IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 24051/2014

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between:

ENGEN PETROLEUM LIMITED
(Registration Number: 1989/003754/06)

APPLICANT

And

MALAN RONALD RASEBOTSA t/a
EVERON FILLING STATION
(Identity Number: […])

RESPONDENT

JUDGMENT

PRETORIUS J

[1] In this application Engen, the applicant, applied *inter alia* for a money judgment and an eviction order. The respondent failed to file an opposing

affidavit. Therefore the matter was set down on the unopposed roll for hearing on 1 September 2014. On 26 August 2014 the respondent filed an opposing affidavit and the matter was postponed at the request of the respondent, due to the fact that the matter had become opposed. The respondent was ordered to pay the costs on an attorney and client scale due to the late filing of the opposing affidavit.

[2] Condonation:

The opposing affidavit was filed four months late despite the applicant sending numerous reminders to the respondent to file opposing papers.

[3] The application was served on 2 April 2014 and the opposing affidavit had to be served in terms of Rule 6(5)(d)(ii) on or before 15 May 2014. On 12 May 2014 an extension was sought by the attorney for the respondent until 23 May 2014 to enable the respondent to file the opposing affidavit. A second extension was sought, after the first extension had been granted and the second extension was granted until 30 May 2014. On 5 June 2014 the attorney for the applicant sent an e-mail to the respondent's attorney enquiring whether an opposing affidavit was forthcoming which resulted in a further request for an extension – until 10 June 2014, which was once again granted. The request for extension set out:

> *"We request that you provide us with time until the 10th June 2014 to finalize said Affidavit, where after you may deal with the matter as you see fit."*

[4] As no opposing papers were filed on or before 10 June 2014, the matter was set down on the unopposed roll for 1 September 2014. This notice of setdown was served on the respondent's attorney on 23 July 2014. Almost a

month after the notice of setdown had been served the opposing affidavit was filed on 26 August 2014, resulting in the postponement of the matter. On 11 November 2014 the heads of argument by the applicant was served on the respondent. Once more the respondent failed to file heads of argument, despite having heads of argument served on the respondent's attorney.

[5] On 13 April 2015 the matter was to be heard on the opposed motion roll. Counsel for the respondent came to court and requested a postponement due to the fact that the notice of setdown served on the respondent's attorney mentioned that the matter was set down on the unopposed roll. At the time of the request for postponement there was no substantive application for a postponement, the request was dealt with by counsel from the Bar. When further enquiries were made by the court, it became evident that the respondent's attorneys' preferred counsel was not available and the present counsel for the respondent had only received instructions to apply for a postponement without any further instructions.

[6] It transpired that heads of argument had been provided to counsel that morning by the respondent's attorney. The court ordered the respondent's attorney to attend court as there was no clarity as to the respondent's position. Mr Ruan Vorster, the attorney for the respondent, deposed to an affidavit on 14 April 2015 wherein he declared:

> *"The matter was therefore quiet* (sic) *clearly opposed and was never in dispute in this regard, that the matter is an opposed matter."*

[7] He further set out:

> *"On the 5th day of February 2015, I received the Notice of Set Down, which is the cause of the current state of confusion on the part of*

myself and counsel, was filed on the respondent's correspondent attorneys.

Upon receipt of said notice I immediately forwarded the notice to counsel, also asking him if it was not placed incorrectly. This was indeed confirmed in a subsequent telephonic conversation that it was indeed incorrectly done."

[8] It is clear that the respondent had known all along that the matter was on the opposed roll and should have enquired from the applicant's attorney whether the notice of setdown on the unopposed roll was incorrect.

[9] The respondent indicated that counsel will be able to argue the matter on 15 April 2015, so that the prejudice to the applicant, due to the tardiness and disregard of the Rules by the respondent, be limited.

[10] The applicant filed the replying affidavit on 1 October 2014 without an application for condonation. I have considered all the facts and arguments and will condone the late serving of the condonation application by the respondent. The respondent has already been punished by a punitive cost order on the scale of attorney and client on 1 September 2014.

