstanding balance. If not, please advise what you feel is outstanding and when you intend to settle?*
> *In our discussions this week …. the options with regards to the debts are:*
>
> 1. *Sign an AOD, if no agreement can be reached. This will result in:*
> 2. *A letter of demand - following by,*
> 3. *Suspension of product followed by:*
> 4. *Cancellation of the dealer agreement.*
>
> *Please can you urgently come back to me by Friday 22 February 2013 on the agreed amount outstanding and your intention to settle?'*

[36] On 18 March 2013 Dippenaar emailed the respondent summarising discussions which had been held shortly before. He stated inter alia:

> *'We mention that we are not in dispute about an amount being owed on the open account but are in dispute on the conditions of repayment of the amount. Our dispute arises from the disastrous effects of the change to Route Africa and the subsequent loss of sales …'*

[37] The respondent replied by email:

> *'Of critical importance is the fact of the outstanding debt. As noted the terms requested by yourself as to the repayment are not acceptable to Total. The settlement of the debt cannot be extended beyond six months as previously communicated due to the fact that some of this debt is now five months old and agreement must be reached as a matter of urgency. In light of this please advise your intentions by no later than 20 March 2013. As advised at the meeting of 14 March 2013 failure to settle this debt or the signing of the acknowledgment of debt will result in a letter of demand for the full settlement of the debt.'*

[38] On 20 March 2013, Dippenaar sent the email which it identified in its founding papers as the appellant's first declaration of dispute inter alia in the following terms:

> *'Regarding the payment of the outstanding debt as referred to we are of the opinion that we shall not reach an agreement on this matter. In terms of article 22.5 of the agreement we therefore declare a dispute on the matter.*
> *The dispute is about:*
> - *The terms of repayment of the outstanding amount due to the events leading up to the outstanding debt.*
> - *We are also of the opinion that our proposed solution to the issues has not been discussed properly*
>
> *The dispute is not about:*
> - *The amount of the debt and/or*
> - *Our willingness to repay the debt.'* [my emphasis]

[39] The previous day, 19 March 2013, Dippenaar had emailed the respondent stating inter alia as follows:

> *'I am the dealer of Petroport Touws River which I believe is at the top of your 'blacklist' and for which you are about to issue LOD and have us evicted soon … The shortfall on the open account is at a constant value for the past year and the sales at Touws River is increasing … to the extent that it would be possible to service the debt over a reasonable time.*
>
> *We are not blaming Total SA nor are we disputing the amount or that it is owing.* [my emphasis]
>
> *…*

> *We are not requesting Total to write off any amounts nor to refrain from charging a reasonable rent (sic) on outstanding amounts. We are humbly requesting that the period of repayment of the outstanding amount be discussed and that the parties reach a viable solution.'*

In context, LOD clearly refers to a letter of demand.

[40] It appears that over the ensuing month or two further discussions took place between the parties but they were ultimately unsuccessful. Matters culminated in the following email from the respondent to the appellant on 11 July 2013:

> *'I refer to our discussions yesterday afternoon 10 July 2013, regarding the suspension of products supplied to the abovementioned business.*
> *As much as this matter was not communicated to you in writing please be advised that this communication serves to confirm the decision by Total to suspend supply with immediate effect. This decision is as a result of non-payment to Total for the products sold and delivered by Total.'*

The correspondence thus clearly establishes that the appellant's claim that petrol supplies to it were suspended by the respondent without warning was unjustified, if not false.

[41] The appellant's attorney first intervened in the correspondence on 17 July 2013. There, for the first time, it was alleged on behalf of the appellant that there was a dispute regarding the outstanding amount that it owed to the respondent. This emerges from the following passage:

> *'3.2. The outstanding amount that your clients claim is due to it by our client, is not correct. There is a bona fide dispute about the initial amount of approximately R3.5mil claimed by your client from our client, which dispute persists. Furthermore, any further arrears that ran up since 24 June 2013 was caused by your client's own neglect as a result of your client having unilaterally ceased to collect payment from our client by way of a debit order granted to your client.*
>
> *..*
>
> *All such amounts need to be reconciled between the parties and this forms part of a dispute previously declared by our client and which is again hereby*

