IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 5395/2006

In the matter between:-

BP SOUTHERN AFRICA (PTY) LTD Applicant

and

CECELIA PARK MOTORS CC t/a CECELIA PARK MOTORS Respondent

HEARD ON: 25 JANUARY 2007

JUDGMENT BY: VAN DER MERWE J

DELIVERED ON: 22 FEBRUARY 2007

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[1] The applicant is what is commonly known as an oil company. It sells petroleum products through a network of retail service stations. Depending on the nature of the contractual relationship between them and the applicant (or the absence thereof) the operators of the service stations are referred to as dealers, franchisees or caretakers. The applicant is the owner of fixed property known as Plot 37, Quaggafontein, Bloemfontein ("the property"). The property was developed

in order to be utilised as a BP service station. Petrol and diesel pumps, pumphoses and fittings, underground storage tanks and signage and boarding bearing the BP name on the property, are also the property of the applicant.

[2] The service station on the property was operated by the respondent as a BP service station, supplied by the applicant, from 1989 to 3 January 2007, when the respondent was interdicted from continuing to do so in terms of the court order referred to below. The respondent is however still in occupation of the property. The present members of the respondent close corporation are Mr. B.J. Stander and his mother.

[3] It is common cause that the applicant informed the respondent in writing that with effect from 1 December 2006, all agreements between the applicant and the respondent in respect of the property and the service station are terminated. It is also common cause that thereafter the respondent continued to operate the service station on the property with fuel obtained from a different source, notwithstanding the fact that on all appearances, the service

station was still a BP service station. As a result the applicant sought as a matter of urgency and obtained on 22 December 2006, the following order:

"IT IS ORDERED THAT:

1. .....

2. A *rule nisi* be issued calling upon the respondent to appear before this Court on 25 January 2007 at 10h00 and show cause, if any why an order should not be made in the following terms:

   2.1 That the respondent and all those holding title under it be ejected from the property situated at Plot No. 37 Petrusburgpad, Quaggafontein, Bloemfontein ("the property")

   2.2 That the respondent be interdicted and restrained from:

      2.2.1 holding itself out at the property as a duly authorised dealer of the applicant entitled to sell petroleum products to general public,

      2.2.2 selling any petroleum products to the general public from the property,

      2.2.3 utilising, disposing of, or exploiting any of the BP trademarks, service marks, trade names, logos, designs, symbols, emblems, uniforms, as well as the letters "BP", the

green and yellow BP colours and any other insignia of BP.

3. Pending the final determination of this application, paragraph 2.2 hereof operate as an interim interdict, as from the 3rd of January 2007.

4. Costs to stand over."

[4] On the return date of the *rule nisi* the applicant moved for the confirmation thereof whereas the respondent asked that it be discharged with costs. In my view the decisive question is whether the respondent has any right of occupation in respect of the property. If the respondent has no such right of occupation, it may also not do what it is interdicted and restrained from doing in par. 2.2 of the *rule nisi* and the *rule nisi* must be confirmed *in toto*. On the other hand, as will be mentioned hereinlater, the rights of occupation in respect of the property relied on by the respondent include the right to be supplied with petroleum products by the applicant, so that in the event of a finding or acceptance of such right of occupation, the *rule nisi* must be discharged *in toto*.

[5] The question of the onus in proceedings brought by an owner of property for ejectment from that property, is settled.

Such owner need do no more than alleged prove that it is the owner and that the respondent is in occupation. The onus is then on the respondent to allege and establish any right to continue to hold the property against the owner. If however the owner concedes a right of occupation relied upon by the respondent, but alleges that the right has been terminated, the owner must prove the termination of that right. If on the other hand however the respondent does not invoke or rely upon the right that the owner conceded the respondent would have had but for the termination thereof, the concession becomes mere surplusage. See **CHETTY v NAIDOO** 1974 (3) SA 13 (A) at 20 – 21.

