

SOUTH AFRICA / JUDGMENT

Nondabula trading as Umzimkhulu Garage v Shell Downstream South Africa (Pty) Ltd (63998/18) [2020] ZAGPPHC 487 (15 July 2020) [2020] ZAGPPHC 487

COURT

North Gauteng High Court, Pretoria

BEFORE

Khumalo

CASE / FILE NUMBER

63998/18

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IN THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 63998/18

15/7/2020

NONDABULA; VUVISILE ZAMINDLELA trading as

APPLICANT

UMZIMKHULU GARAGE

and

SHELL DOWNSTREAM SOUTH AFRICA (PTY) LTD

RESPONDENT

JUDGMENT

KHUMALO J

Introduction

- [1] Several applications have been brought by the parties against each other in this matter. At the date of final hearing there was an Application, Counter Applications and Cross Counter Application to a Counter Application and re-service of a Cross Counter Application such that there were eight sets of Affidavits that the court had to decide if all were to be admitted. The

matter had already been before court several times, upon which an interim order was made directing the parties to try and come into some agreement regarding narrowing the issues and of how the business could be kept in operation whilst

the parties are deciding on a resolution to the standoff. To illustrate how the matter was narrowed down to the two main Applications now before court and outline and lay the context of the issues between the parties, I will refer to all the Applications.

[2] The first Application that serves before me is a Counter-Application (Claim in Reconvention) by Shell Down Stream, ("Shell"). It was filed answering to an Urgent Application that was brought by Mr V Z Nondabula ("Nondabula"), an owner and proprietor of a petrol station business trading under the name Umzimkhulu Garage who consequently is hereafter referred to as the Applicant (and "Nondabula" interchangeably) and Shell as "the Respondent." Nondabula's Urgent Application was subsequently withdrawn. Shell's Counter-Application is therefore proceeding as the Main Application. The Counter Application was initially separated into two parts, that is A and B. Shell is proceeding before me with only Part B, Part A was withdrawn . In Part B Shell is seeking relief in the following order

[2.1] That Nondabula, and all persons claiming possession or occupation of the property known as the Remainder of Erf 233 (Portion of Erf 18) Umzimkulu, Umzimkulu Municipality, District of Umzlmkulu, Province of the Eastern Cape ("the property"), or any part thereof, under or through Nondabula, are ordered to return possession and occupation thereof to (Shell) the Respondent, within one month and one day from the granting of this order.

[2.2] In the event of Nondabula, or all those possessing and occupying the property or any part thereof, failing to vacate the property as provided in paragraph 1 above, the sheriff and/or his lawful deputy is duly authorised, empowered and directed to:

[2.2.1] remove Nondabula, and all those claiming possession or occupation of the property or any part thereof through or under Nondabula, from the property or such part thereof; and

[2.2.2] if necessary, request any person or entity, inclusive of, but not limited to, members of the South African Police Services, to assist in the aforesaid removal.

[2.3] In the event of Nondabula, or all those possessing or occupying the property or any part thereof, having to be so removed from the property, as provided for in paragraph 2 above, Nondabula is ordered to pay all costs incurred by the sheriff, his lawful deputy to assist, provided that should the Respondent, in the Nondabula's stead, pay such costs to the sheriff or his lawful deputy, Nondabula is ordered to reimburse the Respondent on demand.

[2.4] Nondabula is ordered to pay to the Respondent R31 969 812.42 (Thirty One Million Nine Hundrend and Sixty Nine Thousand Eight Hundrend and Twelve Rand and Forty Two Cents), plus interest thereon from date of service of this process to date of final payment, at the maximum permissible interest rate in terms of section 1, read with s 2 of the Prescribed Rate of Interest Act 55 of 1975.

Historical**background**

- [3] Nondabula owns the property from which he operates his garage business and is sought to be evicted by Shell. The property is situated in Umzimkhulu, a remote village near the Drakensburg, on the border of Kwazulu Natal and the Eastern Province. Nondabula has been operating the petrol station business from the property as a sole proprietor since 1993 when the property was still owned by the Umzimkhulu Municipality. The business was then supplied with fuel and petroleum products by Shell Down Stream South Africa (Pty) Ltd, said to be the successor in title of Shell South Africa Marketing (Pty) Ltd, the Respondent (Shell).
- [4] In 2002 Nondabula bought the property from the Umzimkhulu Municipality. He subsequently renegotiated with Shell, as the owner and manager of the petrol-brand on the site to reopen the station under him as the owner of both the business and the land. The negotiations culminated in the conclusion of several agreements in that year and 2003 which, included, inter alia, two notarially registered deeds, that is, a Notarial Lease and the attendant servitude, a return or sub lease with a Franchise Agreement. later in 2005 Nondabula registered a mortgage bond in favour of Shell with no money exchanged. Nondabulo also concluded a Shell Card Retailer Agreement on 28 July 2008. The business continued to be operated under those agreements. Nondabula had in terms of the Notarial lease, let the property to Shell for an initial period of 15 years and thereafter the period was to extend automatically for three more five (5) year periods unless Shell cancels. Shell or its sub-tenant was in terms thereof afforded the right to use (usus) the premises. According to this agreement Nondabulo's petrol station business was Shell's sub-tenant/sublessee.
- [5] Shell supplied petrol and collected its payment through a system that the parties described as an electronic ordering, supply, accounting and payment system. The system was installed at the petrol station and operated by Shell who in terms thereof monitored the stock levels on an ongoing basis and when the levels drop to a certain point, Shell would dispatch delivery of fuel to restore the stock levels to what Shell regards as appropriate (the automatic delivery system). After receiving proof of the delivery from its carrier, having been duly authorised by Nondabula to do so, Shell's system would automatically generate an invoice and draw the value of the invoice from the petrol station's bank account ("a direct debit"), drawing the right price or value for the actual fuel delivered by its carrier. Shell referred to this arrangement as a "payment on delivery" basis and regarded the system to be precise and accurate as to orders, sales, volumes and payment. Nondabula's bankers furnished Shell with a performance guarantee in the amount of R1 Million, to cover any purchases made by the business from Shell.
- [6] The parties' smooth operations and relationship came to an end when suddenly for the first time in the