> *declared in this letter and which dispute will have to be settled upon arbitration in terms of the dealer agreement concluded between the parties.'*

[42] In the letter the appellant's attorney went on to formally declare six disputes, namely, damages caused by unlawful action taken and/or unfair business practices pursued by Total in breach of contract and/or in breach of applicable legislation, losses suffered as a result of the new rental formula, the diminution of the reasonable market value of the appellant's business, a dispute regarding the appellant's right to sell its business, a claim for damages arising out of the termination by respondent of the supply of petroleum products to appellant and, finally, the determination of the exact quantum of any debt either party might owe to the other.

In the letter it was contended that the appellant's claims against the respondent amounted to R11 480 000 and concluded as follows:

> *'Our client's aforesaid claims against your client by far exceed your client's claim which we believe to be in the amount of approximately R7mil. Our client denies that it is indebted to your client in this amount or any lesser amount for the reasons aforesaid.'*

[43] The letter elicited a reply from the respondent's attorneys on 18 July 2013, the relevant portion of which reads:

> *'Our client denies your client's assertion that it does not have any right to interrupt the supply of petroleum products to your client.*
>
> *…*
>
> *Our client has suspended the supply … to your client as a result of your client's breach of the dealer agreement … by failing to pay amounts due by it to our client. In this regard, your client's attention is drawn to the provisions of clause 10.6 of the agreement which provides that our client is under no obligation to supply your client with petroleum products … if your client is, in our client's opinion guilty of conduct which constitutes a breach of the agreement …'*

[44] Dealing with the disputes declared by the appellant, the respondent's attorneys suggested that all claims and counter-claims be resolved in the High Court. That arrangement was accepted by the appellant in due course. In a separate letter written on the same day the respondent's attorneys advised the appellant's attorneys as follows:

> *'Your client is in breach of its obligations in terms of the dealer agreement … in that it has failed to pay the amounts due to our client … your client is hereby informed that the agreement is cancelled with immediate effect.*
>
> *[3] In accordance with clause 23.2 of the agreement your client is hereby given three business days within which to vacate the premises … failing which our client will take the necessary legal steps to ensure the eviction of your client.'*

[45] The following day the appellant's attorneys wrote to the respondent's attorneys advising that the appellant disputed the validity of the purported cancellation and would be seeking *'relief declaring it to be invalid'*.

[46] In its answering affidavit the respondent duly alleged that the appellant had breached the agreement by falling into arrears with its payments. It annexed a notice of the aforesaid breach dated 17 May 2013 wherein the respondent's attorney recorded its instructions as being that the appellant was indebted to the respondent in the sum of R3 494 360.50 in respect of goods sold and delivered including, but not limited to, petroleum products, and calling upon the appellant to make suitable payments arrangements failing which legal action would be taken against it.

[47] It is common cause that this letter was wrongly addressed to a PO box number in Bothaville. The respondent also relied on a later certificate of balance effected on 5 August 2013 reflecting the appellant's indebtedness in the sum of R8 515 000.

[48] A central theme of the respondent's answering affidavit was that at all material times the appellant had been substantially in arrears with its payments to the respondent and therefore that the respondent was not contractually obliged to supply it with products and would not do so (other than in the terms of the interim arrangement made pending the return day of the agreed rule nisi); further that the Court could not make a contract compelling a party to perform contrary to the terms of the agreement.

[49] In its replying affidavit the appellant took issue with the accuracy of the amount claimed in the letter of demand (sent to the wrong address), namely, R3 494 360.57. It annexed extracts from the respondent's statement, in pdf format, for the period 1 May 2013 to 31 May 2013 showing the balance carried forward as R3 757 169.73 and the closing balance as R4 124 829.03, adding that *'screenshots from the Excel format statement for the same period confirm the integrity of the Excel file and read as follows'.* On one of these extracts from this document (reproduced in the affidavit) the balance owing by the appellant on 17 May 2013 varied between R3 512 003.24, at its lowest, and R3 757 667.49 at its highest. The closing balance for that day appeared to be R3 613 870.14.

