ORIGINAL

IN THE CONSTITUTIONAL COURT
REPUBLIC OF SOUTH AFRICA

CCT CASE NUMBER. CCT290/20
SCA CASE NUMBER: 290/20
GJ CASE NUMBER: 37883/2016

In the matter between:

SEEBED CC t/a SIYABONGA CONVENIENCE CENTRE
(REGISTRATION NUMBER: 2004/125873/23) Applicant

and

ENGEN PETROLEUM LIMITED
(REGISTRATION NUMBER: 1989/003754/06) Respondent

FILING SHEET – RESPONDENT'S ANSWERING AFFIDAVIT

The Respondent files herewith its Answering Affidavit.

DATED at Johannesburg on this the 14th day of December 2020.

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ACCEPTED WITHOUT PREJUDICE
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Received a copy hereof on this
14th day of DEC 2020

For: Applicant's Attorneys

IN THE CONSTITUTIONAL COURT
REPUBLIC OF SOUTH AFRICA

CCT CASE NO: 290/2020
SCA CASE NO: 290/2020
GJHC CASE NO: 37883/2016

In the matter between:

SEEBED CC t/a SIYABONGA CONVENIENCE CENTRE (Reg. No. 04/125873/23) Applicant

And

ENGEN PETROLEUM LTD Respondent

ANSWERING AFFIDAVIT

I, the undersigned,

LEFIKA MOROBE

do hereby make oath and state as follows:

1. The facts herein contained are, save where the context indicates to the contrary, within my own personal knowledge and to the best of my knowledge and belief both truly and correctly stated.

2. I am duly authorised to depose to this affidavit and to represent the respondent (hereinafter: "Engen") herein.

3. I have read the applicant's application for leave to appeal, appeal and application

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for an order for the stay of proceedings under case number 37883/2019, delivered on 20 March 2020 and wish to respond in opposition thereto, on behalf of the respondent, as set out below.

4. AD PARAGRAPHS 2 & 3

4.1. The respondent denies that the content of the founding affidavit is true and correct.

5. AD PARAGRAPHS 7 & 8

5.1. There is no basis or truth in these allegations as will be shown below.

6. AD PARAGRAPHS 9 & 10

6.1. In making the allegation that there are "conflicting judgements" the applicant fails to apply the rule of precedent. On a proper reading of the judgements referred to by the applicant there is no conflict.

6.2. In this matter there are no matters of constitutional importance or of general public importance.

6.3. In any event the relief sought by the applicant is moot as on any version the applicant is no longer entitled to occupy the premises.

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7. **AD PARAGRAPHS 15 & 16: BACKGROUND FACTS**

7.1. This application had its genesis in the second eviction application launched by the respondent against the applicant in October 2016.

7.2. The facts and issues set out in the affidavits of the first eviction application, issued in September 2012, which was referred to trial, were of no relevance to the court's decision in the second eviction application.

7.3. According to the founding affidavit in the leave to appeal to the Supreme Court of Appeals, the second eviction application was opposed on essentially two grounds.

7.4. Firstly that the second application ought to be referred to trial due to the disputes of fact, as the first eviction application had been referred to trial, the counterclaim therein had not been determined and that the issues regarding the alleged unfair or unreasonable contractual practice by the respondent could only be determined by oral evidence.

7.5. Secondly, that the concessions by the applicant's counsel that the applicant relied on a "month to month" lease for the basis of its occupation, was a concession of law, not of fact.

7.6. The applicant also raised the issue of section 12B, in the application it brought on 27 August 2017 for a stay of proceedings on the basis that the applicant had, on the 30 June 2017 submitted a request to the Controller of Petroleum Products to refer the matter to arbitration in terms of the Petroleum Products Act 120 of 1977.

7.7. However, that application for a stay of proceedings was heard and dismissed by Her Ladyship, Victor J, on 6 July 2018, and that decision has not been appealed.