- (15) fifteen years the agreements have been in place, the automatic deliveries by Shell took place without Shell raising invoices or drawing payments for a period of 5 (five) months from 21 February to 25 July 2018. According to Shell a modification to its e-system occurred that caused Nondabula's business details somehow to be changed to reflect on the system that its payment terms were now on a "consignment basis" whereupon the e-system electronically triggered automatic orders and deliveries for Nondabula when the fuel stock had dropped below a given volume, but did not automatically generate invoices or payment orders.
- [7] It was for that reason that Shell froze Nondabula's account and demanded from that time onwards that he makes upfront payments for petrol before it is delivered, until the issue of the unprocessed invoices and undrawn payments is sorted. It is this occurrence that has resulted into the ongoing colossal controversy between the parties.
- [8] Nondabula adhered to the upfront payment arrangement for the remainder of the month of July 2018. On 1 August 2018 Shell demanded an upfront payment of an amount of R20 Million on the unpaid due invoices, whilst undertaking in the interim to quantify the total amount payable on the invoices as soon as possible. Seemingly a discussion never took place between the parties on how the problem came about or how it was going to be sorted and prevented. It is part of Shell's allegations that its investigations failed to reveal how exactly the change to the e-system occurred, so the precise cause of the problem was unknown.
- [9] Aggrieved by the sudden demand made prior to the finalisation of the quantification of the debt, Nondabula deemed Shell's conduct to unilaterally produce invoices referred to as "the reconciliation," and its demand for payment of an amount of more than R30 Million Rand worth of petrol within three (3) days of providing the several hundreds of pages of paper comprising of invoices allegedly due, without giving him an opportunity to scrutinise and challenge them, to be dictatorial. Shell nevertheless persisted with its demand. On 13 August 2018 Shell demanded immediate payment of an amount of R31 Million constituting again of several hundreds of pages of invoices based on an allegation that Nondabula was all along aware that payment was due and also warned of further invoicing that was still to follow. Nondabula vehemently queried the demand. On 20 August 2018 Shell made another demand, this time for payment of an amount R33 728,776.15 within two (2) days as the final total amount of the unpaid invoices.

It questioned Nondabula's insistence to have time to consider the invoices, when he already had records of the fuel delivered to him for several months without making any payment, when payment was due on delivery. Shell indicated its intention to hold Nondabula in breach of the franchise agreement on non-payment as demanded.

- [10] On 25 August 2018 Shell finally sent a letter holding Nondabula in breach of the Franchise Agreement for failing to settle the unpaid invoices for the period February to July 2018 supposedly invoking clause 14 of the Franchise Agreements that reads:

"14.1.1 Should the Franchisee fail to pay timeously and in full any amount due to Shell in terms of this agreement,·

...

then Shell shall immediately be entitled to any or all of the following remedies, without prejudice to its other rights in terms of this agreement:

(c) to require the Franchisee to cease the operation of the Businesses or any part of the Businesses and to cease supplying the Franchisee with supplies under the Shell Supply Agreement until the particular breach has been remedied."

[11] Shell thereby required Nondabula to immediately cease the operations of the business and suspended the supply of fuel until he has paid up all the amounts of the unpaid invoices. Nondabula at the time had already on 22 and 23 August 2018 paid in advance an amount of R1 158 963.73 for fuel which was yet to be delivered by Shell. Shell rejected Nondabula's demand that parties engage in attempt to resolve the dispute about the invoices whilst Shell continues to supply his

business with fuel that he had already paid for in advance as per the interim agreement. Shell alleged to have set-off Nondabula's advance payment against the unpaid invoices and rejected his allegation of spoliation of his advance payment for fuel). It referred Nondabula to clause 5 of the Franchise Agreement that reads as follows on the question of delivery:

5.2 Shell will not be obliged to supply any Shell Products to the Franchisee if the Franchisee has failed to pay for any quantities of products for which payment is due, until the amount owing is paid in full."

8 Integrity of Shell products

The franchisee shall not:

8.1 Pass off or represent goods and products not supplied to him by Shell pursuant to this agreement as being Shell Products;

8.3 mix any Shell Products with any other product or substance..."

[12] Shell warned Nondabula against purchasing fuel from another supplier and threatened that such conduct would amount to a repudiation of the franchise agreement. The business was therefore practically shut down. Shell however could not locate a copy of the franchise agreement. Nondabula raised as a defence, against Shell's demand for immediate payment of the due invoices, his right of action for statement and debatement of the accounts, calling for the continuance of the supply and retailing activities on cash basis pending finalisation of the dispute. He offered to pay in the interim an amount of R18 000 000.00 upfront and the remainder after the statement and debatement of the account. He, in addition also questioned the charges raised by Shell on RAS and its potential of wiping off the remainder of Shell's claim. Shell refused the offer. Nondabula's business operations were halted, he

could not run the petroleum and fuel sale business without the supply from Shell whilst also prohibited from sourcing the products from other petroleum suppliers.