[11] <u>The merits:</u>

The applicant applies for judgment against the respondent in an amount of R797 911.94 and interest thereon at the rate of 9% *a tempore morae*, as well as the eviction of the respondent from Portion 3 of Erf 2 Lebowakgomo – BA Township, Limpopo with further related relief.

[12] The applicant has developed an automotive fuel filling station on the immovable property and owns the immovable pumps, tanks and ancilliary equipment utilized for the storage and dispensing of petroleum and

automotive fuels and erected signs and advertising material to identify the service station as an “Engen Service Station”.

[13] It is of paramount importance to the applicant, Engen, that the appearance of the station, the quality of oil and fuel, the Quickshop and the service provided should be to maintain and enhance the Engen brand name.

[14] Strict operating procedures must be observed by all dealers to ensure that a leak in a tank or spillage must be detected as soon as possible and to minimize environmental contamination at all costs.

[15] There is enormous competition by the respective oil companies for lucrative sites and the number of new service stations is restricted by legislation.

[16] The property is owned by the Ronald Rasebotsa Family Family Trust and is the site from which the respondent operates the Everon Filling Station and is thus in occupation of the immovable property.

[17] On 26 March 1997 the respondent and his wife, as the registered owners of the property and the applicant, as lessee entered into a Notarial Deed of Lease which was registered in the Pretoria Deeds Registry. On 29 October 2009 the Addendum to the Notarial Deed of Lease was registered wherein the Ronald Rasebotsa Family Trust is the owner of the property.

[18] The applicant is the lessee of the immovable property and its rights arise from the registered lease agreement. The material terms of the lease agreement are:

> *“The Lessor let to the Applicant, the immovable property being:*
>
> *Erf 2 BA (3) in the Township of Lebowakgomo, district Thabamoopa, in extent 2523 square metres held by Deed of Grant Number*

TG254/1994LB, which immovable property is the immovable property referred to in paragraph 10 above. (Preamble)

"Premises" would mean the Property together with all buildings, erections and other improvements thereon or which might be constructed thereon (including all fixtures and fittings herein to the extent owned by the Lessor)…

…Notwithstanding the provisions of sub-clause 2.2, the Lessee would be entitled to extend this tenancy from time to time for a further period of 5 years on each occasion: Provided that:

(a) Such right of extension may not be exercised except by written notice deliver to the Lessor during the currency of this tenancy, whether during the period referred to in sub-clause 2.2 or whether during any subsequent period or extension thereafter;

(b) After the Final Date, the Lessee shall have the option to extend its tenancy under this Notarial Deed of Lease for two (2) further periods of five (5) years each…

…Throughout the period of the Lease Agreement, including any renewal thereof, the Lessee would be entitled to the exclusive use and occupation of the Premises

The Lessee would be entitled to sub-let the Premises (or any portion thereof) or to give up occupation or possession of the Premises (or any portion thereof), without the Lessor's consent and without reference to the Lessor…;"

[19] Applicant complied with the terms of the lease agreement and the letters for renewal were delivered on 5 March 2002, 29 October 2007 and 31 August 2012. The current lease agreement will expire during November 2017.

[20] On 10 December 2012 the respondent, in his personal capacity, and the applicant concluded a written agreement of lease and operation of the service station. The material express terms of the Operating Lease were *inter alia*, the applicant let to the respondent the entire premises and would be deemed to commence on 1 December 2012 and remain in force for two years and four months until the termination date of 31 March 2015.

[21] In terms of clause 11 Schedule 2 of the agreement entered into the respondent is prohibited from dealing in any way in any automotive fuels other than those supplied by the applicant. The respondent would exclusively purchase from the applicant or the applicant's nominated approved suppliers the respondent's entire requirements of automotive fuel marketed by the applicant for resale from the premises. No automotive fuel from any other entity may be stored, sold or distributed from the premises.

