

SOUTH AFRICA / JUDGMENT

Engen Petroleum Limited v DAV Distribution t/a Willowcrest Convenience Centre (39469/20) [2023] ZAGPJHC 1391 (29 November 2023)

[2023] ZAGPJHC 1391

COURT

South Gauteng High Court, Johannesburg

BEFORE

Noko

CASE / FILE NUMBER

39469/20

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IN THE HIGH COURT OF
SOUTH AFRICA,
GAUTENG LOCAL
DIVISION, JOHANNESBURG
CASE NO: 39469/20
NOT REPORTABLE
NOT OF INTEREST TO OTHER
JUDGES
NOT REVISED
29/11/23
In

the matter between:

ENGEN
PETROLEUM LIMITED
Applicant
and
DAV
DISTRIBUTION ta WILLOWCREST
CONVENIENCE
CENTRE
Respondent

JUDGMENT

NOKO J

Introduction

[1] The applicant brought an application to evict the respondent from the immovable property, to wit, Erf 59, Cresta Ext 1 Township, held under Deed of Transfer No. T27880/95[1] situated at corner Judges and Republic Avenue, Cresta, Randburg, (premises). The respondent took occupation of the premises pursuant to a lease agreement entered into with the applicant. The respondent brought a counter application on 30 March 2022 for a stay of the eviction application pending adjudication of the arbitration lodged in terms of section 12B of the Petroleum Products Act 120 of 1977 (Petroleum Act).

[2] The application for a stay was granted on 02 November 2020.[2] The said order for a stay stated that

“[T]he present application, the application to have the respondent evicted, is stayed pending the final determination of the arbitration between the parties before the Arbitrator, Adv T Goldbe SC, instituted in terms of section Petroleum Products Act, Act 120 of 1977”.

[3] The documents uploaded on CaseLines includes a judgment by Windell J dated 28 April 2022. [3] The learned judge was adjudicating over a lis in which the applicant sued the respondent for certain sum of moneys due in terms of the lease agreement. Windell J held that the lis for monetary claim should be adjudicated upon together with the eviction proceedings. The parties did not make submissions to me

regarding the claim for money and this judgment will therefore make no finding on the said monetary claim.

[4] The arbitrator dismissed the respondent's claims with costs on 17 March 2023. The applicant then set down the eviction proceeding which served before me. The respondent is on the other hand aggrieved at the outcome of the arbitration proceedings and has launched a review proceeding and therefore contends that the arbitration is not finalised. I am therefore invited to declare that the order for the stay of the eviction proceedings is extant and as such since the respondent has launched review application the arbitration between the parties is not finally determined.

Background

[5] Though the issues to be decided are narrow it is imperative that detailed background of the matter as viewed through parties' prism should be presented. The parties[4] entered into a lease and operation of service station agreement (lease agreement) in respect of the premises. The lease agreement was for the respondent to conduct a business as an Engen branded automotive fuel filling and service station. The tenancy in accordance with the

Lease Premium Addendum, as submitted by the respondent, would obtain for a period ending on 31 March 2023.[5]

- [6] The lease agreement enjoins the respondent to only purchase Engen branded products and further provides that should the filling station stand dry in respect of one or types of automotive fuel without reasonable cause or mistake the applicant would be entitled to forthwith cancel the lease of on a written notice to the respondent.[6]
- [7] The respondent conveyed its intention to sell the business in 2015 August but took a volte face stance notwithstanding that the process was already at an advanced stage. The respondent further conveyed to the applicant that it is experiencing loss of profit, and this was due to, inter alia, theft by the employees. The applicant commissioned an investigation and the report pointed to the lapses on the management of the respondent's business.[7]
- [8] It came to the attention of the applicant that during November 2017, and for a period exceeding 10 days, the petrol filling station remained dry which conduct was proscribed in the lease agreement. The applicant issued a letter of cancellation of the lease agreement predicated on the breach of this material term of the agreement. The breach was admitted[8] by the respondent who pleaded with the applicant not to evict the respondent and would ensure that there is compliance with letter of the agreement. In retort the applicant being aware of the possible sale of the business on the horizon agreed to extend the lease agreement on a month-to-month basis, but still subject to compliance with the terms and conditions of the lease agreement.
- [9] During July 2019 the respondent conveyed to the applicant its intention again to sell the business due to ongoing operational challenges which negatively impacted the ability to profitable run the business. The applicant accepted the proposal and commenced the process of facilitating procuring interested buyers of the business. This process included the advertisement of the sale of the business on its online platform called Neptune. This ended in the applicant securing an acceptable purchaser with whom a purchase agreement was signed with the respondent. Mr Jacqueson represented the purchaser, K2017468720 (Pty) Ltd, and the agreement was subject to certain conditions which included conducting the due diligence. The purchase price was 7.8 million rands.
- [10] During this period the respondent still breached the material term of the agreement by not keeping the filling station wet with the last purchase being in November/ December 2019.[9] This led to the applicant issuing another letter of cancellation on 30 April 2020.
- [11] The respondent further conveyed to the applicant that he vacated the premises and recommended that the applicant should place the security company on site to secure the premises. The applicant in retort conveyed to the respondent that its conduct amounted to the repudiation of a month-to-month lease agreement and the said repudiation was accepted. Later the respondent took a volte face stance and insisted that he is in possession of the business and disavowed his declaration that the premises is vacated.