- [13] This led to Nondabula's launching on September 2018 of an Urgent Application in this court, the Gauteng Division, Pretoria, for an interdict or an anti-spoliatory relief to compel Shell to continue supplying his business with fuel and petroleum products on a cash basis pending the resolution of the unpaid invoices by statement and debatement, with consideration of the RAS component margin in each invoice. Nondabula pleaded for a prayer that on failure of such resolution any of the parties could set the matter down for the court's determination. The anti-spoliatory was with regard to the appropriated advance payment alleged by Shell to have set off the debt on the invoices. This is a typical dispute where the parties could have benefited from a mediation process that the legislature has been trying to systematically integrate in our judicial system as a cheapest and quickest method of resolving some of the litigated matters.
- [14] It must be pointed out that all the Deeds on the property and the Mortgage Bond were concluded and registered at the Deeds Office in Durban Natal, whilst the property is situated in the Eastern Cape. Shell provided in all these agreements a domicilium address in Durban where a High Court exists. Notwithstanding the obvious convenient jurisdictional option being the Durban High Court, the litigants who were supposedly to be informed by the speedy resolution they claimed the matter merited, launched their Applications at the Pretoria High Court, the busiest court in the country, which is six hundred and fifty eight (658) km away from Umzimkhulu and bursting at its seams, it being the capital seat of government departments and state owned entities and the country's economic hub; see *Nedbank v Thobejane* 2019 (1) SA 594 (GP) whilst the alternative was only 160+ km away. This definitely determines and impacts on the speedy delivery of judgments.
- [15] In its defence, answering to Nondabula's urgent interdict and anti-spoliatory Application, Shell accused Nondabula of having misappropriated the fuel supplied to him by not paying and his Application to be *ma/a fide*. It implored the court not to grant Nondabula the relief he was seeking absent a tender to secure the outstanding amount pending determination of what it alleged to Nondabula's contrived defence. It accused Nondabula of failing to submit his monthly "Wet Stock Management" (WSM) report that details, inter alia, the volume of the fuel traded in the business during the months in question, which it insisted was an obligation of every retailer. It alleged that Nondabula consequently breached the franchise agreement and to have done so to avoid detection of the change in the system as long as possible.
- [16] Furthermore Shell alleged the arrangement for the supply of fuel to Nondabula on an advance payment basis to have been temporal until finalisation of the generation and reconciliation of the outstanding invoices and the calculation of the total amount for the unpaid fuel. The arrangement was going to cease once a final amount is determined, which was to be payable immediately thereafter. According to it the temporary nature of the arrangement was evident from the minutes of a meeting that took place between Khumalo,

a Shell employee and Nondabula on 25 July 2018 after detection of the problem. Shell alleges to have, as a result Issued a breach notice for the WSM.

[17] At the same time Shell conceded that no franchise agreement was signed by the parties as the document could not be located. It however persisted to justify its actions arguing that with no franchise agreement Nondabula had no substantive or prima facie right to the supply of petrol and therefore no justification for an interdict and had no right to a statement and debatement of the account. More so since Nondabula denies that a franchise agreement was concluded, in that case there is no agreement in existence that obligates Shell to so engage Nondabula.

[18] According to Shell all that remained were the several agreements on the lease of the property, that is, the notarially registered head lease and servitude, a Mortgage Bond and a Shell Card Retailer Agreement concluded by Nondabula as a retailer and the owner of the land, supposedly ancillary to the petroleum

garage business, upon which the business was structured. Nondabula let the property to Shell in terms of the Notarial Lease, affording

Shell or its sub-tenant the right to use the premises. Shell had according to this agreement in return let the premises to Nondabulo's

petrol station business as Shell's sub-tenant. Nondabulo had therefore in his Urgent Application, also sought the expungement of

the Notarial Deeds from the Deeds Office Registry if Shell insisted on terminating its services.

[19] Shell's Counter Application was also brought on an urgent basis. In Part A, that was subsequently abandoned, Shell sought an interim relief, to stop Nondabula from breaching the franchise agreement by storing, selling or distributing petroleum fuels from the property and an anti-dissipation order in cash, understandably, since no franchise agreement existed. In Part B of the Counter Application which is now the main Application, Shell as the head lessee is seeking an order for the eviction of Nondabula's business from the leased property endeavouring to assert its rights under the notarial agreements and a final relief for payment of the unpaid invoices.

[20] On 5 September 2018 Nondabula filed a Replying Affidavit to Shell's Answering Affidavit and Counter-Application, (now the main Application}. The Affidavit also served as an Answering Affidavit to Shell's Counter-Application. Shell then on 7 September 2018 filed a Replying Affidavit to Nondabula's Answering Affidavit to its Counter-Application. Nondabula for obvious reasons decided not to continue with his matter and withdrew his Urgent Application as indicated, there being a concession on the non-existence of an operative Franchise Agreement.

- [21] With the Urgent Application withdrawn and Part B of Shell's Counter-Application serving as the Main Application, on 10 September 2018, Nondabula served a fresh (Application) Notice of Motion and Founding Affidavit launched as a Counter Application to what has become the Main Application (that is Part B of Shell's Counter Application}. Nondabula seeks in this Application an order confirming his cancellation of the notarial deed of lease and notarial servitude, on the basis of Shell's repudiation of the agreements. He alleges to be entitled on cancellation of the Deeds to eviction of Shell from its land, buildings and business. Nondabula argued that since Shell has refused to supply fuel or allow him to source fuel from anyone else, his petroleum business has been grounded to a halt. He therefore needs to have access and use of his property, to make a livelihood. He also seeks on cancellation, the expungement of the notarial deed of lease from the Deeds Registry records. These are the two Applications that are proceeding each seeking an order evicting the other.
- [22] Lo and behold, Shell filed a response to Nondabula's Application whose Affidavit is said to be a Replying Affidavit to Nondabula's Answering Affidavit and an Answering Affidavit to Nondabula's Counter Application. Nondabula proceeded to file a Supplementary Affidavit to his Answering Affidavit to the Counter Application. All it dealt with was the explanation to his challenge of the invoices issued by Shell, specifically the configuration of the price in applying the RAS denominations, and the illiquidity of the amount claimed. The record is as a result needlessly voluminous. An argument ensued on the admissibility of all these Affidavits.
- [23] On 3 February 2019, the matter came before Fabricius J. The terms agreed upon by the parties were made an order of court. They agreed on interim measures, with Nondabula agreeing to pay an amount of R23 000 000.00 whereupon Shell was to resume supplying Umzimkhulu with fuel products, with bona fide discussions taking place during that period subject to the terms of a franchise agreement that was to be concluded by the parties. If no agreement was reached by 15 March 2019 on the amount outstanding, the parties were to appoint an independent expert whose decision was to be final and with binding effect and his or her fees to be split equally between the parties. If parties fail to agree on the person to be appointed, the chair of the Institute of Accountants was to appoint an expert out of the names submitted by the parties.
- [24] Irrespective of the agreement each party had a right to summarily terminate the agreement on failure of bona fide discussions and re-enroll the application for determination of the remaining issues. Shell decided to pull out from the discussions and that is when it decided to abandon Part A of the Main Application. Nondabula on that basis proceeded to set the matter down for all the issues raised to be heard simultaneously including the admissibility of the additional Affidavits and his Counter Application that consists of a New Notice of Motion to which Shell had responded and filed an Answering Affidavit.
- [25] The issues raised in all the Founding Affidavits are intertwined. It would be of no assistance to the parties to deal with them in piecemeal, seeing the time it takes to be allocated a trial date in this Division. Furthermore, with Nondabula's Urgent Application withdrawn, it is

arguably correct that Shell's Counter Application is the Main Application and therefore accepted that the only Counter Application that was in existence as at the time of the hearing before me is Nondabula's as in his latest Notice of Motion. The Affidavits filed thereafter by Shell will be accepted on that basis to give access to fair administration of justice. Both parties have therefore had an opportunity to ventilate the issues raised in all the Affidavits. There is no prejudice that can be suffered by any of the parties that cannot be remedied by an appropriate cost order.