7.8. At no time previously in the application has the applicant raised the relevance of clause 41: "Dealer Right of Termination". The applicant did not rely on clauses 41.1 to 41.3, which were not raised in the applicant's answering affidavit (dated 30 November 2016), the supplementary answering affidavit (dated 20 January 2017), the further supplementary answering affidavit (dated 1 August 2018, which was not admitted by the court), the leave to appeal to the High Court of 15 August 2019 or the leave to appeal to the Supreme Court of Appeals dated 18 August 2020. Indeed

7.8.1. the applicant still does not seek relief based on clauses 41.1 to 41.3;

7.8.2. if the applicant was on a month-to-month lease, which

could be terminated on a months' notice, it would not have expected to be given nine months to sell the business in terms of clause 41.2 and/or 41.3;

7.8.3. the applicant, in light of the fact that there was a breach of the agreement, is entitled to rely on clause 41.1, but has not done so;

7.8.4. the provisions of clause 41.2, only apply prior to the Termination Date which the parties agreed to be 31 May 2010. Although the Operating Lease was extended to 31 July 2017;

7.8.5. although the applicant quotes clause 41.3, neither clause 8.3 or 4.5 of the First Part (referred to therein) are relevant. The applicant paid the financial contribution referred to in clause 8.3 and agreed (as will appear below) to the establishment of a Corner Bakery on the site, thus in terms of clause 4.5. The applicant's breach (as described in the breach notice and then in the in the notice of cancellation, dated 16 November 2011) was a failure by the applicant to sign the Franchise Agreement and thus was a breach of clause 6 of the Bakery Schedule.

8. AD PARAGRAPHS 17 TO 19: FIRST EVICTION APPLICATION

8.1. In respect of the applicant's allegations relating to the first eviction application, although the decision to establish a Corner Bakery and to conclude a Franchise Agreement was initially voluntary, however upon agreeing to establish a Corner Bakery, the applicant was bound by that agreement.

8.2. Thus in the papers in the first eviction application, it was established that, the applicant had agreed to the establishment of a Corner Bakery on the premises, and the subsequent facts/conduct confirm this, for example, as a result of that agreement, the applicant:

8.2.1. concluded, on 21 January 2011 a written extension of the Operating Lease with effect from 1 April 2011 until 31 March 2015;

8.2.2. concluded the written Lease Premium Addendum with Engen, on 21 January 2011;

8.2.3. paid the Lease Premium in the sum of R1.75 million to the respondent;

8.2.4. completed, signed and submitted the Franchise Application Form to Retsol on 31 January 2011;

8.2.5. received approval on 10 February 2011 from Retsol for the establishment of a Corner Bakery franchise, and then paid the "upfront fees";

8.2.6. received final costing for the facility on 4 April 2011, allowed the construction to take place and be completed;

8.2.7. received beneficial occupation of the bakery wet works on 14 April 2011 and accepted hand over of the bakery on 3 June 2011;

8.2.8. commenced with the running and operation of a Corner Bakery on the premises.

8.3. Thus subsequent to the aforesaid, the applicant was not entitled to refuse to sign a Franchise Agreement or to then contend that the establishment and operation of the Corner Bakery remained a "voluntary undertaking".

8.4. Consequently, the applicant's failure, in the circumstances, to conclude a Franchise Agreement constituted a breach of the agreement and entitled the respondent to cancel the agreement, which it did on 10 November 2011.

9. AD PARAGRAPH 20: TRIAL ACTION OF FIRST EVICTION

9.1. The allegation by the applicant of a "reasonable (or legitimate) expectation" that the Operating Lease would be extended to 31 July 2020, on the basis of an alleged oral agreement, dated 24 August 2011, was:

9.1.1. in case number 37883/2016 (the second eviction) not raised in the applicant's answering affidavit (dated 30 November 2016), or in the supplementary answering affidavit (dated 20 January 2017), but only in the further supplementary answering affidavit (dated 1 August 2018, which was not admitted by the court);

9.1.2. in case number 35614/2012, (the first eviction application):

9.1.2.1. not raised in the answering affidavit dated 24 June 2014 or the supplementary answering affidavit dated 5 August 2015, but rather the applicant stated in those papers that the applicant was entitled to remain in the premises until 31 July 2017;

9.1.2.2. only raised in the counterclaim after the matter had been referred to trial.

9.2. Thus the applicant delayed, without explanation, from the date of the alleged oral agreement (24 August 2011) until 4 August 2016 (the date of the counterclaim) or 1 August 2018 (the supplementary answering affidavit) to raise this issue.

9.3. Further without explanation, the applicant waited until 30 June 2017 to refer the matter to the Controller of Petroleum Products

10. AD PARAGRAPH 21: COMMON CAUSE FACTS IN 2ND EVICTION

10.1. The facts listed below were common cause.

10.2. The respondent is the registered owner of the immovable property which is the site from which the applicant conducts an Engen Service Station known as Siyabonga Convenience Centre.

10.3. The conclusion, on 10 June 2008, existence and terms of the Agreement of Lease and Operation of Service Station (herein "Operating Lease") and all the schedules thereto.