[12] In the meantime, and on 8 July 2020, the respondent referred a dispute for arbitration in terms of section 12B of the Petroleum Act. The referral was predicated on the ground that the applicant committed unfair and unreasonable contractual practices by wrongfully

cancelling the lease agreement[10] and further failing to cooperate in relation to the sale of the business.[11] The applicant contended that the reason for the sale agreement not proceeding was because the purchaser has after conducting due diligence reverted to the respondent stated, inter alia, that since the business was not operating and stood dry for a period in excess of 8 months there is no longer goodwill and then offered to pay 5,5million. This counter-offer was acceptable by the respondent provided that the applicant should pay the difference between the initial amount of 7.8 million and the 5.5 million offered by the purchaser. The applicant did not accept the proposal. The purchaser stated that despite several attempts the respondent has never communicated its position.

[13] The applicant launched eviction process and in addition, sued for the respondent for the sum due for, inter alia, the unpaid levies and utilities. The certificate of balance reflected the amount due in the sum of R1 228 431.26.[12] The respondent in turn successfully applied for the stay of eviction proceedings pending arbitration.

[14] The respondent has since not vacated the premises and contends that on the proper interpretation of the court order of 2 November 2020[13] it remain operative until the reviews and/or appeals challenging the award have been exhausted. To this end the respondent launched

application for review which will be served on the applicant on the same date when I was hearing this application. In any event, the respondent submitted, that the lease agreement was for a period ending on 31 Mach 2023[14] and the cancellation is wrongful.

Issues

[15] Issues for determination are whether the order to stay the eviction proceedings of 2 November 2020 transcend the final arbitration before Advocate T Goldbe SC and secondly, whether applicant has made out a case for the eviction of the respondent. The parties though raised issues against each other for the late filing of other pleadings they both did not pursue arguments to resist the late filing.

Submissions and contentions by the parties

[16] The parties agreed that, subject to leave of the court, the respondent be the first to address the court on a specific and limited point on which the counsel has been briefed to argue. The respondent's counsel contended that on proper interpretation of the order granted on 2 November 2020, the eviction proceedings would remain stayed until the final determination of the dispute between the parties. The respondent has on the date of hearing before me launched application to review and set aside the decision of the arbitrator and to that end the final determination of the arbitration has not been reached. As a result, the adjudication

of the eviction application should remain stayed until the review proceedings and/or appeal proceedings, if applicable, are finalised.

- [17] The counsel for the respondent referred me to the Western Cape High court judgment in *Auction Alliance (Pty) Ltd and Another v Minister of Police and Others*[15] (*Auction Alliance*) where it was held that the final determination does not end with the outcome of the adjudication of the first stage of adjudication. The respondent's counsel quoted the judgment where it was stated that "... 'final determination' of an application must therefore be read to mean something distinct from the mere determination of the application. In my view the word final... can and must on its ordinary meaning only mean to include determination on review or appeal." [16] In this regard, so counsel continued, once the review application was launched challenging the award of the arbitrator the dispute which has been referred for arbitration has therefore not yet finally determined.
- [18] The applicant in retort contended that the order was very specific that the eviction proceeding is stayed until the final determination of the arbitration proceedings before the arbitrator, Goldbe SC. In addition, the *Auction Alliance* judgment[17] was inconsistent with the approach adopted in this division in *Royal AM v NSL*[18] where the court held that filing application for leave to appeal the judgment (in terms of which the review application of the award was dismissed) would not ipso facto suspend the implementation of the award. Further that it is a trite principle of stare decisis that the court is bound by the decision of its division unless the court is persuaded that the said decision was wrong.
- [19] In addition, the review application was brought late, and condonation has not been granted and besides that the respondent did not specifically bring a fresh application for the stay of the eviction proceedings pending application for the review.
- [20] The applicant further contended that it is trite that once the applicant has demonstrated the right of ownership and further withdrew the consent to occupation by the respondent it is incumbent on the latter to either challenge the ownership or to demonstrate the legal basis for the continued occupation. The respondent has in this case failed to demonstrate either of the two. In addition, so went the argument, the position of the respondent is aggravated by its failure to make payments or even to operate the business.