- [26] It is common cause, as is of all facts in this matter that Shell remains unpaid for the fuel that was supplied to Nondabula's business and erroneously not invoiced during the period February to July 2018. However the issue no longer forms part of these proceedings as I was advised that it has been referred to an expert for final

determination.

- [27] Shell, is only proceeding with its claim for eviction of Nondabula's business from the leased property for allegedly failing to comply with or breaching the notarial agreements, by refusing to sign a Franchise agreement, allegedly asserting its rights in terms of the notarial agreements. Although Shell in its Affidavits conceded that the franchise agreement did not exist, it however in its heads of argument alleged that the parties did conclude the agreement but it came to an end by effluxion of time and was never renewed. Shell agrees that the parties have been trading and doing business on an informal basis since then, without a signed franchise agreement regulating their relationship. Shell now blames Nondabula that by his refusal to sign a new revamped franchise agreement he breached the lease agreement.
- [28] Nondabula confirms that the business between them was mutual and voluntary despite there being no signed franchise agreement for more than a decade. He counters and seeks an order confirming cancellation of the notarial deed of lease and the servitude on the basis of Shell's alleged repudiation of the agreements by refusing to supply petroleum products and fuel to his business for him to be able to operate. He alleges that on cancellation of the lease he is entitled to evict Shell from its land, buildings and business, alleging the agreements to be related to the operation of the business.
- [29] Following those assertions and allegations Nondabulo argues that all that considered, if there is no reason for him to sublease the premises (due to no supplies), it would equally mean that there is no reason for Shell to remain leasing the property from him. He alleges that as Shell has repudiated the Notarial lease by refusing to continue supplying his business, he on 10 September 2018 accepted the repudiation and cancelled the lease, in the premises Shell's right is terminated and it is not entitled to be in the premises or to can evict him from the property (as he as the owner has an undisputable right to claim ejectment, ie, a rei vindicatio against Shell; see *Chetty v Naidoo* 1974 (3) SA 13 AD at 20B-D. His right as the owner of the land and the business overrides that of the lessee and is to be protected. He argues that in Shell refusal to supply the site, it has materially repudiated all arrangements

and agreements between the parties and must remove itself. Nondabula argued that the Notarial lease never obliged him to sign a new and different business model contained in a new revised and different franchise agreement that Shell wanted him to sign.

[30] It is therefore common cause that at the time of the fall out regarding non-payment and disagreement that followed on the supply, the parties have been operating without the franchise agreement to regulate the operations of the business for nearly 10 years. So therefore if there was no franchise agreement, Shell's stopping of the supply was a unilateral decision.

[31] The first issue that arises is whether Shell repudiated the Notarial Deeds when it refused to supply Nondabula's business with petroleum products, if it did whether such repudiation entitles Nondabula to cancellation of the Deeds and eviction of Shell (ii) whether or not Nondabula was in terms of the lease agreement obligated to sign a new and revised franchise agreement, and thereby by his refusal or failure to do so committed a breach of the lease agreement, justifying a cancellation of the sublease and his eviction.

[32] In considering the first question it must be ascertained whether indeed the Notarial Deeds are connected to the supply of petroleum to the business. Shell argues that it is only connected in so far as it requires that a franchise agreement be concluded and that failure or refusal to do so amounts to a breach of the lease agreement. It argued further that without a franchise agreement there is also no room for a sublease for Nondabulo's business. It therefore can sublet the premises to any other retailer. It further argues in response to Nondabula's Application, that the Notarial Deed of lease is completely silent with regard to the delivery of fuel and other products to Nondabula's business. It only deals with the leasing of the immovable property to Shell and the granting of a type of a right

of first refusal to becoming a Shell retailer. Accordingly a Shell retailer is however made subject to Nondabula entering a Shell

Franchise Agreement. A condition in 10.3 which remains unfulfilled. It denies that Nondabula has a right to cancel any of the agreements.

[33] Shell therefore disputes that it has repudiated the terms of the notarial lease or that of the servitude by refusing to continue supplying Nondabula's business with petrol but says it had simply elected to cease delivery of fuel products which it is entitled to do especially in the light of the fact that on Nondabula's own version no franchise agreement subsists. Nondabula therefore cannot inter alia, trade under the Shell banner or insist that Shell supply it with petroleum products since a "lease constitute part of Shells Standard Franchise Agreement." Shell regards the issue to be whether Nondabula is entitled to remain in occupation of the premises absent an agreement on the petroleum business (franchise agreement) for which he had remained in the property and blatantly refused to sign and to pay the money known to be due to Shell.

[34] Furthermore on repudiation, Shell further pointed out that Nondabula never purported or put Shell on terms regarding its non-delivery of fuel (perceived non-compliance or repudiation) and questioned how it might lead to cancellation of the lease. Shell therefore persists with the relief it is seeking. It states that it is not prepared to supply retailers whose use of Shell product is not regulated by a formal written Shell Franchise Agreement. In respect of the interim supply of fuel, on the cash basis arrangement it alleged that the arrangement

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as meant to endure until the full extent of the error has been determined. However when Nondabula was advised of the amount due, he failed to pay any part thereof, which led to Shell ceasing all further supply of fuel to Nondabula's business. On the supply

arrangement that existed it argued that it was on a month to month basis which could then be cancelled by either party with one month's notice or on a breach. By reason of Nondabula not making payment of the money that is due, Shell cancelled the arrangement. On that basis there is no supply agreement presently in existence. Nondabulo is accordingly not entitled to demand or to receive deliveries from Shell who could only have been obligated had there been a franchise agreement. It also denies that the decision not to supply Nondabula was unlawful and a repudiation as there was no franchise agreement.

