



CASE NO.: A 269/2008

SUMMARY

BP NAMIBIA (PROPRIETARY) LIMITED

and

SOUTHLINE RETAIL CENTRE CC

Manyarara, AJ

21 OCTOBER 2008

Statute – Petroleum Products Regulations (2000) GN 155 of 23 June 2000 – Amended Regulation 30 - Licence Certificate – Change of information thereon – Application to Minister for approval required.

Civil Procedure – Eviction on an urgent basis – Petroleum business premises – Procedure governed by statute – Non-compliance therewith – Rule 6(12) not satisfied – Application dismissed with costs on the higher scale.



CASE NO. A 269/2008

IN THE HIGH COURT OF NAMIBIA

In the matter between:

BP NAMIBIA (PROPRIETARY) LIMITED

APPLICANT

and

SOUTHLINE RETAIL CENTRE CC

RESPONDENT

CORAM: MANYARARA, A.J.

Heard on: 26 September 2008

Delivered on: 21 October 2008

REASONS

MANYARARA, A.J.: [1] This is an application brought on an urgent basis to evict the respondent from certain property leased from the applicant and to cancel the accompanying franchise agreement for the operation of a petrol service station on the property.

[2] At the hearing, I declined to condone the applicant's non-compliance with the Rules of Court and ordered that the application be struck from the roll

with costs on the higher scale including the costs of two instructed counsel, with reasons to follow. These are they.

[3] The applicant is the registered owner of Erf 4501 Block B, Rehoboth (the property, also referred to as “the premises”). It conducts as its principal business the selling of petroleum fuels, lubricating oils, liquefied petroleum gas, kerosene detergents and other petroleum based products (the business). In conducting its business, the applicant develops service stations on its land. The applicant then leases the properties so developed and all buildings, fixtures, fittings and equipment on its land to approved dealers for the carrying on of service stations. On 31 August 2005 the applicant entered into a lease agreement with the respondent, in terms of which the applicant leased the property to the respondent for a period of 3 years commencing on 1 September 2005 and terminating on 31 August 2008. The parties also entered into a franchise agreement to subsist for the duration of the lease, by which the applicant granted the respondent the right and authority and licence to operate a “BP Gold franchise operation” on the premises in accordance with the “BP Systems and BP Trade Marks.” There was an option for renewal of both agreements for a further period of one year, whose interpretation is hotly disputed. No reference to the arbitration clause mentioned by the papers was made by counsel in their submissions and the point will be allowed to rest.

[4] In terms of a supply agreement also entered into by the parties, the applicant undertook to supply to the respondent, which undertook to obtain

from the applicant during the supply period (which coincided with the period of the lease and franchise agreement), for resale, all the respondent’s requirements of petroleum products and not to accept any offer from any other

person to supply the respondent with petroleum products for resale from the premises. However, the agreement provided that, in the event of the respondent (defined as “the dealer”), upon the expiry of the supply agreement, wishing to continue with the resale of petroleum products from the premises, the dealer was not to accept any offer from any other person to supply the dealer with petroleum products for resale from the premises until the dealer had submitted to the applicant (defined as “BP”) full details in writing of the terms and conditions of such offer and a period of seven days from the date of receipt by BP had expired.

[5] The present application was delivered on 23 September 2008 for hearing on 26 September 2008 and the founding affidavit and annexures totaled 250 pages. The relief sought was two-fold. Firstly, the applicant sought condonation of its non-compliance with the Rules of Court and an order declaring the lease agreement terminated on 31 August 2008 by the effluxion of time and ejecting the respondent and those holding under it from the premises and authorizing the applicant to immediately take occupation of the premises; and, secondly, a *Rule Nisi* interdicting and restraining the respondent from operating any petroleum retail business from the premises pending the return date of the *Rule* plus costs of the application on a scale as between attorney and client.