[50] If these figures are compared to the letter of demand bearing the same date, it appears that the amount demanded by the respondent was some R28 000 less than the lowest balance appearing on its statements reflecting the appellant's liability on that day. Significantly, the appellant took the question of the balance owing no further, for example, by explaining in what amount it was indebted to the respondent at that stage, if at all, and how this was calculated.

[51] This failure, in my view, amounts to a bald or tactical denial, particularly seen in the light of the numerous indications in the email correspondence that, until the respondent cancelled the agreement, the appellant did not dispute that it was in arrears with its payments. It gives rise to a situation analogous to that in the unreported case of *Stamford Sales and Distribution (Pty) Ltd v Metraclark (Pty) Ltd*[1] where the Court stated as follows in relation to an affidavit opposing summary judgment:

> *'[17] When faced with the specific claim for payment of R700 000 for goods and/or services supplied to it during a defined period, namely, October 2010 – January 2011 it should have been a simple exercise for Stamford to set out what goods or services it received from Quali Cool CC during this period, together with the payments it made to Quali Cool CC. This would constitute a sufficiently full disclosure of the material facts to persuade a court that if proved at trial Stamford would establish its defence that it had paid the cedent in full (Maharaj (supra) at 426A – D).'*

[52] The appellant went on to challenge, at length and in detail, the accuracy of the certificate of indebtedness issued by the respondent in August 2013, reflecting the sum of some R8mil. In my view that material is largely irrelevant, the critical question being appellant's indebtedness around 17 May 2013 or at the time of respondent's cancellation of the agreement, on 18 July 2013.

[53] Reverting to the requirements for interim interdictory relief, one must first identify the right which is the subject matter of the main action which the appellant seeks to temporarily protect and which it must establish at the very least on a prima facie basis. That can only be its right to continue trading on the premises and to have products supplied to it by the respondent and must, inevitably, be determined with regard to the provisions of the agreement governing the relationship between

[1] Case 676/2013 [2014] ZASCA 79 (29 May 2014)

the parties. This leads to the question of whether, through breach of these terms by the appellant, it had forfeited this right.

[54] The essence of the dispute between the parties is the lawfulness of the respondent's cancellation of the agreement. Although the appellant challenges the lawfulness of the agreement in a variety of respects the core of its case for interdictory relief was that the respondent was not entitled to cancel the agreement inasmuch as the appellant was not in arrears in its payments and therefore not in breach of the agreement.

[55] If the cancellation was clearly unlawful, or at least prima facie so, the appellant would, subject to proof of the further interdict requirements, be entitled to interim relief pending the outcome of an arbitration or litigation to determine this and possibly other disputes. The question is, then, whether the appellant has established a clear right in this regard.

[56] In my view that question cannot be answered in favour of the appellant for the simple reason it failed to produce any facts or documentation to support its allegation that it was not in arrears in its payments to the respondent. Dippenaar merely repeatedly asserts this conclusion in the founding and replying affidavits.

[57] The further question is then whether the appellant has made out a prima facie case in relation to this right, although open to some doubt. Here the test is that mere acceptance of the appellant's allegations is insufficient but a weighing up of the probabilities of conflicting versions is not required. The proper approach is to consider the facts as set out by the applicant (appellant) together with any facts set out by the respondent which the applicant cannot dispute and to decide whether, with regard to the inherent probabilities and the ultimate onus, the applicant should

on those facts obtain final relief at the trial. Facts set up in contradiction by the respondent should then be considered and if they throw serious doubt on the applicant's case the latter cannot succeed[2].

[58] There is no single document that conclusively determines the question of whether the appellant was in arrears at the critical period, and if so, in what amount, since the appellant ordered petrol on open account and paid for it on a running basis. At best for the appellant this leaves the question evenly poised and the Court must have regard to the inherent probabilities and the ultimate onus. The documentation which passed between the parties prior to cancellation is the strongest evidence, the various statements made by Dippenaar in emails on 18 June 2012 and 18, 19 and 20 March 2013 being of particular significance. In these Dippenaar made unequivocal admissions that the appellant was in arrears (and by clear implication substantially so) with its payments to the respondent. Those admissions were, moreover, entirely congruent with the general tenor of the correspondence from the appellant to the respondent complaining that, on the existing terms and business arrangements, it was experiencing financial difficulties and seeking more favourable terms in order to become more profitable. Nor do I consider that the weight of the admissions can be discounted on the basis that Dippenaar was merely seeking to remain on good terms with the respondent. By 20 March 2013 matters had reached such a pass that the appellant formally declared a dispute with the respondent. This was clearly a serious step yet in that same email the appellant specifically noted that it did <u>not</u> dispute the amount owing to the respondent.