[35] On the other hand Nondabula alleges that the purpose of the Notarial lease and servitude was for the operations of the business under his premises revamped, branded and supplied by Shell. Therefore Shell's frustration of such operations by refusing to supply his business is in contravention of the purpose of the lease and therefore calls for its cancellation and eviction of Shell therefrom. Shell denies that that was the purpose of the lease.

[36] It is therefore crucial in determining the stalemate to look into the terms of the Notarial Lease and Servitude to establish the purpose of the agreements, in relation to the supply of the petrol and fuel to Nondabula's business and the allegedly or purportedly cancelled return /sub lease.

Legal framework

The terms of the notarial lease

[37] The principal terms of the Notarial lease provide as follows; 'Nondabula being referred to as the lessor:

9.1. This lease is subject to the prior fulfilment of the following conditions, to Shell's satisfaction and at the cost of Shell, by 31 December 2003 or within such extended period thereafter as may be reasonable in the circumstances to procure such fulfilment:

9.1.7 that the lessor signs Shell's standard Franchise Agreement in a form required by Shell but including those terms and conditions referred to in clause 10. 2 below and that the Lessor provides Shell with financial guarantees required by Shell.

9.2 It is recorded that all the above conditions are to the benefit of Shell which shall be entitled to waive compliance with any one or more or all of them on written notice to that effect to the lessor and which waiver shall constitute fulfilment of the relevant condition/s.

10.1 Shell shall, subject to the provisions of clause 10.2 below, be entitled to sublet the whole or any portion of the premises to a dealer of its choice on the standard terms and conditions of its Franchise Agreement, without obtaining the Lessor's consent, provided that Shell shall at all times remain primarily liable to the Lessor's for the due fulfilment of all the terms and conditions of this lease.

10.2 Notwithstanding the provisions of clause 10.1 above, Shell agrees to let the premises to the lessor for purposes of the lessor operating the garage, filling and/or service station and convenience store on the premises on inter alia the following terms and conditions:

10.2.1 The lessor shall pay to Shell a monthly rental of R100 in respect of the premises for the duration of the sublease;

10.2.2 The sublease was to endure for a period of 5 years calculated from the first day that the lessor first purchase petroleum fuel from Shell for resale from the premises, provided that if the lessor has not been placed in breach (such breach to be in writing) of any provision of the Franchise Agreement or any of its Schedules or any other agreements that it has signed with Shell during that initial period of 5 years then Shell undertakes to extend the sublease for a second period of 5 years.

10.2.4 In the instance of the sub-lease terminating for any reason, Shell shall have the right to, in its sole discretion to sublet the

premises to another operator of its choice in terms of the provisions of 10.1above.

10.3 All the terms in 10.2.1 to 10.2.4 above will apply to the lease between Shell and the lessor and will be contained in a separate lease agreement to be signed between Shell and the Lessor simultaneously with the signing of this lease. Such lease agreement constitutes part of Shell's standard Franchise Agreement.

19. Breach

In the event of-

19.1 Shell failing to pay the rent or any portion thereof on the due date and remaining in default for a period of 21 (twenty-one) days after receipt of written demand therefore; or

19.2 Shell committing a breach of any of the other material terms and conditions of this lease and failing to remedy such breach within 30 (thirty) days after receipt of written notice from the Lessor (or should the period of thirty days not be reasonably sufficient for remedying the breach in question, then within such time as is reasonably required therefore);

The lessor shall without prejudice to any other remedies available to it, have the right in law to claim payment of such rental or specific performance as the case may be (in the latter case with an alternative claim for damages) or to cancel the agreement on written notice to Shell, and claim damages.

22. Undertaking by Lessor

Subject to the provisions of 10 above, the lessor undertakes that for the whole of the period of this lease, it will not establish and/or conduct or permit any other company, organisation or any other person other than Shell to establish and or conduct the business of a garage, filling and /or service station on the premises or the remainder of the property, nor shall the lessor or any company,

organisation of person sell, store or distribute therefrom any petroleum fuels.

[38] Notarial Deeds of Servitude have been found to be product servitude, of no status and inconsequential in law, accept to be a recordal of personal ordinary contractual rights and obligations that parties to it have afforded each other. Servitudes are excellent tools used to grant to a person a right of use or access over immovable property, alternatively to prohibit a person from exercising a normal ownership right. In the latter instance with the owner remaining in possession. Its registration in the Deeds Office serves as a notice to the public at large of the consensual arrangement between two parties. It has no special status in law except for converting the personal contractual rights into real rights valid against third parties; See *Young v Smith* 1961 (3) SA 793 (T). It falls to be interpreted, not in accordance with the law relating to servitudes but in terms of the customary approach to the interpretation of written instruments which are the product of agreement." see *Quest Petroleum v Walters & Van Zyl's Garage* (Case no 16225/2017, delivered 9 November 2018 at [33]). The Servitude therefore is more covered or flows from the Notarial head lease.

[39] That having been said, in *Du Preeze v Nederduitse Gereformeerde Gemeente, De Deur* 1999

(2) SA 1991 it was held that:

"The general point of departure in the interpretation of written contracts is the principle that the intention of the parties is to be sought in the words which they have used. When, however, the chosen wording reveals shortcomings such as material vagueness, incompleteness, obscurity or ambiguousness, elucidation can be sought beyond the wording of the contract. Thus the background circumstances against which the contract was concluded and the circumstances surrounding its conclusion can be taken into account." (my emphasis)

[40] Accordingly, a court must firstly interpret the contract in a way that reflects and promotes the intention of the parties at the time they entered into the contract as expressed in the document. Determining the intent of the parties should be an objective analysis. The court should not consider subjective intentions of the parties. The court, based on presented evidence and the language of the contract, should attempt to determine what a reasonable person, having all the background knowledge the parties had at the time of contract formation, would have understood the terms of the contract to be; see *United Bioscope Cafes Ltd v Moseley Buildings Ltd* 1924 AD 60 at 66; *Murray v Schneider* 1958 1 SA 587 (A) 592-593. The object of such approach made clear in *Richter v Bloemfontein Town Council* 1922 AD 57 69 that:

"Every document should, of course, be read in the light of the circumstances existing at the time, and evidence may rightly be given of every material fact which places the court as near as may be in the situation of the parties to the instrument."