Legal principles and

analysis

- [21] I had regard to the *Auction Alliance* judgment and noted that the quotation by the respondent left out a portion of the order which paints a different picture. As a result, thereof that judgment is distinguishable to the lis before me. Paragraph 4 of the order reads thus "... Smiedt and Associates will retain the returned items ... until Friday 7 September 2012 or until the final determination on any application(s) brought before that date for a subpoena(s) or a search warrant(s) pertaining to the returned items." [19] (underlining added). The court order specifically reads thus

“(1) Declaring that on a proper interpretation of paragraph 4 of the Order of this court dated 23 August 2012 (coram Stelzner AJ), the words “final determination of any application” include the outcome of any review of such application, including the final determination of any appeal processes which any of the parties may pursue in respect of any decision given on review, provided such review or appeal processes

are brought in terms of the rules of any applicable court.” (underling and emphasis added)

- (2) Declaring that on the proper interpretation of paragraph 6 of the Order of this Court, dated 23 August 2012 (coram Stelzner, AJ), the first and/or second respondent may not execute the search and seizure warrant issued on 2 May 2014 by the district magistrate, Cape Town, pending the final determination of the review application launched by the applicants in this court on Monday 12 May 2014, including the final determination of any appeal processes which any of the parties may pursue in respect of any decision given on review, provided such review or appeal processes are brought in terms of the rules of any applicable court; (underlining added).
- [22] The facts in the said case referred to the determination of any application and in contrast the lis serving before did not extend the stay to any process (application) beyond the arbitration process. To this end the judgment in Auction Alliance does not serve as authority for the argument advanced by the respondent that final determination before the arbitrator included determination of issues beyond the decision by the arbitrator.
- [23] In the end and consistent with the decision in Auction Alliance had it been the intention that the stay should go beyond arbitration the respondent should have specifically request to order to clearly that. The contention that I should read into the order that any application would be stayed is untenable, gratuitous, and bound to be dismissed.
- [24] That notwithstanding the respondent’s relief before the arbitration included the damages[20] against the applicant and to this end there is no need to hold on to the premises. In addition, such a relief is competent before court of law and not within jurisdiction of the arbitrators.[21] The respondent appears to have acquiesced with the conclusion by the prospective purchaser who stated that the business has lost goodwill due to, inter alia, effect Covid 19 on businesses and that the business having been kept dry for a period more than 8 months. To this end the purchaser made an offer of 5,5 million. The respondent was prepared to accept the offer provided the applicant pays the difference. If the respondent felt differently, it would have clearly rejected the counter-offer and look for a purchaser who could pay the requested sale price.
- [25] The review application does not automatically cause a stay of the proceedings and the respondent should have therefore formally brought a fresh application for an order to stay the eviction proceedings pending the review application without which I am not barred to consider the application for eviction or ejection. It was held by the SCA in SABCO v DA[22] that “[I]t is well settled in our law that until a decision is set aside by a court in proceedings for judicial review it exists in fact and has legal consequences that cannot simply be

overlooked. It is clear from the above that any advice to the effect that a review application stays the implementation of the remedial action is incorrect and is a sheer display of cluelessness on the person giving such advice.” (underlining added). As it would demonstrated below, I would not have found in favour of the respondent as circumstances of this case militates against staying of the eviction proceedings. The effect thereof would be prejudicial to the applicant. The sanguine and a fixated view that the previous order to stay shall inevitable transcend the arbitrator’s decision award vitiated the respondent’s wherewithal to have regard to launch a fresh application to stay as an option.

[26] Once the argument for stay which is hinged on the order of 2 November 2022 fails then cadit questio and the order for eviction should follow. The applicant has demonstrated its title to the immovable property and further proved that the lease agreement has been terminated alternatively that the repudiation was accepted.

[27] I also opine that the prospects of the court directing that the lease be continued to allow the respondent to sell the business is very remote. In any event the respondent has not prayed for an order extending the agreement in order to sell the business to a purchaser willing to accept the sale price.[23] The respondent has conveyed his wishes at least in two occasions to sell the business, the filing station has been dry since 2019, the business has been struggling though the respondent blames the applicant and the later attributing blame to bad management, the agreement was on a month to month contract terminable on a month notice, even on the respondent’s contention the agreement

lapsed through effluxion of time in March 2023 - all these factors militates against a possible wish to extend the agreement or event to stay the eviction. It also implies that the goodwill (also referred to in the lease agreement as the entrenched value) is being negatively affected. The appropriate option for the parties may be to sue for damages[24] (if either of the parties believe that there are good prospects) rather than to insist that the lease agreement remain extant or be extended (which was not before the arbitrator) as no practical purpose would be served for either of the parties.