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[2] *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189

[59] Also relevant to this aspect is the notice of breach abortively sent by the respondent's attorneys to the appellant on 17 May 2013 alleging that the appellant was in arrears in the amount of R3 494 360.50. As mentioned, although the appellant challenges the accuracy of this figure it goes no further than pointing out that it did not correspond exactly with the respondent's own statement as per an Excel format. The manner in which the appellant dealt with this critical issue in its affidavits amounted to little more than a bald denial of facts which were within its own knowledge and concerning which it should have been able to produce countervailing evidence if the respondent's assertions were indeed materially inaccurate. The correspondence between the parties as a whole, furthermore, made it clear that long before the cancellation the respondent had been troubled by the appellant being in arrears.

[60] Having regard to all these circumstances and looking at the probabilities as a whole, I regard it as overwhelmingly probable that the appellant was in substantial arrears as at the time of cancellation. It follows that in the main action the appellant has very limited prospects, if any, of establishing that it was not in material breach of the agreement.

[61] The next question is what the rights of the parties were in this situation. In this regard the dealer agreement is clear. Clause 10.6 stipulates that the respondent is under no obligation to supply the appellant with petroleum products if in the respondent's opinion the appellant was guilty of conduct which constituted a breach of this agreement. Clause 12.7 required the dealer to pay cash on delivery for all petroleum products delivered and clause 12.9 records the respondent's rights to cancel the agreement and eject the dealer from the premises for failure by the dealer to pay for petroleum products supplied.

[62] Reinforcing these provisions is clause 13.1.3, which precludes the reliance by the dealer on any right of deferment or avoidance by virtue of any counterclaim or set off, and the cancellation clause, which provides in 23.1.1, read with 23.1.9, for the respondent's right to forthwith cancel the agreement should the dealer fail to pay any amount on the due date. Furthermore, clause 23.2 records the dealer/appellant's agreement to vacate the designated premises within three business days of receipt of a notice of cancellation and records reasons why such an onerous clause is justified.

[63] Finally, clause 23.3 deals with the situation where the agreement is cancelled but the dealer disputes the company's right to do so and remains in occupation of the premises. It expressly stipulates that in this interim period the company *'at its sole discretion'* may continue to make deliveries of its products to the dealer (against payment) without prejudice to its cancellation of the agreement. Although designed to deal with the situation where the dealer does not accept a cancellation and refuses to vacate, these provisions serve also to operate as indirect confirmation of the primary right of the company to withhold the supply of petroleum products to the dealer where that party is in breach of the agreement and which has led to a cancellation.

[64] Argument was directed by the appellant's counsel at the alleged draconian nature of clause 10.6. I do not agree. In any contractual dispute a party which considers that it is prejudiced by a breach by the other contracting party must, in the first place, be the judge of the materiality of that breach and act accordingly. Should it incorrectly treat the breach as material and cancel the contract, it may well suffer the consequences and, conceivably, even be interdicted from acting on the basis of that cancellation. All other things being equal it can hardly be the position that the

party alleged to be in breach must be the judge of whether there has been a breach or that there must be agreement between the parties on this score.

[65] The respondent's exercise of its power in terms of clause 10.6 was also challenged by the appellant on the basis that that clause gave the respondent a free and unfettered discretion to decide whether the dealer is guilty of conduct which constituted a breach of the agreement and then, based on that decision, to stop fuel supplies to the dealer. It was submitted that the clause was against public policy in that it entitled one party to the contract to unilaterally usurp the function of a court and thereby to exclude the jurisdiction of the courts. It was submitted further that it was *'akin'* to the pure potestative condition *si volam* of the Roman law and was not enforceable, void for vagueness and unconstitutional in that it infringed upon the appellant's constitutional right of access to court.