[41] The contract should be viewed as a whole and all of the documentary, factual, and commercial context of the contract should be taken into account. Dealing with context in *Jago v Donges* 1950 4 SA 653 (A) 662H *Schreiner JA* held that:

"the context is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of statute, its apparent scope and purpose, and, within limits, its background."

[42] These words have been accepted as equally applicable to the interpretation of contracts; see *Van Rensburg v Tuatse* 1975 1 SA 279 (A) 303. Christie also refers to context as to "the nature of the transaction as it appears from the entire contract" as explained in *Sassoon Confirming and Acceptance Co (Pty) Ltd v Barclays National Bank Ltd* 1974 1 SA 641 (A) 646C; *Ekurhuleni Municipality v Germiston Retirement Fund* 2010 2 SA 498 (SCA) [13]. Although it is the start that the contract does not stop at the four corners of the written contract. It may be read in conjunction with other related contracts on the same subject matter. Equally, background evidence may be admitted for the purpose of showing facts which the parties had in their minds and about which they were negotiating; see *Witbank Colliery Ltd v Lazarus* 1929 TPD 529 at 538.

[43] The purpose of a contract should assume greater importance than merely being taken into account as part of the context. This is regarded as not surprising because once a court has ascertained the object of a contract it would be failing in its duty if it did not endeavour to give effect to the object the parties intended by their contract. The method of pursuing this endeavour has long been known as a purposive construction; see Christie at 221.

[44] It is therefore important to look at the purpose or the intention of the parties when they concluded the agreement. The important question after establishing the purpose, is whether there was repudiation thereof and if so, whether did such repudiation result in a breach of the agreements upon which an aggrieved party may resile (cancellation may ensue). If the Notarial Lease and Servitude could survive notwithstanding the absence of such causa.

The perspective of the parties in relation to the purpose

[45] According to Nondabula, the purpose for letting the premises to Shell was in Clause 10.2, of the Notarial head lease, envisaged to be for the operation/conduct of his filling station or petroleum garage business and a convenient store, as set up and supplied by Shell. For that reason, Shell was to sublet the premises to him and the parties to conclude a franchise retail agreement which was to remain in operation for a period of 5 years after which Nondabula had an option to renew the sublease for a further 5 five year periods.

[46] Shell's insistence on the other hand on remaining in the premises and evicting Nondabula is based on:

[46.1] Clause 10. 1 in terms of which Shell alleges to be entitled to sublet the business premises to a retailer of its choice without prior consent of Nondabula, except at commencement stage as it undertook to sublet to Nondabula and also he in terms of clause 6.2.4 had the right of first refusal.

[46.2] Clause 10.2.4 and 6.2.6 once sublease entered into, on termination or failure by Nondabula to renew, Shell can sublet to any other retailer.

[46.3] Clause 10.2.2 and 10.3 for an instance if Nondabula does not wish to enter into a franchise agreement or such franchise agreement being terminated for any reason that Shell shall be entitled to put another 3rd party retailer in occupation of the premises. Shell's intention is to put another retailer in occupation and therefore needs the premises to be vacated.

[47] Shell pointed out that any person is entitled to contractually alienate or encumber his proprietary rights. Once a person has voluntarily compromised his rights or ownership, by limiting same, he is bound to the terms of that agreement. Nondabula is limited to the right of first refusal to be a shell retailer. The inference being that his refusal to take up the offer on the terms as required by Shell entitles Shell to extend that offer to somebody else. Shell wanted Nondabula to at least agree to be bound by the standard franchise agreement which he still refused.

[48] On the other hand it was argued on behalf of Nondabula by Mr B G Savvas that;

[48.1] no real possessory rights accrued to Shell as such from the Notarial Deed of Servitude but all that actually subsists is the right to exclusive branding and supply rights. It was obtained for the purpose of revamping and from which flow Shell's exclusive right of supply. I agree with this reasoning and that is where Shell's obligation to supply Nondabula's business actually arises. For that reason, the undertaking is by Nondabula not to store or keep certain items in the property as

he remained in possession and control notwithstanding the lease agreement. The notarial servitude they signed being prohibitory, In that it prevented Nondabula from exercising a normal ownership right.

[48.2] Whilst the servitude hinges on the notarial lease, the purpose of which is to leave control and ownership over all retailing operations with Nondabula. Since Shell has repudiated the core premise of the notarial lease it cannot acquire or assert rights under any of these documents.

[49] In essence the parties commenced by concluding the three interlinked agreements, a head lease that also provided for the signing of a franchise agreement (as a condition to be fulfilled for the head lease to come into operation and whose signing could be waived by Shell), and a sublease which was to be on the standard terms and conditions of a franchise agreement and was but a sine qua non to the head lease. The head lease was notari ally registered with a servitude that secured Shell the exclusive right of supply of fuel and other shell products to Nondabula's business under his control and ownership situated at the latter's premises. That being its primary purpose. However at the expiry of the initial period of the franchise and sublease agreement neither was renewed for the next two 5 year periods that followed. The parties therefore for a decade operated without the renewal of the sublease or franchise agreement. The two were supposed to be concluded separately from the head lease whose contractual period was 15 (fifteen) years. However, the core purpose of the contract was sustained by the arrangement the parties had thereafter, with Shell continuing to exercise its exclusive right to supply the petroleum products

[50] Taking into consideration the inter -relations hip of the agreements, the parties are alleging that there was absence of the causa/purpose of the agreements, with Nondabula contending that such absence terminates/cl the Notarial Lease and Servitude. Conversely whilst Shell agrees that the causa was not there and blame Nondabula for such absence, it does not agree that for that reason the head lease is therefore terminated but contends that it can still assert its rights that allegedly flow from the lease agreement. It accordingly, alleges that by refusing to sign a franchise agreement Nondabula breached the lease agreement, as a result it seeks his eviction from the property so that it can exercise its rights to let the property to another retailer, as it is provided by the lease agreement, that, under such circumstances, the property can be sublet to any other retailer.