10.4. The duration of the Operating Lease was originally from 1 April 2008 to 31 May 2010.

10.5. On the 21 January 2011 the parties signed a written Lease Premium Addendum recording that the term of the Operating Lease would be

until 31 July 2017.

10.6. On 24 August 2011, the parties agreed, and the applicant signed, a further written schedule which stipulated the termination date of the Operating Lease to be 31 July 2015. No other provisions were included in this schedule.

10.7. The applicant, subsequent to the facts set out above refused to sign the Franchise Agreement with Retsol.

10.8. The respondent issued a breach notice and then the requisite notice of cancellation, this was all the subject matter of the first eviction application.

10.9. During the hearing of the first eviction application, the applicant contended that the applicant was entitled to remain on the premises as it had a "month to month" lease.

10.10. On 31 May 2016 the applicant received a letter in terms of which the respondent advised that it had elected to terminate the Operating Lease on one calendar months' notice, calculated from 1 June 2016 and that the applicant vacate the immovable property from the 1 July 2016.

10.11. The applicant refused to vacate and the second eviction application

was launched on the basis that taking into account that the applicant relied on a month-to-month lease, the lease had been terminated on a months' notice

10.12. That the applicant remains in occupation of the property.

11. AD PARAGRAPH 22 TO 30, 33.1 to 33.2, 35

11.1. **Stay of proceedings and referral to trial**

11.2. The applicant persists in contending that the application ought to have been referred to trial and/or that a stay of the eviction application should be allowed pending the outcome of the referral of the dispute to the Controller.

11.3. The applicant sought to incorporate the issues of an unfair and/or unreasonable contractual practice in terms of Section 12B of the Petroleum Products Act and, thus sought to stay the proceedings and refer the determination of that issue, to trial.

11.4. The court however correctly found that this issue of the stay had already been determined by a court as the applicant had already sought a stay of proceedings in order that this issue can be determined by the Controller of Petroleum Products.

11.5. The court in the hearing of the stay application rejected these contentions.

11.6. The issues which the applicant sought to raise in front of the Controller:

11.6.1. are the same issues which the Applicant sought to raise in the supplementary affidavit;

11.6.2. could be dealt with by a court had the applicant timeously raised the issue

11.7. Thus *res judicata* applies, as recently stated by the Constitutional Court, the rationale for the doctrine is to bring finality to legal proceedings by limiting repeat litigation on the same issues and to "*ensure certainty on matters decided by the courts*" (Mkhize NO v Premier of the Province of KwaZulu-Natal and Others [2018] ZACC 50 (6 December 2018))

11.8. The applicant, without proper explanation, delayed in raising the Section 12B issue, in this matter until 1 August 2018, thus:

11.8.1. for a period of 6 years since September 2012; and also

11.8.2. since the launch of this (the second) application in

October 2016.

11.9. Consequently, the court correctly found that the applicant should not be allowed to delay the adjudication of this dispute which involved a narrow issue, and which could easily be determined on the papers.

11.10. An order, referring the matter to trial, would have severely delayed the determination of the issue, the pleadings would have had to be supplemented and amended to incorporate the issue.

11.11. The issue which was determined in this application (37883/2016) had nothing to do with any conduct of the respondent or whether that did or did not constitute an unfair or unreasonable contractual practice.

11.12. The applicant chose deliberately not to incorporate such a defence in its answering affidavit or its first supplementary answering affidavit, notwithstanding the fact that the allegations were issues which the applicant had raised in the trial under case number 35614/12. For example, virtually all of paragraphs 4.9.2, to 4.9.9 of the applicant's second supplementary answering affidavit were copies of paragraphs of the applicant's plea.

11.13. In addition, the "oral agreement" alleged by the applicant including the alleged suspensive conditions are precluded by the written terms of the agreement between the parties.

11.14. The applicant, in its affidavits, contends that the applicant, had a right to occupy the property "until the end of July 2017", in terms of the Lease Addendum, and also admitted having signed the lease schedule with a termination date of 31 July 2015.

11.15. Yet, neither of those documents record or contain the terms which the applicant contends were part of the 2011 "oral agreement", which agreement is denied by the respondent.

11.16. Further, the applicant is precluded from relying on both a reasonable/legitimate expectation or on the contention that the respondent's alleged failure to enter into an operating lease and that this failure constitutes an unfair or unreasonable contractual practice, when the applicant, in its plea and counterclaim in the trial, and in its affidavit in 37883/2016 contended that in fact such agreement was orally concluded. Rather it ought to have sought to enforce such an agreement.