Other issues

[28] It is disconcerting that the importance and value to refer matters to arbitration is to achieve costs effective and expedited resolution of disputes[25] but in this instance the dispute was referred in 2020 and award was only issued in 2023. In the meantime, the applicant is not realising the object of the business as a result of the respondent not purchasing petroleum products (and or even paying rentals) and at the same time the respondent is not realising the profit from the filing station. The very important object of arbitration as a stratagem to achieve swift justice appears to have been derailed and the delay the finalisation of the dispute such that parties end up in a worse off position.

Costs

[29] The applicant is seeking costs order on attorney and client scale as envisaged in terms of the lease agreement and I harbour no qualms with such a request.

Conclusion

I grant the following order:

1. It is declared that the order to stay granted on 2 November 2022 lapsed on 17 March 2023.
2. The respondent is ordered to vacate the immovable property, to wit, Erf 59, Cresta Ext 1 Township, held under Deed of Transfer No. T27880/95 situated at corner Judges and Republic Avenue, Cresta Randburg, within 7 days of the order.
3. The respondent is ordered to pay applicant's costs on attorney and client scale.

Mokate Victor Noko

Judge of the High Court

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 29 November 2023.

Counsel for the applicant: Adv S Aucamp

Instructed by: DM5 Incorporated

Counsel for the Respondent: Adv JM Butler

Instructed by: Des and Naidoo Attorneys

Date of hearing: 15 August 2023

Date of Judgment: 29 November 2023

[1] See copy of the Deed of Transfer at CL 003-28.

[2] See Caselines (CL) 000-1.

[3] CL 19-1.

[4] The applicant carries on a business as a manufacturer, marketer and bulk distributor of petroleum, diesel and chemical products and also a franchisor of, inter alia, The Quick Shop Convenience Store chain operated at Engine Service Stations. See Applicant's Heads of Argument, para 6, CL 102-3.

[5] The applicant averred that this addendum was subject to terms and conditions of the main lease.

[6] Vide clause 34.1(3) of schedule 2 of the operating lease.

- [7] See applicant's Replying Affidavit, CL 008-12 t para 16.
- [8] See Respondent's letter annexed to the Applicant's Replying Affidavit at CL 008-30 where the respondent stated that "... I can positively state that DAV has remedied the position. As you are aware, before and even during the dry period, we were already engaging with Engine to remedy the situation."
- [9] See Applicants Heads of Argument, CL 102-7 at para 18.2.
- [10] As it was valid until 31 March 2021.
- [11] By failing to issue letter of intend within 30 days of the sale agreement with the purchaser.
- [12] See certificate of balance marked AA10, CL 008-71.
- [13] In terms of which eviction was stayed pending the arbitration.
- [14] See Respondent's Heads of Argument, para 7, CL 102-23, the respondent stating that it has right of occupation till 31 March
2023. "...Respondent has a legitimate entitlement to remain on the premises as the respondent concluded a Lease Premium Addendum on 14 September 2009, securing the respondent's tenancy up until 31 March 2023."
- [15] (8324/2014)
- [2014] ZAWCHC180 (3 December 2014).
- [16] At 54.
- [17] A decision of the Western Cape High Court.
- [18] (21/27854)
- [2021] ZAGPJHC (21 July 2021).
- [19] Para 3 of the judgment.
- [20] The applicant having stated that the respondent has claimed compensation to the tune of 36 million. See Applicant's Replying Affidavit at CL 008-7, para 5.
- [20] The applicant having stated that the respondent has claimed compensation to the tune of 36 million. See Applicant's Replying Affidavit at CL 008-7, para 5.
- [21] See Engen Petroleum Ltd v Mfoza Service Station (Pty) Ltd and Another (17400/2019) [2020] ZAGPJHC (5 October 2020).
- [22] 2016(2) SA 522 SCA.

- [23] This makes the judgment in *Rissik Street One Stop cc t/ Rissik Street Engine v Engine Petroleum Limited* (CCT 196/21) [2023] ZACC 4; 2023 (4) BCLR 425 (CC) 91 February 2023) distinguishable.
- [24] The respondent having claimed 36 million and the applicant having claimed amount due which may have increased over time.
- [25] See *Lufuno Mphaphuli & Associates Pty Ltd v Andrews* 2009 (4) SA 459 (CC). on the advantages of arbitrations.
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