[6] In an affidavit supporting the application it is stated by Mr. P.L. van der Hoven that the father of Mr. B.J. Stander was the regional manager of the applicant for the Free State Province. During 1989, after the retirement of Mr. Stander Sr. from the service of the applicant, various agreements were concluded between the applicant and the respondent (then controlled by Mr. Stander Sr.) in respect of the service station which had by then already existed on the property for some time. These agreements between the applicant and

the respondent included an oral agreement of lease of the property and the assets of the applicant to respondent as well as an agreement in respect of the supply of petroleum products by the applicant for sale by the respondent. In terms of these agreements therefore the respondent operated the service station on the property as a dealer under the name Cecelia Park Motors. Mr. Van der Hoven then states that, by the end of August 2001 after the death of Mr. Stander Sr., all of the agreements in terms of which the respondent operated the service station on the property as a dealer, had expired. Consequently, on 30 August 2001, the applicant addressed a letter to the respondent for the attention of Mr. Stander in the following rather inelegant terms:

> "The lease agreement between your father and BP has expired. The time BP SA wants (sic) to renew it your father was in the hospital and presently he has passed away. BP SA does not have a lease agreement with you and you have not yet been approved by BP SA to become a dealer therefore you are considered to be a Caretaker on a month-to-month basis. The following procedure must be followed for the appointment of a new dealer at the site:

- The site must be advertised
- You have to apply like any other person
- Business plan and financial statements must be submitted with the BP application form
- Interviews will be conducted by a BP appointed panel
- The appointed dealer have to under go training in Cape Town

I would like to take this opportunity to thank you for having assisting (sic) us in running the business temporarily until the new dealer is been appointed.

We will give you until 30 September 2001 to run the site and after that the new appointed dealer or caretaker dealer will start to operate the dealership."

According to the applicant no new agreement as envisaged was entered into subsequent to 30 September 2001. It is therefore the evidence of Mr. Van der Hoven, on behalf of the applicant, that subsequent to 30 September 2001 the respondent was allowed by the applicant to operate the service station as a caretaker on a month-to-month basis and that this arrangement was terminated by notice by the applicant to the respondent with effect from 1 December 2006.

[7] On behalf of the respondent it was contended that the content of the aforesaid letter dated 31 August 2001 is inadmissible on the basis that it constitutes hearsay evidence and should be struck out. In this regard it must, in my view, firstly be pointed out that according to the affidavit of Mr. Van der Hoven, the aforesaid facts contained in his affidavit are within his personal knowledge. He also states that after his retirement from employment with the applicant at the end of July 2006, he had been contracted by the applicant as a new site agent. Prior to that, for the period November 2005 to end of July 2006, he was the applicant's acting network manager for the inland region, including the Free State. Before that he was employed by the applicant as a portfolio developer with the primary responsibility of renewal of agreements and focusing on sale of properties owned by the applicant at which service stations or retail depots were operated. On the other hand, Mr. Stander, on behalf of the respondent, does not in his answering affidavits deny that Mr. Van der Hoven has the alleged personal knowledge. On the contrary, Mr. Stander accuses Mr. Van der Hoven of deliberately not telling the truth in this regard, which would imply that he has knowledge of the truth. Although Mr. Van

der Hoven did not state when he entered into the employ of the applicant or precisely how he obtained the personal knowledge regarding the relationship and dealings between the applicant and the respondent by 2001, there seems to be no reason to doubt that Mr. Van der Hoven was in a position to have such knowledge.

[8] In any event I am of the view that the contents of the aforesaid letter should be admitted in terms of section 3(1)(c) of the Law of Evidence Amendment Act, No. 45 of 1988. Mr. Stander admits receipt of this letter. He says that it was delivered to him by hand by the signatory thereof, who signed the letter as applicant's business manager for the Free State and Northern Cape. Mr. Stander expressly accepts that the letter emanated officially from higher ranking officials of the applicant than the signatory thereof and says that he acted thereon as such. Most importantly in my judgment, as will be shown later, the truth of the contents of this letter is not in reality disputed by the respondent. There can therefore be hardly any prejudice to the respondent of the sort envisaged by section 3(1)(c)(vi). See **S v SHAIK AND OTHERS** 2007 (1) SA 240 (SCA) at 297 – 302 and

specifically at 301 G – H. Even though the absence of an affidavit by the signatory of this letter is not explained in the papers, I consider the letter of such high probative value and the possibility of prejudice to the respondent so negligible, that it is in the interest of justice that it should be admitted.