11.17. Furthermore the contentions, allegations and facts relating to the "reasonable expectation", were set out in the applicant's plea and

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counterclaim, but defence of an "unfair/unreasonable contractual practice" however did not form part of the applicant's plea/counterclaim as at 25 September 2018.

11.18. Despite ample opportunity to raise such a defence in the applicant's answering affidavits of 30 November 2016, or 20 January 2017, it failed to do, notwithstanding the fact that it was raised in the Applicant's plea of 2 August 2016.

11.19. Consequently, the applicant chose not to raise this as a defence and ought not to be permitted to do so now, particularly when the basis of such "expectation" was that the applicant was entitled to remain in the premises only until 31 July 2020.

11.20. **Operating Lease validly terminated even on the applicant's version**

11.21. The first application was launched under case number 35614/12 on 16 November 2012.

11.22. In that application the respondent relied on a breach of the Operating Lease by the applicant which resulted in the respondent cancelling the Operating Lease.

11.23. The application which was then argued before His Lordship Mr

Justice Meyer on 26 May 2016 and was referred to trial.

11.24. The defence raised by the applicant in that hearing was that the respondent had allegedly committed a fraud (a fraudulent misrepresentation) which resulted in the extension of the Operating Lease being void, or so contended the applicant.

11.25. The applicant contended that the lease reverted to a month to month lease as the parties had agreed in the Operating Lease that they could agree on a further lease period once the Operating Lease had expired, but in the event that the parties did not agree on a further period of lease, the lease would continue on the terms and conditions contained in the Operating Lease but on a month to month basis, subject to one calendar month's written notice of termination by each party.

11.26. So, in order to justify its possession of the premises, it was the applicant's version in the first application that there is a month to month lease.

11.27. As a consequence of that contention, the respondent elected to terminate the lease alleged by the applicant, and, on 31 May 2016, gave one calendar months' notice and required the applicant to vacate the immovable property with effect from 1 July 2016.

11.28. The applicant opposed the application on the preliminary ground of lis pendens, i.e. that the first application had been referred to trial, and then after dealing with the issues in the first application, secondly contended that the misrepresentation by the respondent which could not be relied upon as these allegations (made by the applicant itself), had not been tested by a court, and lastly that the respondent cannot rely on concessions made by the applicant's counsel.

11.29. Although the respondent did not concede that there was a fraudulent misrepresentation, even on the applicant's own version:

11.29.1. the applicant maintained that, as a consequence of the alleged fraudulent misrepresentation, the applicant had a right to remain in occupation of the immovable property, on a month to month basis, in terms of clause 2.3 of the First Part of the Operating Lease;

11.29.2. the applicant gave no other basis that it was entitled to remain in occupation;

11.29.3. the applicant was thus required to vacate the property with effect from the 1st July 2016;

11.29.4. the Operating Lease has been validly terminated.

11.30. It is, acceptable for the respondent in law, to claim, cancellation alternatively specific performance. (S Myers v Abramson, 1952 (3) SA 121 C; Custom Credit Corporation (Pty) Ltd v Shembe, 1972 (3) SA 462 A).

11.31. There is no difficulty with the respondent relying on multiple grounds to seek relief, the respondent must simply specify and satisfy each such ground. (Beck v Du Toit, 1975 (1) SA 366 (O))

11.32. Consequently the court correctly found that there was a valid termination of the Lease.

11.33. **The applicant is not bound by its counsel's concession**

11.34. The applicant argued that the concessions and statements made by the applicant's counsel during the hearing, was a *"concession of law"*, was made in a manner *"expressly reserved"*, was *"wrong"*, resulted from an *"incorrect legal position put to counsel"* by the court and are not binding on the applicant.

11.35. However, it is clear that the concessions were not concessions of law, but concessions of fact, namely that there was a fraudulent misrepresentation which resulted in a month to month lease.

11.36. The applicant's case, which was placed on record by Meyer J, is that it's right to remain in occupation of the premises was as a consequence of there being a month to month agreement in terms of clause 2.3 of the First Part of the written agreement.