[51] The substratum of the relationship between the parties when the dispute arose was therefore the notarial lease and servitude which came into effect on fulfilment of the conditions set out in 9.1, 9.1.7 and 9.2, and subsisted after the expiration of the franchise agreement and sublease in 2003. It is however obvious that the parties would not have envisaged the lease agreement by which Shell gained branding and supplier exclusivity to Nondabula's business surviving or remaining in effect without Nondabula occupying or conducting the petroleum business from the premises. It is the sine qua non (the return) of letting the property to Shell, to retain ownership and control of business. It is the only reason the notarial lease and servitude endured with Nondabula conducting his business and Shell supplying it notwithstanding the expiry of the sublease's

initial period and termination of the franchise agreement.

[52] It is also correct as per Mr Savvas argument that the basis and core-premise (essential condition) of the notarial lease is the back to back relationship, or a sine qua non to Nondabula giving Shell the rights that notarial lease gives it, inter alia the exclusive right to supply the business with petroleum. If the sine qua non falls then the notarial lease itself as a whole falls. The notarial lease rights granted to Shell go hand in hand with a reciprocal return-lease (sublease) to Nondabula's business not in only as to "time" (duration) but also for the same amount of rental so that the rental of the head lease cancels the rental of the (sub) return- lease. The condition is enshrined in clause 10.2. Shell can therefore sublet to another retailer only when the head lease is still operative. If the head lease is cancelled there is nothing to sublet. The Notarial lease according to Mr Savvas is legally as well as factually incapable of efficacy and enforcement and in fact had collapsed. Also without the signed franchise agreement or retailer arrangement for petroleum supply services there is no causa for either a lease or a sublease. This actually sums up the dispute.

[53] In respect of the notarial lease and servitude over the property, Shell argues that a major capital outlay for the revamping or upgrading of the business was subject to the registration of the notarial deed of lease and servitude over the property, which purpose was therefore to protect Shell's investment. The upgrade put Nondabula's business in line with other Shell branded fuel stations with convenient stores. The deeds afforded Shell real rights over the property. Such rights as registered against the title

deed of the property form assets in Shell's estate. Further that negating the impact and the rights which emanate from these deeds is not countenanced in law, absent due process, and will amount to an arbitrary deprivation of Shell's property. Accordingly, Shell

insisted on its demand to evict Nondabula from his property and business and the sustenance of the lease agreement.

[54] Furthermore Mr Stockwell argued wrongly that the Notarial deeds are completely silent in regard to the delivery of fuel and other products to the lessee but only deal with the leasing of immovable property to Shell. He was of the view that with the franchise agreement and whatever other arrangement that followed thereafter having been cancelled, Nondabula has no right to be supplied by shell, therefore no reason to be in the premises. In other words, not agreeing that the purpose of the agreement was Shell's exclusive supply of the fuel to Nondabula's business and the latter to run his business under such monopolised supply. Arguing however that notwithstanding the absence thereof, Shell can still assert its rights reliant on the notarial lease, the supply agreement

being separate from the lease. He therefore concluded that by refusing to vacate the premises Nondabula is in breach of the lease

agreement.

- [55] Mr Savvas missed the important point that what flows from the Notarial lease and servitude is not a possessory right, but one that is prohibiting, in that it prevents Nondabula from exercising a normal ownership right, that is, deciding upon who to give access to and what to keep in his premises or business. The notarial servitude they signed being barring.
- [55] Mr Savvas had correctly identified the causa or purpose to be encapsulated in clause 10.2 of the lease agreement. In interpreting the clause, the context and all relevant circumstances are to be taken into consideration. Clause 10.2 clearly provides that notwithstanding clause 10.1 (which entitles Shell to sublet the whole or any portion of the premises to a dealer of its choice without obtaining the Lessor's consent), Shell shall at all times remain primarily liable to Nondabula for the due fulfilment of all the terms and conditions of the lease, by agreeing to let the premises to him or his business for purposes of operating the garage, filling and/or service station and convenience store on the premises.
- [56] Therefore primary to the contractual relationship between Shell and Nondabula as the owner of the premises and the business, was the possession and control of the premises to remain with Nondabula for the operation of the petroleum business, under Shell's monopoly of supply and branding. In terms of the lease agreement the operations of the monopoly of supply and branding was then to be structured in a franchise agreement or in any other way the parties can agree upon, the gist of it being that the supply to

Nondabula's business in the property then determined in the Notarial Deed of Lease and servitude. It is therefore correct that the letting of the premises to Shell was a sine qua non of Nondabula operating the business in his property. It therefore cannot be said that the parties had intended that Shell, at its own pleasure could unilaterally refuse to carry the terms of the contract and deprive Nondabula, who is the owner of the business and the premises, the supply, which will culminate to him relinquishing possession and access to his property and business through an eviction by Shell in preference of a third party.

- [57] Mr Stockwell's argument does not explicate where Shell derives its monopoly rights to supply Nondabula in terms of which it could elect to stop Nondabula from using other products. A proper reading of the notarial lease and servitude agreement makes it apparent that those are the rights that are embodied in the Notarial Deed of Servitude. In terms thereof not only can Shell exclusively supply Nondabula with fuel and petroleum products for the operation of his business, but

can also advertise its brand and store its products at Nondabula's business premises being what was intended in their agreements. Shell as a result assumed, from those rights, an obligation to supply Nondabula and making certain that he is capable of running a gainful petroleum and fuel business as per clause 10.2 with unlimited and exclusive access to the business and property whose possessory rights was never relinquished by Nondabula.