[9] In my judgment the applicant established at least *prima facie* that the agreements that entitled the respondent to occupy the property and to operate the service station thereon, had expired by the end of August 2001. In response hereto, Mr. Stander on behalf of the respondent, states the following:

> "I immediately protested the letter with the rep but took it up with one Dolf Sonnekus, then the interim chairman of the BP Dealer's Council. My father had been the Chairman prior to his death. The said Dealer's Council took the matter up on my behalf with BP head-office and I was advised that BP's primary objection was that I had not, myself, undergone a training course with BP as required for permanent dealers. It was then arranged that I should attend at Cape Town, at BP's head-quarters, and undergo the necessary course. This I did and I attach hereto as STA 1 a true copy of the certificate issued to me by the Applicant. I therefore categorically state that after

> completion of the course, I never again heard any form of complaint from the Applicant and that business was conducted by the Applicant with the Respondent on the basis that Respondent was a fully enfranchised and permanent operator."

This is summarised in a supplementary affidavit as follows:

> "As indicated in my founding affidavit, after the intervention of Dolf Sonnekus the BP Dealers Council, it was agreed that all that would be required in order to restore the respondent's status as a dealer, was for me to attend training in Cape Town."

[10] From what is stated above, it is in my judgment clear that the respondent does not deny the truth or correctness of the contents of the letter of 30 August 2001, that the respondent does not as justification for its continued occupation of the property rely on any agreement entered into or in existence before 31 August 2001, but that at best for the respondent, it relies on a fresh agreement with the applicant allegedly entered into thereafter and in terms of which the respondent became a "fully enfranchised and permanent operator": This is certainly not the right of occupation conceded by the applicant. It follows that the onus is on the respondent to

show that it obtained the alleged right to the property against the owner. That the respondent in the manner alleged and apparently without any *quid pro quo*, became a "fully enfranchised and permanent operator" of the service station is in my view so highly improbable that it is one of those rare cases where it can be said to be clearly untenable and unacceptable on the papers. At any rate, the probabilities on the totality of the evidence are overwhelming that the respondent was simply allowed to remain on the premises on the basis stated by the applicant.

[11] However, what the respondent particularly relies upon is a right of occupation of the property and of operating the service station resulting from the alleged exercise of a right of pre-emption granted by the applicant. It is not disputed by the applicant that a pre-emptive right was granted in the manner and on the terms set out below.

[12] The applicant addressed a letter dated 24 May 2005 to Mr. Stander. This letter was however only delivered to Mr. Stander on 12 July 2005. In the letter the applicant informed Mr. Stander that the applicant had accepted a written

proposal that constitutes an offer to purchase the property for a purchase price of R1 024 000,00. The proposal constituted an agreement in principle between the applicant, Messrs H.F. Holtzhausen and I.J. van der Walt acting as trustees of a trust, Double Step Trading CC and Mr. Holtzhausen in personal capacity. In accordance with the proposal it was essentially envisaged that the applicant will sell the property to the aforesaid trust and that Double Step Trading CC will operate the service station on the property in terms of a supply agreement with the applicant. The proposal was therefore subject to suspensive conditions *inter alia* to the effect that a deed of sale in respect of the purchase of the property for the purchase price of R1 024 000,00 and the necessary supply agreements are entered into. A draft deed of sale which would have to be entered into in order to fulfil the suspensive condition in respect thereof, was attached to the letter. In terms of this letter "the pre-emptive right to match the proposal" in the terms set out in clause 12 of the proposal was granted. In clause 12.1 of the proposal it was recorded that the applicant has granted "..... to certain Barend Jacobus Stander or any Company or Trust nominated by him as (Owner and/or Dealer), the right

of pre-emption and/or right to match .....” any agreement for the purchase of the property on substantially the same terms and conditions as those set out in the proposal itself, including the conclusion of the supply agreements referred to. Clause 12.2 of the proposal provided as follows:

> “12.2 It is specifically recorded that should Barend Jacobus Stander exercise his right of pre-emption and/or right to match as aforementioned, BP shall subsequently be entitled to entertain and to enter into more favourable or other agreements in BP’s discretion which the said Barend Jacobus Stander shall likewise be entitled to match upon the same terms and conditions *mutatis mutandis* as contemplated herein above. It follows from the aforegoing that an Agreement or Agreements shall only come into force between BP and Barend Jacobus Stander pursuant to his exercise of right of pre-emption and/or right to match should BP not after such exercise enter into more favourable or other agreements as contemplated.”