11.37. During the hearing, it is clear from the transcript that the following factual concessions were made:

11.37.1. The applicant's Counsel, Ms Bezuidenhout, stated that: *"Well M'Lord what I can submit is from the facts that has been advanced in these papers, it would appear as though the allegation is that there is fraudulent misrepresentations."*

11.37.2. Ms Bezuidenhout: *"What I can submit to M'Lord on the papers as they currently stand is this. The* [Applicant's] *case is, misrepresentation ... [intervenes]."* Court: *"Induced the contract?"* Ms Bezuidenhout: *"Induced the contract."* Court: *"And so what do I do with the contract?"* Ms Bezuidenhout: *"And as a consequence of that, that is on the papers as it currently stands M'Lord, the contract must be avoided. If the contract is avoided we are back to a month to month lease. That is on the papers as it stands."*

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11.37.3. The Honourable Justice Mr Meyer stated that "*You see that is why I raised the witness issue right at the outset, because what the Engen is saying to me is the agreement is cancelled due to noncompliance. What the* [Applicant] *is saying to me is their agreement is cancelled due to misrepresentation. So on both party's version (of the facts), there is no agreement at the moment, but a month to month agreement.*"

11.37.4. Ms Bezuidenhout: "*Yes but M'Lord the difference ultimately is if there is no agreement, then as M'Lord has correctly pointed out, then at least there must be a month to month agreement. It is up to the Engen whether it wants to then continue, or even the [Applicant] whether they want to continue with a month to month agreement and that will be a fight on its own.*"

11.37.5. In conclusion, the Honourable Mr Justice Meyer stated that "*Well on the concession made by your colleague it seems to me – and I have noted down the exact case before me is that the misrepresentation induced the contract and hence the contract must be avoided and back to a month to month lease. That is placed on record*

before me."

11.38. There were many examples of exchanges between the court and the applicant's counsel which contradict the applicant's contentions in the answering and supplementary affidavits:

11.38.1. the court questioned the applicant's counsel *"Your client's case is that there was certain fraudulent misrepresentations"* to which the applicant's counsel answered *"Yes My Lord ..."*;

11.38.2. the court stated *"No, but it was on the basis of the so-called fraudulent misrepresentation that the extension was concluded from 2011 to 2015 and then from 2015 to 2017"* and applicant's counsel answered *"Yes My Lord..."*;

11.38.3. the court also enquired *"Say the Engen now concedes that the initial agreement ought to be cancelled because of representations made, what is the consequence of that?".* To which the applicant's counsel answered *"You then revert to a month to month basis"*. The court then confirmed *"You are on a month to month basis"*.

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11.39. Consequently, there is no basis to suggest that what was stated on record by the applicant's counsel constituted a concession of law or was reserved or conditional. Rather, it was a statement of the factual position of the agreement which the applicant contended bound the parties and of the basis which entitled the applicant to remain in occupation.

11.40. A concession made during argument on a point of fact binds the client. (Labuschagne v Labuschagne and Another 1967 (1) SA 543 (O))

11.41. The applicant, then astoundingly, suggested in the answering affidavit that the respondent cannot rely on the applicant's allegations that there was a fraudulent misrepresentation by the respondent, because the applicant's allegations have not been tested by a trial court.

11.42. What the applicant failed to appreciate is that if these allegations of fact, are tested in a trial court and are found to be true, as contended for by the applicant, then the consequence is that the extension of the Operating Lease is void as a result of the applicant's clear election in the previous application.

11.43. Consequently, taking into account and assuming (solely for the

purpose of this application) that there was a fraudulent misrepresentation, that the extension of the Operating Lease is void and that, as is contended for by the applicant, the parties were bound by a month to month lease, then the respondent was entitled to give a month's notice of termination.

11.44. In the result the court a quo, on the issues before it, correctly found that there had been a valid termination of the Operating Lease. Thus there are no prospects of success on this basis.

12. APPLICANT'S CONTENTION THAT IT IS ENTITLED TO REMAIN ON THE PROPERTY UNTIL 31 JULY 2017

12.1. This ground was not specifically raised in the Leave to Appeal before the Court a quo, despite the findings of the court, which were thus not challenged, but is indirectly challenged in these proceedings.

12.2. In the answering affidavit, the applicant expressly states that:

12.2.1. it has elected to stand by the contract, notwithstanding the misrepresentation;

12.2.2. it is entitled to remain in occupation of the property until 31 July 2017;

12.2.3. The respondent *"admits that the operating Lease was extended until 31 July 2017. This is the basis for the Respondent's* (applicant in this application) *continued lawful occupation of the property".*

12.3. This contradicts the contention of the applicant's counsel at the hearing of the first eviction application, (that the applicant occupied the property on a month to month lease) and also the statements under oath in the answering affidavit filed in the first eviction application.

