IN THE HIGH COURT OF SOUTH AFRICA [Not Reportable]

[EASTERN CAPE DIVISION, GRAHAMSTOWN]

CASE NO: 2471/2020

Heard on: 01 & 04/12/20

Delivered on: 02/12/20

In the matter between:

EXPRESS PETROLEUM (PTY) LTD	Applicant
and	
ROPAX INVESTMENTS 10 (TY) LTD	First Respondent
RIO RIDGE 1387 (PTY) LTD	Second Respondent
GRANT COTTERELL	Third Respondent
ADRIAN PRICE	Fourth Respondent
ISMAEL NCHOLU	Fifth Respondent
NOMA MAGAGAMELA	Sixth Respondent

JUDGMENT ON INTERIM RELIEF

NHLANGULELA DJP

[1] Express Petroleum (Pty) Ltd is a company registered in South Africa. In these proceedings it sues duly represented by Russsel Rutter Wells in his capacity as a director, he being duly authorised to do so in terms of an appropriate resolution dated 13 November 2020. These proceedings were launched on the

basis of urgency, on 17 November 2020. The matter was set down for hearing on 01 December 2020, and on the time lines created by the applicant that a notice to oppose the application be delivered on or before 4 pm, on 19 November 2020; followed by an answering affidavit on or before 4 pm, on 24 November 2020; as well as a replying affidavit by 4 pm on Thursday 26 November 2020. The provisions of Rule 6 (12)*(a)* allowed the applicant to set these time lines. The timeous service of the papers by the respondents on the time lines created by the applicant were not complied with strictly by the respondents. Despite that, an application for condonation for the delivery of opposing papers was not brought. Consequently, the reasons as to why the time lines created by the applicant were not observed is unknown. To the extent that the issue of time lines should not deter the consideration of the substantive issues of the application, a determination of the consequences of non-compliance will be shelved until the correct time arrives for it to be decided.

[2] A relief sought on behalf of the applicant is succinct. It is that pending the final determination of a trial, which is intended to be instituted by the applicant within 30 days of the order, the first and second respondents be precluded from sourcing fuel from any supplier other than the applicant. This relief is sought to be granted in the interim, and on urgent basis. The law is trite, a determination of the issue of urgency hinges on the facts as set out in the founding affidavit – see *Cekeshe v Premier, Eastern Cape* 1998 (4) SA 935 (Tk). I next deal with the facts of the application.

[3] Mr Wells (Wells) is the holder of 35.42% shares in the applicant (Express). In the same company, the third respondent (Grant) holds 20% shares and the fourth respondent (Price) holds 18%. The fifth (Ishmael) and sixth (Noma) respondents (Noma) are the holders of 13% shares each respectively.

[4] The first respondent is Ropax Investments 10 (Pty) Ltd (Ropax). The second respondent is Rio Ridge 1387 (Pty) Ltd (Rio). Both Ropax and Rio are companies registered in South Africa. Wells holds 47.5% shares in Ropax and

Rio; Grant holds 27% and Price holds 24.5% in both Ropax and Rio. Ishmael and Noma do not own shares in these two entities.

[5] Express concerns itself with wholesaling bulk fuel to Ropax, Rio as well as to other interested businesses. Both Ropax and Rio are doing a business of retailing fuel on their truck stop sites.

[6] As born out of the historical facts Express, Ropax and Rio have always enjoyed a close business relationship if compared to other business entities that deal in fuels as the retailers in the petroleum industry. The papers show that in 1994 Price together with Mr Pierre Cotterell (Cotterell) the father of Wells and Gant, formed Express with an aim of running a business of wholesaling in fuel supplied by Engen, the former employer of Price. Engen would later on be substituted by Shell. Uncontroverted evidence is that Express hit the ground running from the first day of opening of its business. It became a success story that it still is right up to the present day. Buoyed by a healthy balance sheet and growing passion in the fuel distribution industry that had proved profitable to Cotterell and Price they decided to fledge their wings into retail line. That decision led to the registration of Ropax in 2002 and Rio in 2013. These new entities are truck stops that retail in fuels to truck owners that deliver commercial goods across the Republic. Both Ropax and Rio have become success stories.