- [58] The fact that the conduct of the business by Nondabula at the property under the exclusive supply of Shell was understood and regarded by the parties to be core primary to the lease agreement is evidenced by their conduct in the (10) ten years that the franchise agreement

and sublease were not concluded (which in terms of clause 9.2 could be waived by Shell anyway). The operations went on in terms of an arrangement that the parties had adhered to in fulfilment of the purpose of the lease agreement. Nondabula continued to run his business in his premises, under Shell's branding and continued supply, in that manner fulfilling the main purpose and obligation of the parties' under the lease. The conduct of the parties also confirms that the conclusion of the franchise agreement was not necessarily a sine qua non of the lease agreement but the running of the petroleum business by Nondabula from the premises was, whilst in terms of the servitude agreement it was to be under Shell's monopoly supply. As a result, by withholding the exercise of its servitudinal right to exclusively supply Nondabula's business, whilst precluding any other suppliers to do so, Shell frustrated the realisation of the parties intention and prevented Nondabula from continuing to run the petroleum business. Shell as a result

frustrated compliance with clause 10.2, which is the purpose of the agreement, thus frustrating the material term of the lease agreement.

[59] Shell's unilateral decision to stop fulfilling its obligation in terms of the notarial lease and servitude, alleging to be asserting its rights, supposedly derived from a non-existent franchise agreement, was improper. It not only frustrated the purpose for which the Notarial lease was concluded, but directly impacted on the viability and or sustainability of the business. The business operations were brought to a halt. Shell's conduct was a repudiation of the Notarial lease and servitude which repudiation amounted to a breach of the agreements. With Shell's persistent refusal to rectify the situation after numerous demand, Nondabula had a right to resile from the contract, absent the purpose sustaining the agreements. He accepted the repudiation and cancelled the agreements as per letter dated 10 September 2018; see *Primat Construction v Nelson Mandela Bay Metropolitan Municipality* (1075/2016) [2017] 7-ASCA 73 (1 June 2017).

[60] The principle that breach of a term going to the root of a contract as opposed to breach of a less important or collateral term justifies the cancellation of the contract is very relevant in this matter. As in *Brown v Sessell* 1908 TS 1137 1142:

'And I think that the rule, that the breach by one party of an essential term of a contract justifies the other party in putting an end to it, depends upon the consideration that the breach of an essential term is equivalent to refusal to carry out the contract.' (my emphasis)

See *Amod Bayat v Doherty* 1919 NPD 44 47.

[61] Definitely Shell's conduct was tantamount to a refusal to carry out the contract. The right to terminate also depends on the nature and term of the contract. If a contract required a close working relationship between the parties, commercial reality would suggest an intention not to be bound in perpetuity. In such cases a tacit term allowing for termination on reasonable notice would be imported in the interests of commercial efficacy; see *Plaskem (Pty) Ltd v Nippon Africa Chemicals (Pty) Ltd* [2014] ZASCA 73, 2014 (5) SA 287 (SCA).

- [62] In a different context, in terms of the decision in *Sishen Hotel Edms Beperk v Suid Afrikaanse Yster en Staal Industrie/e Korporasie Bpk* 1987
- (2) SA 932 (A) where premises are let for the purpose of conducting business, the lessor is under a contractual duty to refrain from impairing the profitability of the lessee's business unless the existence of a term that exempted it from this residual obligation could be proved. Botha JA clarified the obligation of the lessor to abstain from impairing the lessee's commodus usus by doing anything which might impact negatively on the business, that it was one of the naturalia of a contract of lease and, unless excluded in the contract, an ex lege term of all leases. It therefore is not necessary to prove the existence of a tacit or express term to that effect. Where the profitability of the business has been reduced, or made impossible, the lessee's commodus usus has been impaired. Botha AJ thus introduced the principle of equality into the law of lease by protecting the interests of the lessee against both direct and indirect interference with the profitable use of the leased thing.
- [62] Malan J in *Sweets from Haven v Ster Kinekor Films (Pty) Ltd and Another* 1999 (1) SA 796 (W), followed the approach submitted by Cooper, that the question of whether or not a lessor has committed a breach of contract can be decided only with reference to the terms of the contract. A tacit term is implied where the contract is silent on the point, but it is clear that the parties intended the term to be part of their agreement; they would not have contracted otherwise than on the basis of that term. In such a case the common intention of the parties is inferred by the court from the express terms of the

contract and the surrounding circumstances. It is not necessary that the parties should have consciously envisaged the situation, it is sufficient that their common intention was such that a reference to such situation by the hypothetical bystander would have obtained a unanimous assertion of the implied term.

- [63] The right that Shell wanted to assert that entitles it to sublet to any other retailer is secondary and superseded by that of Nondabula as the owner which was the context in which the contract was concluded. The owner was to retain his rights to run and control the business on his property. Otherwise it would not make sense why Nondabula would agree to have Shell take over the control of his property unless if it was for the purpose of securing the conduct of his business in a refurbished building. Cancellation therefore by Nondabula was proper.

Mortgage Bond

- [64] The registered deeds will, on the granting of the order to cancel, be cancelled and expunged as per s 6 of the Deeds Registries Act; see *Ex parte Baines and Another* 1963
- (1) SA 524 (W). Section 6 of the Deeds Registry Act provides that upon cancellation of any deed conferring or conveying title to land or any real right in land other than a mortgage bond, the deed under which the land or such real right in land was held immediately prior

to the registration of the deed which Is cancelled, shall be revived to the extent of such cancellation and the registrar hail cancel the relevant endorsement thereon evidencing the registration of the cancelled deed.

[65] On the mortgage Bond, no money was exchanged, the money was never borrowed to Nondabula. The bond has therefore been idle since and has never been acted upon. It as a result expired a long time ago. A proper case has been made for its cancellation.

[66] Under the following circumstances the following order is made:

1. The cancellation of Notarial lease and Servitude registered under number K7/2003 and KS/2003 is hereby confirmed.
2. The Registrar of Deeds (for KwaZulu Natal having jurisdiction over Mzimkhulu) be authorised and empowered to cancel and expunge the said agreements from the record of the property, Erf 233 Umzimkhulu.
3. The Mortgage Bond registered on the property Erf 233 Umzimkhulu is hereby cancelled.
4. The Respondent is to vacate the property.
5. The Respondent 's (Shell) Application is dismissed with costs.
6. The Respondent is to pay the costs.

NV KHUMALO J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

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