[6] The respondent filed a notice of opposition and delivered its answering affidavit and annexures totaling 600 pages on the date of the hearing. The hearing was stood down for several hours for the applicant to file a replying affidavit which comprised 26 pages and was delivered about half an hour before the commencement of the hearing.

[7] The preliminary issue which the court was called upon to decide was whether or not the application should be allowed to proceed as one of urgency. Mr. Hodes contended on behalf of the applicant that the urgency of the matter was apparent from the fact that the lease and franchise agreements lapsed through the effluxion of time on 31 August 2008 without renewal, from which date the respondent has occupied the property unlawfully and unlawfully kept the applicant from re-entering the property. Mr. Heathcote on behalf of the respondent contended that the application was not urgent because of the protracted correspondence annexed to the papers pointing to deeply rooted disagreement between the parties over important issues relating to the lease, franchise and supply agreement entered into by the parties. The founding affidavit deposed by the applicant's financial manager, Raphael Chipoma, averred to the correspondence referred to as follows:

“The essence of that correspondence essentially entailed a dispute between the parties concerning the Applicant's demand for payment of fuel supplied to the Respondent and the Respondent's failure to pay its franchise fees on the one hand, and, on the other hand, the Respondent's allegations that the Applicant on the one hand failed and/or neglected to deliver sufficient fuel to the Respondents and the Applicant's alleged failure to maintain the systems on the property.

The result of that dispute was that the Respondent decided to sell the business conducted at the property as a going concern and at the time when annexure “ZS5” was addressed to the Respondent, the Respondent was still looking for a suitable buyer.”

[8] Annexure “ZS5” dated 1 July 2008 informed the respondent of the termination of the lease, franchise and supply agreements between the parties on 31 August 2008 and that the applicant would contact the respondent “in good time prior to the foresaid date to make arrangements for handing over the site.”

[9] As it happened, the respondent's proposed sale of the business did not materialize for reasons which the respondent by its facsimile dated 11 July 2008 blamed on the applicant. In the facsimile, the respondent also sought the applicant's views on the possibility of extension of the dealer agreement and supplementary provisions thereto, which the applicant flatly refused to consider. By its facsimile dated 29 August 2008 the respondent informed the applicant that the respondent was prepared to sell the business and goodwill for a price of N\$4.5 but negotiations with Agra had fallen through when the applicant indicated to Agra that Agra could obtain the business from the applicant "at a much lower price."

[10] In the same letter, the respondent's legal practitioners drew the respondent's attention to the provisions of the Petroleum Products and Energy Act 13 of 1990 as amended (the Act) and the regulations made thereunder

relating to agreements between operators and wholesalers in the petroleum industry (the petroleum regulations), to which I shall revert.

[11] In reply to a subsequent facsimile from the respondent, the applicant on 3 September 2008 addressed a facsimile to the respondent in the following terms –

1. denying that the respondent has a valid and enforceable option to renew the lease agreement;
2. denying being unable to supply fuel products to the respondent though it was under no obligation to do so; and
3. demanding an undertaking from the respondent that respondent will refrain from purchasing, storing on and re-selling from the premises petroleum products from any third party.

[12] The respondent continued to in occupation of the premises and apparently ignored the prohibition from obtaining petroleum products from third parties and re-selling these from the premises, which precipitated this eviction application.

[13] Rule 6(12) in terms of which this application was brought provides that in every affidavit or petition filed in support of an urgent application, the applicant shall set forth explicitly the circumstances which he or she avers render the matter urgent and the reasons why he or she claims that he or she could not be afforded substantial redress at a hearing in due course.

[14] The relevant provisions of the amended petroleum regulation 30 provide as follows:

“Amendment of licence or certificate.