[22] The agreement will forthwith be cancelled should the respondent breach any of his obligations as set out in the agreement. The applicant alleged that the respondent breached the agreement by:

> *"The Respondent was dealing directly in Automotive Fuel (being leaded and unleaded petrol and automotive diesel) other than that supplied by the Applicant;*
>
> *The Respondent failed to purchase exclusively from the Applicant, the Respondent's entire requirements of Automotive Fuel and Diesel for resale from the Premises;*

The Respondent was storing, selling and distributing from the premises Automotive Fuel other than that purchased from the Applicant;

The Respondent was purchasing Automotive Fuel from sources other than the Applicant;

The Respondent failed to and or neglected to make payment of rental, retail levies and fuel purchases due to the Applicant."

[23] During the period 12 April 2013 and up to 21 May 2013 no purchases for fuel were made from the applicant. During the month of June 2013 no fuel was sold to the respondent by the applicant. The site continued to operate and sell fuel during these periods and the only conclusion is that the respondent obtained fuel from a different source.

[24] Furthermore the respondent failed to pay rent, retail levies and fuel purchases. On 31 December 2013 the respondent owed rental in the amount of R583591.71; retail levies in the amount of R213982.08 and fuel in the amount of R338.15.

[25] On 18 June 2013 the applicant's attorneys of record advised the respondent that the applicant elected to terminate the agreement concluded in 2012 as the respondent had breached the agreement by buying petroleum products from other suppliers. In this letter the applicant demanded that the respondent vacate the property on 21 June 2013; immediately cease to operate as an Engen Service Station and that the respondent refrain from passing himself off as an authorised dealer of the applicant. Although the respondent initially agreed to vacate the property, he refrained from doing so. On 21 October 2013 a further letter was despatched to the respondent demanding payment of arrear rental in the amount of R479 326.57; payment

of R157 015.04 in respect of retail levies and payment of R381 in respect of the fuel account. On 5 November 2013 a further letter was sent to the respondent as he had not paid the arrear amounts, cancelling the agreement between the parties.

[26] The respondent failed to comply with any of the demands. He is still trading as an Engen Service Station as if he is a validly appointed franchisee of the applicant.

[27] The applicant is suffering prejudice on an on-going basis, as the respondent is causing potential harm to the applicant's reputation by distributing fuel in the name of the applicant, which had not been bought from the applicant or from a supplier approved by the applicant.

[28] The respondent's defence is that the applicant was in breach of the operating agreement as it had allegedly failed to execute orders. The applicant responded thereto:

> *"Not only are the contents of these paragraphs irrelevant but so baldly stated that it is quite impossible to reply thereto. Engen was allegedly in breach of the Operating Agreement in that it failed to properly execute orders "…in that the Applicant delivered stock in a haphazard manner and in quantities which made it impossible to properly deal with the demand from my client base…". This ad hoc statement is unsubstantiated by any documentation whatever; bears no reference to the relevant representatives who would have dealt with these issues and is totally lacking with reference to dates, times and places. It has left Engen in a position where it is quite impossible to refer to any of its*

records and/or any of its employees in order to further cast light on the allegations made in this paragraph."

[29] I must agree that such a baseless statement has no evidentiary value when adjudicating the matter. The respondent did not supply any official order number or set out the particulars in any manner to substantiate these allegations. It is bald, vague and sketchy and cannot constitute a defence in these circumstances.

[30] There is no indication as to when the applicant failed to supply fuel and where the respondent gave the applicant three (3) days' notice to remedy the breach of not supplying fuel. I can only come to the conclusion that it did not happen.

[31] The applicant relies on the failure by the respondent to pay monthly rentals to cancel the operating lease and the consequent eviction application. In clause 34.3 of the second schedule of the Operating Lease it was agreed by the parties that the respondent would not be allowed to discharge any obligations to the applicant by way of set-off. Any losses the respondent alleged was suffered as a result of the applicant's actions can only be remedied by a claim from the applicant.

[32] The respondent concedes that he is not a party to the Notarial Deed of Lease. Therefore the applicant's landlord's position is irrelevant to these proceedings.