[13] In my judgment, if the right of pre-emption was properly or effectively exercised, it would have resulted in a sale agreement in respect of the property and a supply

agreement in respect of the service station between the applicant and Mr. Stander or his nominee. In terms of clause 2.1 of the proposal the supply agreements were to commence on registration of transfer of the property into the name of the purchaser or any earlier or later date upon which the purchaser obtains occupation of the property. In terms of clause 5.2 of the draft sale agreement it is recorded that the purchaser shall be obliged to take occupation of the property on the date upon which the current occupant thereof vacates same from which date the supply agreements shall come into effect. I accept that there is a necessary implication in all the circumstances that in the event of the right of pre-emption having been exercised, Mr. Stander or his nominee would be entitled to remain in occupation of the property and to be supplied with petroleum products by the applicant, pending the registration of transfer of the property.

[14] The question then is whether the right of pre-emption was exercised. In this regard the onus is clearly on the respondent. For purposes of deciding this question, I accept that Mr. Stander intended the respondent to be his nominee

and that at all relevant times hereto, Mr. Stander acted on behalf of the respondent.

[15] In terms of the aforesaid letter dated 24 May 2005 the right of pre-emption had to be exercised within seven days of receipt by Mr. Stander of a copy of the proposal and the draft deed of sale. The draft deed of sale was indeed attached to the letter. It is common cause however that a copy of the proposal was made available to the attorneys acting for Mr. Stander by letter dated 28 July 2005 at their request therefor per letter dated 15 July 2005. However, the applicant extended the period for exercise of the right of pre-emption to close of business on Friday 26 August 2005. In my judgment therefore, the applicant granted the right of pre-emption per the letter dated 24 May 2005 in the terms set out in clause 12 of the proposal however expiring by close of business on 26 August 2005. Despite several indications that he intended to exercise the right of pre-emption, Mr. Stander only purported to do so by letter of 31 August 2005. As it was purported to exercise the right of pre-emption when it was no longer in existence, the respondent did not on this basis establish a right against the applicant.

[16] It was contended however on behalf of the respondent that it must be found that the applicant nevertheless accepted Mr. Stander's letter of 31 August 2005 as proper or effective exercise of the right of pre-emption. In this regard strong emphasis was placed on the aforesaid clause 12.2 of the proposal as well as the following letter dated 13 September 2005 from applicant's attorneys to the attorneys of Mr. Stander and/or the respondent.

> "Further to previous correspondence in this matter, as contemplated in paragraph 12 of the letter proposal dated 11 May 2005 addressed by our clients, BP Southern Africa (Pty) Ltd to Hercules Frederick Holtzhausen and Double Step Trading CC, our clients have decided to invite the said Holtzhausen and Double Step Trading CC to offer a more favourable proposal in regard to price, but substantially on the same terms and conditions otherwise. Our clients have decided to allow Holtzhausen and Double Step Trading CC 30 (thirty) days within which to make such more favourable proposal."

It was argued that in terms of clause 12.2 of the proposal (containing part of the terms of the right of pre-emption) this notification of the applicant was only necessary if the right of

pre-emption had been exercised. Therefore, according to the respondent, the letter of 13 September 2005 shows that the applicant accepted that the right of pre-emption had been exercised. As a more favourable or other agreement was not entered into, so the argument went, a binding agreement between the applicant and the respondent came into existence. Viewed in isolation, this argument appears attractive.