- (1) *If any information on a licence or certificate is to be changed, the licence-holder or certificate-holder shall prior to such change apply to the Minister for an amendment of the licence or certificate, as the case may be.*
- (2) *If any such change of information relates-*
 - (a) *to a change of the relevant premises, the provisions of regulation 27 shall be complied with; or*
 - (b) *in the case of a retail licence, to a change in the name of the operator, the records required in terms of regulation 4(2) shall be supplied with regard to the proposed new operator, and the proposed new operator shall complete Form PP/1 as set out in Annexure B, in as far as it is applicable, together with the application for an amendment*
- (3) *Notwithstanding regulation 31(4) and (5), if a retail licence-holder operates a retail outlet in terms of an agreement with a wholesaler that is the owner of such retail outlet, that wholesaler may in the following circumstances apply to the*

Minister for a change in the name of the operator, whether to that of the wholesaler or to any other operator:

(a) *If it is alleged by the wholesaler licence-holder that the agreement between the wholesale licence-holder and the retail licence-holder-*

(i) *has been terminated by reason of breach of contract on the part of the retail licence-holder; or*

(ii) *has lapsed through the effluxion of time, without renewal of the agreement;*

(4) *The Minister shall not, upon an application in the circumstances contemplated in subregulation (3)(a), amend a licence unless the Minister-*

(a) *has given the relevant retail licence-holder notice in writing of the wholesaler's application;*

(b) *has invited the retail licence-holder to make representations to the Minister, within a specified period, not being less than 14 days after receipt of the notice, concerning the wholesaler's application; and*

(c) *has after the end of that period considered any representations made by the retail licence-holder.*

(5) *Upon the occurrence of an event referred to in sub-regulation (3) the wholesaler concerned shall, until the Minister decides on the application under sub-regulation (4), be deemed to be the holder of the retail licence, except if, in the circumstances contemplated in the subregulation (3)(a) the fact whether the agreement has lawfully been terminated or has lapsed is a dispute between the parties" (My emphasis)*

[15] The circumstances which the applicant averred rendered the matter urgent are that the respondent should be evicted on the ground that the lease and franchise agreement between the parties had lapsed through the effluxion of time. In my view, the averment brought the application squarely within the provisions of subregulation (5) read with subregulation (4) which would deem the applicant to be the holder of the retail licence of the business operated by the respondent on the applicant's property but for the fact that the

circumstances contemplated in subregulation (3)(a) are disputed. (Emphasis provided).

[16] The point seemed not to have been in the contemplation of the applicant when it launched the application to evict the respondent because no reference to the petroleum legislation was made in the founding affidavit. The applicant only reverted thereto in the replying affidavit after the respondent raised the point starkly in the answering affidavit and the replying affidavit then dealt therewith as follows:

“I fail to see the relevance of the fact that the Respondent’s retail licence is still valid and in fact open ended. It is because the Respondent remains on the premises that the Applicant is unable to apply to the Minister for the cancellation of the Respondent’s licence and the issue of a new licence for any new dealer. The licence is in site specific and will become redundant when the Respondent will leave the property.....”

[17] But that is precisely the respondent’s ground of resistance to the relief sought, that from the intricate and protracted background of the dispute which is hardly disputed and which I endeavored to summarise in this judgment, compliance with the legislation governing the petroleum industry is necessary in order to effect any change in the name of the operator of the retail outlet as the applicant proposes to do. Therefore, to my mind, the averments made by the replying affidavit were an admission, be it unintended, of the respondent’s

contention that the applicant had not made out a case for an order for the eviction of the respondent to be granted on an urgent basis and that the

reasons given by applicant why it claimed that it could not be afforded substantial redress at a hearing in due course had not been substantiated.

[18] I agreed that the requirements of Rule 6(12) had not been satisfied. Accordingly, I declined to condone the applicant's non-compliance with the Rules of Court and ordered the application to be struck from the roll on the terms made in the order.

MANYARARA, AJ

ON BEHALF OF THE APPLICANT

Adv. Hodes, S.C

assisted by Adv. Schickerling

Instructed by:

Engling, Stritter & Partners

ON BEHALF OF THE RESPONDENT Adv. Heathcote, S.C

assisted by Adv. Obbes

Instructed by:

Krüger, van Vuuren & Co.