12.4. In that answering affidavit, the applicant stated:

12.4.1. *"Based on the presentation given by Retsol, as well as the information provided by Engen at the NAC meetings, we agreed to conclude the franchise agreement".*

12.4.2. *"Siyabonga agreed to the proposed franchise based on the representations made to it by both Engen and Retsol".*

12.4.3. *"The representations relating to turnover and overall viability of the Corner Bakery business induced Siyabona to agree to the conclusion of the franchise agreement".*

12.4.4. *"It is clear that the misrepresentations, either negligent or wilful, were made to Siyabonga that induced Siyabonga into agreeing to sign the lease addendum that included a provision for the Corner Bakery franchise agreement".*

12.5. Consequent upon an allegation of fraud, a party, in this case the applicant, has an election, either to declare the lease addendum and extension of the Operating Lease void as a consequence of the fraud or to stand by the lease addendum and extension.

12.6. Where the fraud induces the mind of the innocent party, the innocent party has a choice. A person who has been induced to contract by material and fraudulent misrepresentations of the other party, may either stand by the contract or claim rescission. It follows that he must make his election between those two inconsistent remedies within a reasonable time after knowledge of the deception and the choice of one necessarily involves the abandonment of the other. He cannot both approbate and reprobate. (Bowditch v Peel and Magill, 1921 AD 561 at 572 - 573)

12.7. There can be no partial affirmation and partial repudiation. (Trust Bank of Africa Ltd v Eksteen, 1968 (3) SA 529 (N)). A party who takes and retains any benefit from the contract must be deemed to

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have elected to abide by it. (Kleynhans Bros v Wessels Trustee, 1927 AD 271)

12.8. If, as appears from the above statements under oath, the applicant has elected to stand by, uphold and enforce the provisions, terms and conditions thereof, then:

12.8.1. the extension of the Operating Lease is binding on the parties;

12.8.2. there is no need to prove or debate any misrepresentation, fraudulent or otherwise, by means of a trial, contrary to what the applicant contends;

12.8.3. the applicant cannot avoid the written terms of the agreement;

12.8.4. the applicant cannot reasonably contend that the respondent is bound by the agreement, but the applicant is not (and cannot be) in breach of the terms thereof because of alleged misrepresentations. Either the agreement is binding, or it is not, on both parties.

12.9. If the applicant has elected to keep the extension of the Operating Lease or as is stated by the applicant, the "contract alive", despite

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the alleged fraud, the applicant is obliged to comply with the terms and provisions of the contract. (Feinstein v Niggli and Another, 1981 (2) SA 684 (A))

12.10. In any event, at best for the applicant it is only entitled to remain in occupation of the premises until 31 July 2017. It has, however, not explained why it has remained in the premises since that date.

12.11. The applicant clearly states repeatedly in its answering affidavit, that it is entitled to remain on the property until the end of July 2017.

12.12. The result of this is that there is no defence to the relief sought by the respondent, even in the first application and the respondent is entitled to the eviction of the applicant.

12.13. Consequently, the court correctly found, that at best for the applicant, the applicant is only entitled to remain in occupation until 31 July 2017.

13. AD PARAGRAPHS 31, 32, 33, 34, 35: FAILURE TO ALLOW THE FURTHER SUPPLEMENTARY AFFIDAVIT

13.1. The second eviction application was launched in October 2016. Some 16 months after the respondent filed the replying affidavit, the applicant, without the consent of the respondent, filed a second

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supplementary affidavit in August 2018.

13.2. This was after the matter had been set down for hearing on 4 December 2017 by agreement, but then postponed. The parties then agreed, on 31 July 2018, that the application could be heard during week of 1 October 2018. The applicant must therefore have accepted, that the application was ripe for hearing, but then attempted without leave to file a further affidavit.

13.3. In the supplementary affidavit, the applicant sought to raise the following "defences":

13.3.1. Firstly, that the applicant had a reasonable/legitimate expectation that the respondent would extend the Operating Lease until July 2020, which arose as a result of an alleged "oral agreement" concluded on 24 August 2011; and

13.3.2. Secondly, that the respondent's conduct in cancelling the Operating Lease, in terms of the written agreement and in breach of the alleged 24 August 2011 oral agreement, amounted to an "unfair or unreasonable practice" in terms of Section 12B of Act 120 of 1977, as a result of which the application ought to have been stayed and

referred to arbitration/trial.

13.4. However, in the supplementary affidavit of August 2018, the applicant does not raise any new facts or issues which were not previously:

13.4.1. in the Applicant's plea and counterclaim (which raised the "oral agreement"), dated 24 August 2016 in first eviction application, but after it had been referred to trial on 26 May 2016; and/or

13.4.2. in its application for a postponement (heard on 4th December 2017) and dismissed. No appeal was lodged against this order; and/or

13.4.3. in the application, dated 23 August 2017, for a stay of the second eviction proceedings pending the referral to arbitration. This stay application was dismissed by the court in July 2018, again no appeal was lodged against this order.