[7] Cotterell had always kept his wife by his side during the establishment and operations of Express. The wife also had a share allocation in the region of 37.5% in Express, which shares they kept until they decided in 2000 to withdraw participation in the business. That decision saw Wells and Grant, the half-brothers, being introduced into the business through a transfer of parents' shares to them. A business advice given to the owners would later, in 2013, dictate that the shareholding structure in Express and Ropax be re-configured in such a way that Wells was compelled to be a director in Express with Grant and Price concentrating their directorship in Ropax. The court was told that these adjustments were caused by a wrong commercial advice given to the partners that

it was illegal for a person to hold shares in both wholesale and retail outlets at the same time.

[8] After taking the baton from parents Wells and Grant together with Price moved on with great enthusiasm that saw them resolve fierce competition threats of being shut down by competitors who had the backing of Engen. Inevitably, Express and Ropax had to terminate business relationships with Engen. In its stead, Shell and another petroleum house were engaged to substitute Engen. That support has sustained the strength of the entities up to the present time.

[9] In 2013 Express increased its shares participation to include Ishmael and Noma as the BEE partners. That association re-invigorated the desire to grow Ropax truck shop business in Queenstown, Port Alfred and Port Elizabeth. The Port Elizabeth site was registered as Rio. The truck shop businesses in Queenstown, Port Alfred and East London operated under Ropax.

[10] Although Express, Ropax and Rio are separate businesses as in the sense that they are situated at different sites and registered to take an individual identity they did not function truly so due to the commonality of partners owning them, their administrative approach as well as their operations on the ground. It is evident that the closeness of the partners in Express, Ropax and Rio dictated a close-knit working relationship that placed the three entities close to each other. Express became the central business operation point for all. It may be regarded as the headquarters. Investment capital for all the different entities came from Express and profits generated in each have always been channelled back to Express. The administration offices for each entities are concentrated in Express business premises and /or premises held by it under a lease. The shares have never been declared in Ropax and Rio, but in Express, and have always been paid out from that point. Right from the inception of the businesses in Ropax (18 years ago) and Rio (7 years ago) these entities have never procured fuel from any other wholesaler except Express. The financial arrangements currently obtaining, as shown in annexure "FA" dated 1 August 2019, is that Express holds facilities on

behalf of Ropax and Rio for working capital and growth purposes in the sum of R20 million, with Ropax and Rio standing surety for the loan guarantees issued by Express in favour of FNB. The bank holds cession of rights of the retail entities in respect of income derived from them solely in order to ensure that loan debts beneficial to all the entities are serviced properly. The duty to submit bi-annual management accounts in all the entities lies with Express.

[11] The commonality of owners and the financial interdependence between the entities started and progressed well. The wholesaling and retailing operations between them was managed without any friction between the owners. The sharing of business space provided by Express and payment of agreed rentals have been going well. The success of each entity became that of others. Generally, all the entities have been performing well. Rio has been the best of them all in terms of performance, having a high business turnover matched by high level profits. Rio is regarded as the biggest truck stop and its individual performance is equal to no other truck stop in the country. Its success has always been expressed in a group arrangement owing to operational support it receives from other entities, especially Express.

[12] It does appears to me that the current owners of the entities had taken a queue from the management style of Cotterell, his wife and Price of running the business as they saw fit. However, in a dramatic turn of events, on 13 November 2020, Rio was caused by Grant and Price to source and secure delivery of fuel at its Port Elizabeth premise from another supplier. Ropax is threatening to do the same. This happened without the owners of the "group of companies" having sat down to agree to this new arrangement. It appears that the developments now obtaining between the entities represent the end of a golden era that started in 1994 which is dictated to by new economic dynamics. I next deal with the reasons for the fall-out between the owners of three entities that has started, *albeit* beneath the surface.