[33] In **Boompret Investments (Pty) Ltd and Another v Paardekraal Concession Store (Pty) Ltd 1990(1) SA 347 (A)** Van Heerden JA held at p351 F:

"In particular it was contended that the sublease had terminated before the application was launched; that in terms of the sublease the lessee was obliged 'to hand the premises over to the lessor on the termination

of this tenancy…', and that when sued for ejectment after the termination of a lease a tenant may not dispute the title of his lessor. In support of the latter proposition counsel relied upon the decisions in Hughes v Anglia and Co 1912 EDS 242; Hillock and Another v Hilsage Investments (Pty) Ltd 1975(1) SA 508 (A) at 516, and Ebrahim v Pretoria Stadsraad 1980(4) SA 10 (T).

It is, or course, true that in general a lessee is bound by the terms of the lease even if the lessor has no title to the property. It is also clear that when sued for ejectment at the termination of the lease it does not avail the lessee to show that the lessor has no right to occupy the property." (Court's emphasis)

[34] In this instance the lease was terminated by the applicant due to the breach of the agreement by the respondent. Therefore the principles set out in the Boompret matter are applicable in this matter.

[35] The respondent admitted that there exists a lease agreement of immovable property with certain terms and conditions in which the applicant rents the property to the respondent. The respondent does not deny that he is in possession of the property.

[36] The respondent does not deal with the outstanding rent, which is the larger part of the claim. The only answer the respondent has is that the landlord should have been joined. Once again the Boompret matter puts paid to such a defence. The notarial lease agreement between the Trust and the applicant has nothing to do with the respondent being in breach of his agreement in his personal capacity with the applicant.

[37] It is clear that the applicant sent at least three (3) demands to the respondent, respectively on 18 June 2013, 21 October 2013 and lastly on 5 November 2013. The respondent deals with these allegations as follows:

> *"The content of these paragraphs, as well as the Annexures referred to in these paragraphs, is denied.*
>
> *I specifically dispute the content of any certificate of balance and for the reasons referred to earlier in this affidavit."*

and sets out that he disputes the contents of the certificate of balance, without giving any reason or basis for doing so.

[38] The court was referred to **Plascon-Evans Paints v Van Riebeeck Paints 1984(3) SA 623 (AD)** in connection with disputes of facts. Corbett JA found at page 634 H to 635 C:

> *"It seems to me, however, that this formulation of the general rule, and particularly the second sentence thereof, requires some clarification and, perhaps, qualification. It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order."*

[39] I cannot find that a factual dispute exists on the papers as they stand. The non-joinder of the Trust cannot assist the respondent in any way as the Notarial Lease Agreement is between the Trust and the applicant. The respondent is not a party thereto.

[40] I cannot find that the respondent has a *bona fide* defence or a genuine defence to the merits as the respondent admits the agreement between himself and the applicant and he admits the contents of the agreement.

[41] There is no doubt that he owes a substantial amount for monthly rentals. Proper demand was made on various occasions, to no avail. The lease agreement was cancelled and the respondent dos not deny that he is still in possession of the property.

[42] I cannot find that there exists any defence.

[43] I therefor make the following order:

1. Judgment is granted against the respondent in an amount of R797911.94 plus interest on the amount of R797911.94 at 9% *a tempora morae*;
2. The respondent is evicted from Portion 3 of Erf 2 Lebowakgomo – BA Township, Limpopo, together with all persons that claim any right or title in and to the property, in and through the respondent;
3. The applicant is entitled to immediate possession, occupation, use and enjoyment of the property;
4. The Sheriff of the Court is authorised and directed to take such steps as may be necessary in order to give effect to prayer 3 above;
5. The respondent is ordered to pay the applicant's costs of this application on attorney and client scale.

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JUDGE C PRETORIUS

Case number	: 24051/2014
Application heard on	: 16 April 2015
For the Applicant	: Adv. Clive van der Spuy
Instructed by	: Lanham-Love Attorneys
For the Respondent	: Adv. G Janse van Vuuren
Instructed by	: Ruan Vorster Attorneys
Date of Judgment	: 6 May 2015