13.5. Secondly, these issues were not raised in the applicant's answering affidavit served on 2 December 2016 or in its supplementary answering affidavit served on 20 January 2017. The reason, for that

failure, the applicant states, is that it elected to refer these issues to an arbitration before the Controller. Thus the applicant deliberately chose not to raise these issues in the second eviction application.

13.6. Thirdly, the applicant only referred the matter to the Controller on 30 June 2017 and does not explain why it waited 5 years, from 2012 to do so.

13.7. Fourthly, the issue of the "reasonable expectation" and/or "unlawful/unreasonable contractual practice" arose, according to the applicant "during August 2011", as a result of the "oral agreement".

13.8. The applicant did not explain to the Court, why these issues were not raised earlier, or in its answering affidavit filed in December 2016 or in its supplementary answer delivered in January 2017.

13.9. It is clear that the allegations in the supplementary affidavit:

13.9.1. did not serve the interests of justice;

13.9.2. did not relate to "recent" developments;

13.9.3. were not conducive to a fair and expeditious resolution of that litigation;

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13.9.4. did not justify the filing of a supplementary affidavit; and

13.9.5. were not new but were aimed at delaying the adjudication of the application.

13.10. There was simply no proper or satisfactory explanation which would negative *mala fides remissness* or which would explain why the information had not been put before the court at an early stage.

13.11. In regard to the prejudice which the respondent would have suffered, the application was launched in October 2016, was ripe for hearing on 4 December 2017 and consequently, the applicant sought simply to delay the prosecution hearing and determination of this matter.

13.12. The court a quo thus correctly exercised its discretion not to permit the filing of further affidavits. Thus the further affidavit was filed without the leave of the court, the court correctly regarded such affidavit as *pro non scripto*. (Standard Bank of SA Ltd v Sewpersadh, 2005 (4) SA 148 (C) at 153-154)

13.13. Although the respondent had filed a reply to the further supplementary answer, that reply objected to the filing of the supplementary affidavit, inter alia for the reasons set out above and

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pointed out why the additional issues should not be permitted.

13.14. In determining whether to allow the issues to be included, the court correctly considered and dealt with the content of the supplementary affidavit, but this does not result in the court dealing with the content on a "piecemeal basis".

13.15. It is thus respectfully submitted that the court for the above reasons, correctly refused to allow the admission of the supplementary affidavit. (Transvaal Racing Club v Jockey Club of SA, 1958 (3) SA 599 (W) at 604) and no court would have found otherwise.

13.16. Once the court had refused to allow the further affidavits, it correctly refused to consider the issues and defences raised therein.

13.17. This the court a quo correctly refused leave to appeal, as did the Supreme Court of Appeal. It is thus respectfully submitted that the President of the Supreme Court of Appeal also correctly refused the application for reconsideration in terms of section 17(2)(b).

13.18. There is also no doubt that the applicants, instead of seeking a stay of the court proceedings and referring the matter to the Controller, could have raised the section 12B before the court and asked the court to determine whether the conduct alleged by the applicant is

"unfair or unreasonable" and if so, requested that the court make an order to correct such practice. (Business Zone 1010 CC t/a Emmarentia Convenience Centre v Engen Petroleum Limited and Others (CCT09/16) [2017] ZACC 2; 2017 (6) BCLR 773 (CC) (9 February 2017), para 52 and 56). Yet the applicant chose deliberately not to do so. Thus the applicant has no reasonable prospects of success on this issue.

14. AD PARAGRAPHS 36 TO 61 CONFLICTING JUDGEMENTS

14.1. As pointed out above not only are the decisions advanced by the applicant not contradictory, but they cannot be so on an application of the rule of precedent.

14.2. In 2017 this Honourable court in Business Zone 1010 CC t/a Emmarentia Convenience Centre v Engen Petroleum Limited and Others (CCT09/16) [2017] ZACC 2; 2017 (6) BCLR 773 (CC) (9 February 2017) found:

14.2.1. *"The contention that two different adjudicative standards, one equitable and one not, apply based on the forum that the parties find themselves before is unsustainable. There is sufficient context and justification to accept that the equitable standard of fairness and reasonableness prevails in all*

petroleum contracts regardless of whether they are subject to statutory arbitration or ordinary court litigation". (para 52), and

14.2.2. *"In my view, the absence of two adjudicative regimes, one transformatively equitable and the other not, will address the Supreme Court of Appeal's concern that failing to precisely define the jurisdiction of the arbitrator, on the one hand, and the courts, on the other, would result in anomalous consequences. Forum shopping between these two different systems of law applied in different institutions will disappear. Instead, what remains is only the choice of arbitration rather than adjudication in the courts, a procedure well known to our law. And the law will be the same in arbitration as in court adjudication: equitable and giving effect to the demand of constitutional transformation of this part of our industry. Interpreted in this way, the purpose of introducing a fairness standard in petroleum contracts is better given effect to, without shielding the common law from statutory development.*" (para 56).