[13] The business of the group of companies in this matter is centred in Express where Wells exercises much of the control that has been necessary to drive the entities to the high levels achieved so far. As the concentration of decision making power in Wells grew, the misperceptions about the correctness of that position grew in the minds of Grant and Price. When Wells and Grant started to form partnerships in businesses falling outside the group and with Price feeling that he was unduly excluded, he became unhappy. The bad commercial advice that the owners cannot own shares across the entities due to a difference in the type of licences held by the entities followed by the re-arrangement of the share structure that confined Grant to the retail licenced entities made Grant unhappy. The demand by Grant, met with a refusal, that Wells should cease holding shares of Grant in Express as a nominee left an indelible negative mark on the mind of Grant. That this problem had to be resolved by a court of law and later resolved in mediation compromised the trust relationship that had bound the group owners together since 2008. That the success of Rio did not bring about a raise in the value of shares for Grant and Price led to a demand that the old business model of Express charging fuel at above market value price be corrected. Ropax and Rio started to demand that third party wholesale suppliers applying a reduced pricing structure should be introduced. The refusal by Wells to make Grant a director in Express until someone else was nominated to act on behalf of Grant did not go down well with him. Ropax and Rio initiated steps to de-link their banking accounts from Express on the alleged reason that Wells, then in control, was abusing the bank accounts. Grant appointed one Mr Taylor as the CEO, without the concurrence of Wells, with a special mandate of de-linking Ropax and Rio from the profile of Express so that the two entities could begin to establish their independence. Grant and Price started to make a demand for re-structuring of shares in the group in such a manner that will separate Ropax and Rio from Express. Having not been successful to persuade Wells to lower the fuel price, Grant and Price threatened that they were left with: "no other alternative but to terminate the arrangement which has hitherto existed."

[14] Feeling the pressure of the damands made by his co-owners, Wells decided, on behalf of Express, to approach this court for a relief that will preserve the status *quo* relating to the current business structure including the above market-pricing of fuel or that the respondents be compelled to observe all the business structures that had been applicable over many years, and which are not yet changed, for some time pending a determination of trial whether Ropax and Rio are precluded from buying fuel from any supplier other than the applicant. For such a relied the applicant relied on a construct that since Express had been enjoying exclusive rights to provide fuel to the retail entities of the group a tacit agreement existed that Express is the only wholesaler that should continue to supply fuel.

[15] Ropax, Rio, Grant and Price are opposing the application on the basis that since the owners of the entities in the group never sat down and agreed to the exclusive rights in favour of Express, the interim order must not be granted. What they do concede is that there is a need for the court to determine their disputes at a trial. It would appear that the fear entertained by the respondents is that an interim order will have the effect of "locking" Ropax and Rio into a situation where they should be bound by the price determined by a tacit agreement that has not yet been proved to exist.

[16] The relief sought being interdictory in nature, the requirement that a *prima facie* right exists must be proved by the applicant. It was submitted on behalf of the applicant that according to LTC Harms: *Amler's Precedents of Pleadings* (7ed) at 110 the party alleging a tacit contract must catalogue and prove the unequivocal conduct and circumstances from which the contract is to be inferred. The case law given to support these statements are: *Roberts Construction Company Ltd vs Dominion Earthworks (Pty) Ltd* 1968 (3) SA 225 (A) and *First National Bank of South Africa vs Richards Bay Taxi Centre (Pty) Ltd* [1992] 2 All SA 533 (N). For present purposes, the applicant does not need to establish on a preponderance of probabilities that such a contract is capable of being inferred from the proved facts. It must show that the facts *prima facie*, though open to some doubt, support