[66] The court was referred to a number of cases in support of this argument[3] and also referred to the writings of various academic works dealing with the principles of the law of contract. In my view, however, none of these cases were on point and the arguments raised by the respondent are either misstated or overstated. Clause 10.6 does not, on its own terms, exclude the jurisdiction of the court nor does it in my view amount to the company/respondent stipulating for its own prestation in the contract between the parties.

[67] In discussing this matter under the heading ***'Contractual Powers or Discretion'*** the authors Van Der Merwe et al in Contract: General Principles, 4th Edition state the general position in the following terms:

> *'There is authority for a rule, phrased in quite general terms, that*

[3] *Bredenkamp and Others v Standard Bank of SA Ltd* 2010 (4) SA 468 (SCA); *Barkhuizen v Napier* 2007 (5) SA 323 (CC)

> *"[no] contract is legally enforceable if it is made to depend solely upon the will of one of the parties what part of it he should perform."*[4]

The authors go on to state that a clause empowering a debtor to decide on the very existence of an obligation is objectionable and destructive of the validity of the agreement. An agreement to this effect, for example, an undertaking of liability should the debtor so wish, the so-called condition *si voluero*, is abortive. This is the case, not so much because there is uncertainty about the contractual content but, more fundamentally, because such a provision excludes an intention to create an obligation, at least where the discretion is vested in the debtor in respect of its own performance and not restricted by objective considerations. The authors cite examples of contractual powers of such a nature which are not problematic and state:

> '(*a) provision requiring a debtor to perform a mutually agreed upon performance to the satisfaction of the creditor is valid: a power to determine whether a breach of contract has occurred does not render the contractual content uncertain. To counter the possibility of abuse, the courts recognise the exercise of such powers to be subject to their control, both as regards the preconditions for and the reasonableness of the decision arrived at.'* [my underlining]

[68] In my view clause 10.6 falls within the last-mentioned observations and does not necessarily imply an ousting of the jurisdiction of an arbitrator or the courts. It will be recalled that clauses 21 and 22 of the agreement provide for dispute resolution and an arbitration mechanism. In addition clause 23.2 explicitly recognises the dealer's right to dispute a cancellation by the company and remain in occupation of the premises pending, presumably, an order of ejectment. In any event the question of whether clause 10.6 is void by reason of its draconian nature does not, in my

[4] The authority for this being from *Shell SA (Pty) Ltd v Corbitt and Another* 1986 (4) SA 523 (C) 525.

view, arise in this application. The nature of the breach upon which the respondent relies, substantial arrears on the part of the appellant, is, if proved, so material as to render academic the question of whether the appellant's opinion in this regard is sufficient to justify cancellation.

[69] A further argument on behalf of the appellant was based upon the respect which the courts will accord to the process of arbitration as exemplified in *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another*[5]. It was submitted that the appellant was relying upon its contractual right to continue trading on the premises and to that end to continue to purchase petroleum products from the respondent until a court (in lieu of an arbitration) had determined whether there had been a breach of the agreement, justifying the respondent's cancellation of the agreement and the eviction of the applicant from the premises. In my view this mischaracterises the right which the appellant was seeking to protect.

[70] In any event the agreement does not provide for an automatic freezing of the contractual rights and obligations of the parties simply because there has been a referral of a dispute to an arbitrator by one such party. Nor is *Lufuno Mphaphuli* authority for any such proposition. That case concerns, in broad terms, the deference which a court will pay to the arbitral process where this has been agreed between parties. There is nothing in the wording of the arbitration clause in the agreement, nor implied in its terms, suggesting that ordinary trading arrangements between the parties must continue pending the outcome of any dispute.

[71] In conclusion, the evidence in the papers establishes that at the time of cancellation the appellant was in arrears in a substantial sum to respondent for

[5] 2009 (4) SA 529 (CC) at 585 to 599.

petroleum products supplied and that it had been in arrears for some time. The indications are that the arrears were in the region of R3.5mil when the supply of products was stopped by the respondent and the agreement cancelled.