14.3. The above approach was followed in Former Way Trade & Invest (Pty) Ltd v Bright Idea Projects 66 (Pty) Ltd (1341/2018) [2020] ZASCA 118 (1 October 2020), in 2020 when the Supreme Court of Appeal held:

14.3.1. *There are accordingly no circumstances which warrant a finding that a referral to arbitration under s12B of the Act ousts the court's jurisdiction to adjudicate a dispute. Where, as in this instance, the referral to arbitration occurred after commencement of the litigation it fell within the discretion of the court below to stay proceedings pending the arbitration. The judge in the high court exercised her discretion in refusing a stay. It was not argued that she misdirected herself in doing so or that her decision was so patently flawed that we were free to depart from it. There was no basis for a stay pending the arbitration under s 12B. The issue in the arbitration turned out to be the very same issue as that before the high court ...That was the very kind of forum shopping that the Constitutional Court said did not arise under s 12B.*

14.4. Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others (CCT109/19) [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC) (17 June 2020), was a matter which did not involve an application or consideration of section 12B, yet the court held:

14.4.1. *"It emerges clearly from the discussion above that the divergence between the jurisprudence of this Court and that of the Supreme Court of Appeal is more perceived than real. Our law has always, to a greater or lesser extent, recognised*

the role of equity (encompassing the notions of good faith, fairness and reasonableness) as a factor in assessing the terms and the enforcement of contracts".

14.5. In light of the above decisions it cannot be argued, as the applicant seemingly does, that any of the following High Court decisions could create a scenario of "conflicting judgements" which require the intervention of this court in the interests of justice or result in a "compelling reason":

14.5.1. Hansco Motors CC t/a Hansa Motors v BP Southern Africa (Pty) Ltd and Another (5980/2011) [2011] ZAKZPHC 48 (12 August 2011);

14.5.2. Engen Petroleum Limited v Rissik Street One Stop CC t/a Rissik Street Engen and Another (1583/2019) [2020] ZALMPPHC 2 (12 February 2020);

14.5.3. Future Phambili Petroleum (Pty) Ltd v Chamdor Service Station CC (82577/2015) [2017] ZAGPPHC 1206 (10 November 2017)

15. APPLICANT'S CONTRADICTORY VERSIONS & CONCLUSION

15.1. The applicant furthermore advances contradictory, mutually

destructive versions.

15.2. If there was a fraudulent misrepresentation, but nevertheless the applicant elected to stand by the contract, then the respondent is entitled to the relief which it sought in the first eviction application as there is no need for a trial to debate whether there was a fraudulent misrepresentation or whether that fraudulent misrepresentation resulted in the agreement (and the addendum) being void. Thus, there is no basis for the occupation after 31 July 2017.

15.3. However, if the applicant contends that the agreements were void as a consequence of the fraudulent misrepresentation, this resulted in a month to month lease which has now been terminated by notice.

15.4. In any event, the applicant on its own, version in the answering affidavit claimed that it has a legal claim to occupation until 31 July 2017. This date had passed by the time the matter was heard, hence the attempt in the further supplementary affidavit, by the applicant, to change this date to 31 July 2020. In any event now even this date has passed.

15.5. Thus this is not a matter of substantial importance in the sense of a

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"compelling reason" neither is it a matter of general public importance, rather, this is a matter which falls under section 16(2)(a),of the Superior Courts Act (Act 10 of 2013) as even on the latest version of the applicant, the Operating Lease terminated on 31 July 2020.

WHEREFORE the respondent prays that the application be dismissed with costs.

DEPONENT

I hereby certify that the Deponent has acknowledged that the deponent knows and understands the contents of this Affidavit, which was signed and sworn before me at Johannesburg on the 13th day of December 2020, the regulations contained in Government Notice No 1258 of 21 July 1972, as amended, and government Notice No R1648 of 19 August 1977, as amended, having been complied with.

COMMISSIONER OF OATHS

(CC AA.10.12.2020)

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