the existence of such a contract; there is a well-grounded apprehension of harm if the interim relief is not granted; the balance of convenience favours the granting of an interim interdict and that there is no other satisfactory remedy. See: *Setlogelo v Setlogelo* 1914 AD 221 at 227. Regard being had to the factual matrix of the matter, I am satisfied that a *prima facie* right has been proved. The establishment of the group entities, the institutional and financial structures created by the owners (original and subsequent); the commonality of share-holding in the entities; the inter-relatedness of the businesses (wholesaling and retail); the centrality of business in Express; and the earnings of dividends in Express point to the fact that the owners intended to operate their businesses and earn profits as if they were one person. A reversal of the *modus operandi* adopted and implemented for well over 18 years coupled with the dependence of Express upon the retail entities as a preferred pathway for bulk fuel distribution can, if terminated, lead to a demise of Express. In that event the stability of the entities, given the economic turbulence, can be compromised. In this case the existing win-win environment can very easily be blown out if Express's fuel distribution channels *vis-à-vis* the group retail entities is put to an abrupt end. In the absence of an alternative/solution having been found for alternative structures to serve post termination of supplies to the entities business harm is more likely, than not to strike. Liquidation against all the entities is a real possibility should the financial institutions not be able to realise the loan guarantees that have been given by Express on behalf of itself and the retail entities. In the circumstances inconvenience will be caused to Express should an interdict not be granted, and given that an alternative remedy is unavailable for Express. The hostilities being so heightened by the urge on the part of the respondents to implement their declared intentions of sourcing fuel from third parties, which Rio has begun, it is necessary to grant the relief as sought by the applicant.

[17] I was urged by counsel for the respondents to interprete the evidence by Cotterell that he and Price had intended to use the entities of the group for their convenience and benefit only at that time (before the introduction of new owners)

without binding future owners to a fused business approach in which Express will dictate terms to the retail entities. The case of *Spur Steak Ranches Ltd v Saddles Steak Ranch*, Claremont 1996 (3) SA 706 (C) was referred to in argument as support for the proposition that the applicant's allegations and evidence of the existence of an exclusive agreement of supply were rendered doubtful by the facts averred in the Cotterell's affidavit, and for that reason a finding must be made that the applicant has failed to establish a *prima facie* existence of a tacit exclusive supply agreement. I do not agree. A proper reading of the case is that the owners did not make an agreement and that the respondents have realised only recently that there is a need for the prevailing status *quo* of exclusive supplies of fuel by Express to be stopped. It is, with respect, not the case of the respondents that the conduct of the owners from the first day on which the group was established until November 2020 contradict the generally accepted method of exclusive supplies of fuel by Express. More than that, the respondents' papers are replete with correspondence in which an acknowledgement of the fact, at least *prima facie*, is made that Express had been the exclusive supplier of fuel without any objection. In my opinion the version proffered by the applicant in support of the claim of a tacit exclusive supply agreement is *prima facie* plausible. The process to be undertaken in order to terminate the tacit exclusive supply agreement should be the issue for determination at another forum. The same may be said about the question whether the granting of the relief sought will amount to locking the respondents into a contractual position that they do not want anymore.

[18] The determination of the issue whether the Court's decision in the exercise of discretion in favour of the applicant would be predicated on a restitutionary or specific performance pedestal need not detain the conclusion of the application on the issue now crying out for a speedy decision for the preservation of the status *quo* until final adjudication is completed at the trial in due course. As the interim court, I have to limit my decision on the basis of the four criteria/requisites for the interim interdict. That having been done, not more will be required except the determination of costs.

[19] On the consideration of all the facts of this matter the applicant have succeeded to make a case of urgency.

[20] Counsel for the applicant brought to the attention of the court that the respondents' affidavits was filed late, but without it haven been accompanied by an application for condonation. The Court must take a dim view of such conduct. In the circumstances. Grant and Price shall pay the costs of this application. But the main reason for which they should be mulcted with costs has to do with stopping Express from supplying fuel without recourse to a due process of law. Such an approach has generated litigation costs which, in my opinion, no other person should pay.

[21] In the result the following order shall issue:

1. **Pending the final determination of trial, which shall be instituted by the applicant within 30 days of this order, the first and second respondents are precluded from sourcing fuel from any supplier other than the applicant.**

2. **The third and fourth respondents shall pay the costs of this application jointly and severally, the one paying and the other being absolved from liability; and such costs shall be consequent upon the employment of two counsel.**

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Z. M. NHLANGULELA

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

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