[17] There is however strong evidence pointing the other way and indicating that neither the applicant nor the respondent or Mr. Stander regarded themselves bound to an agreement of sale resulting from the exercise of the right of pre-emption. The allegation that a binding agreement between the parties resulted from the exercise of the right of pre-emption during August 2005, was made for the first time in the answering affidavit in these proceedings. This is so despite the fact that the applicant and Mr. Stander communicated with each other on a number of occasions between August 2005 and December 2006 and despite the fact that thereafter a number of letters were written by the attorney for the respondent in response to the notification by the applicant to

the respondent that all agreements with the respondent in respect of the property and the service station had been terminated with effect from 1 December 2006, in which the position of the respondent in respect of the property and the service station had been set out. Moreover, it is clear that over a period of more than a year after the binding agreement was allegedly entered into, no steps whatsoever were taken by the applicant or the respondent or Mr. Stander to implement or enforce the provisions thereof. It is further common cause that by letter dated 22 May 2006 the applicant invited Mr. Stander to make an offer for the purchase of the property, *inter alia* in the following terms:

> "**re: PROPOSED SALE OF GARAGE PETROL FILLING STATION SERVICE PREMISES – STAND 37 QUAGGASFONTEIN 101 SMALL HOLDINGS BLOEMFONTEIN – FREESTATE PROVINCE trading as CECELIA PARK MOTORS**
>
> This letter is addressed to you to inform you that we are considering selling certain of our service station properties. One of the properties that we consider selling is the abovementioned property upon which the garage business conducted by you is situated. As you are aware, there is no legal obligation upon us

to grant any prior rights to anyone. Notwithstanding the aforegoing, before we accept any third party offer, we are prepared to entertain an offer from you should you wish to make one.

1. We will entertain any offer made by you before 5 June 2006. After that date, we may accept any other offer at our discretion.
2. .....

No agreements, however, will be entered into if, in our sole discretion, we conclude that it would not be commercially viable for you and/or us.

Whilst the agreements to be entered into will provide that no alterations, additions or upgrades to the premises can be made without our written discretion, we emphasise this for the sake of clarity.

All of the above decisions will lie in our sole and absolute discretion. You should also be aware that should we wish to entertain an alternative offer from a third party, we are entitled to do so.

Should we consider allowing you an opportunity to match or improve upon such alternative offer, we may do so at the time, but no undertakings are given in this regard. Should, however, we receive such a third party offer and decide to allow you to match or improve upon it, the terms and conditions of such matching will be disclosed to you at that time."

The response of Mr. Stander and the respondent was not what one would expect on their version, namely indignation and immediate reference to the existing binding agreement. On the contrary, it is common cause that an offer was in fact made on behalf of the respondent pursuant to this letter, which offer was not accepted by the applicant. The respondent was notified hereof in a letter dated 22 June 2006 in the following terms:

> "The price indicated by you to purchase the above property is not acceptable to BP. We therefor advise you that we will invite offers from third parties."

The undisputed evidence of the conduct after 31 August 2005 of both parties, especially that of the respondent, is therefore quite inconsistent with the existence of a binding agreement of sale in respect of the property.

[18] It is in my judgment therefore not possible to find that it was shown on a balance of probabilities that a binding agreement of sale and supply came into existence as a result of the exercise of the right of pre-emption. The probabilities tend to

favour the applicant on this point but at best for the respondent the probabilities are evenly balanced.

[19] It follows that the *rule nisi* must be confirmed. I do not think that either the scope or the complexity of the matter justifies that the respondent be saddled with the costs of two counsel. The costs that stood over on 22 December 2006 should follow the result.

[20] The following orders are made:

1. Paragraphs 2.1 and 2.2 of the *rule nisi* dated 22 December 2006 are confirmed.

2. The respondent is ordered to pay the costs of the application including the costs of 22 December 2006.

C.H.G. VAN DER MERWE, J

On behalf of the applicant:	Adv. P.B. Hodes SC and R.J. Howie Instructed by: Israel Sackstein Matsepe Inc BLOEMFONTEIN
On behalf of the first respondent:	Adv. N.P.G. Redman Instructed by: Saffy & Associates BLOEMFONTEIN

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