[72] I am prepared, for the purposes of determining this application, to accept that the appellant established a well-grounded apprehension of harm and that the balance of convenience favoured it. I am also prepared to assume that an action for damages will, in the circumstances of this matter, not be an adequate remedy for the appellant. One factor that weighs in this regard is the limitation on the damages which a dealer may claim in these circumstances in terms of clause 23.5 and 23.6.

[73] Be that as it may, having regard to the appellant's proven material breach of the dealer agreement it failed, in my view, to establish a clear right or even a prima facie right, although open to doubt.

[74] The relief sought in the notice of motion relating to the appointment of an arbitrator has fallen away because the parties agreed to litigate in the High Court. Leave to appeal was not sought by the appellant in respect of the relief claimed requiring obligatory mediation of the disputes between the parties. In any event such relief is misconceived since the agreement makes no provision for mediation, merely that a dispute shall be referred to arbitration if all efforts to resolve such disputes by negotiation have failed. The correspondence in this matter makes it abundantly clear that such a process was embarked upon but was unsuccessful.

[75] Accordingly for these reasons I consider that the appeal against Cossie AJ's judgment in the application must fail.

THE COUNTER-APPLICATION

[76] The respondent counterclaimed for a declaratory order confirming the purported cancellation of the dealer agreement and for an eviction order against the appellant. Cossie AJ dismissed the counter-application on the basis that there were '*… major disputes of facts between the parties concerning the clauses of the Agreement which cannot be resolved in application proceedings.*' The learned judge did not specify what these major disputes of facts were. As mentioned the principal dispute between the parties was the question of the appellant's indebtedness to the respondent between 17 May 2013, when the respondent stopped supplies of petroleum products to the appellant, and 18 July 2013, when the respondent formally cancelled the agreement.

[77] In dealing with the application, I have found that on the overwhelming probabilities the appellant was in substantial arrears with its payments to the respondent at the material time, in the region of approximately R3.5mil. It follows that the appellant was in material breach of the agreement and the respondent was entitled to cancel and, in terms of clause 23.2, to require the dealer to vacate the premises.

[78] It must be borne in mind that, once the respondent had decided to halt supplies to the appellant, the service station which stands on its property was no longer functioning as such with the consequent loss of revenue to it as well.

[79] The appellant raised a plethora of points as to why the counter-application was improper. These included that that it was not properly brought or enrolled and constituted an abuse of the process of court, that it was in contempt of a court order granted on 12 May 2014 in the main action, that the defences which it raised in the

appellant's answering affidavits were uncontested inasmuch as no replying affidavit was filed and, finally, non-joinder. It also made much of the fact that the counter-application sought final relief. However, applying the Plascon Evans rule to the determination of facts, I find that the appellant's substantial arrear liability at the material time can be taken as a proven fact notwithstanding its pro-forma denial by the appellant.

[80] The first point taken by the appellant was based on the fact that the counter-application was not provided for in the Court order taken by agreement regulating the further conduct of the interdict for temporary relief. That Order did not specifically preclude the respondent from bringing a counter-application which clearly was a corollary to the application for a temporary interdict and it was, in my view, entirely sensible for it to be heard together with those proceedings. The Court a quo was apparently content to hear the counter-application on the date which had been arranged for the application on semi-urgent roll and it was not persuaded that there was anything irregular in the bringing of the counter-application. In the circumstances I do not consider that this point has any substance.

[81] The appellant then raised non-joinder in respect of the franchisor of its restaurant and the appellant's 55 employees on the basis that their eviction was also sought by the respondent. The appellant alleged that the franchisor was a party to a tri-partite agreement concluded between the appellant and the respondent. However, the respondent did not specifically seek an order of eviction against the franchisor and in these circumstances I can see no warrant for it to be joined. Nor is there any requirement in law, of which I am aware, or to which we were referred to by the appellant, that before an eviction order can be issued against a party, such party's non-resident employees have to be joined.

[82] Next, the appellant submits that the appeal was in contempt of an order made by Traverso DJP in November 2013, whilst the parties were awaiting judgment from Cossie AJ, dismissing an application for summary judgment by the respondent in the main action. Part of the relief sought in that action was a declaration that the respondent's cancellation of the dealer agreement was lawful and an order of eviction against the appellant.

[83] Respondent's counsel advised that prior to the hearing of this appeal a notice of amendment withdrawing the prayer for relief in relation to the eviction order had been filed in the main action. It is not this Court's function to regulate proceedings in the main action and nor does the issue of the respondent allegedly being in contempt of an order by Traverso DJP arise in this appeal.

[84] On the merits the appellant raises a host of points, most of them centering around its disputing of the precise amount owed to respondent and the accuracy of the certificate of indebtedness which the respondent relied upon. This is largely a diversion since, as I have found, the real issue is whether there were substantial arrears between 17 May and 18 July 2013 and whether there is any credible evidence from the appellant disputing this.

[85] The appellant's argument that in the absence of a replying affidavit from the respondent the defences which it raised in its answering affidavit in the counter-application must be taken to have been conceded is simply unfounded. It relied also on its challenge to the validity of several of the clauses in the dealer agreement but, as stated earlier, these issues are properly the subject of the trial action. These challenges are certainly not such as to justify a court at this stage in effect re-writing the agreement and compelling the respondent to supply petroleum products to the

appellant pending the outcome of the main action notwithstanding the appellant's material and continuing breach of the agreement.

[86] On the appellant's own case the action will not come to trial before late 2015 and, given the vagaries of litigation, it might even be considerably later. In these circumstances refusing the respondent an eviction order could well mean that the site stands unused, at least as an outlet for the respondent's petroleum products, for several years. Should the respondent's cancellation of the agreement eventually prove to have been unlawful the respondent will retain its right to claim damages, albeit that these have been limited.

[87] In the circumstances I am persuaded that there is no real dispute as to the single most material alleged dispute of fact, namely, the appellant's substantial arrears as at the time the petroleum supplies were stopped and the agreement cancelled. In the final analysis I agree with the respondent's case that the appellant was free to prosecute any counterclaim it might have but, in the interim, had to pay its outstanding arrears without deduction or set off, failing which the respondent was entitled to stop the supply of petroleum products, cancel the agreement and eject the appellant from the premises. In the absence of a tender to make payment of such arrears, if needs be under protest, the respondent in my view was unable to establish a prima facie right, even one open to some doubt, and, it follows, had no answer to the counter-application.

[88] Since the question of the validity of the cancellation of the contract is one of the principal issues which is said to come before the trial court, it is obviously not appropriate to grant the declaratory relief sought by the respondent in this regard.

[89] Accordingly I consider that the cross-appeal against Cossie AJ's judgment must succeed and an eviction order must follow.

COSTS

[90] The respondent sought the costs of both the application and the counter-application. I can see no reason to depart from the ordinary rule that costs follow the result. Respondent also sought the costs of two counsel which is also appropriate given that both parties used two counsel. It also sought costs on the attorney/client scale but advanced no reasons as to why a special order should be made, nor are such reasons apparent.

[91] In the result the following order is made:

1. *The appeal against the dismissal of the application in convention is dismissed with costs including the costs of two counsel where employed;*
2. *The appeal against the dismissal of the counter-application is upheld with costs including the costs of two counsel where employed and the order of the court a quo in respect of the counter-application is replaced with the following:*

    2.1 Applicant and all those holding or occupying Erf 1340 Touws River, also known as the Total Service Station (Petroport Touws River) on the N1 National Road, Touws River, Western Cape ('the premises'), are ordered to be ejected from the premises;

    2.2 in the event the applicant and/or all those holding or occupying the premises do not vacate the premises within 7 calendar days of the date of service of this Order, the Sheriff or his lawful Deputy are authorised, directed and empowered to eject applicant and/or all those holding or occupying the premises from the premises;

2.3 the costs of the counter-application are to be paid by the applicant.

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BOZALEK J

I agree.

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STEYN J

I agree.

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BLOMMAERT AJ

APPEARANCES

For the Appellant:	Mr Rosenberg SC
	Mr TJ Nel
	Instructed by:
	Hayes Inc
For the Respondent:	Mr S Burger SC
	Mr A Kantor
	Instructed by:
	Denton