REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 5434/2014

Delete whichever is not applicable

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

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In the matter between:

SHELL SOUTH AFRICA MARKETING (PTY) LTD **APPLICANT**

EXCLUSIVE ACCESS TRADING 431 (PTY) LTD **RESPONDENT**

JUDGMENT

ANDREWS, AJ

1. This is an application for an interdict against the respondent, interdicting several activities that arise out of a franchise agreement. The applicant also seeks an order that the respondent return certain assets to it, obtained in terms of the franchise agreement. Finally the applicant seeks an order that the respondent immediately vacate the premises at the corner of Malibongwe and Witkoppen Drives, Randburg, failing which the Sheriff is authorized and instructed to eject the respondent and all those occupying through it from the said premises.

2. This matter was heard on 1st and 4th September 2014. At the end of the first day of argument the parties were given an opportunity to file additional heads of argument on the issue of the purported termination of the franchise agreement, by the applicant.

3. The applicant sought an order in the following terms:

1. that the respondent be interdicted from:

1.1 operating a business as a retailer of petroleum products;

1.2 using the Shell retail franchise;

1.3 holding itself out in any way as a franchisee or agent of the applicant;

1.4 using in any way whatsoever any of the applicant's intellectual property;

1.5 selling, using, distributing, advertising or storing anywhere on or from the premises at the corner of Malibongwe and Witkoppen Drives, Randburg any product other than that supplied by the applicant;

1.6 passing off or representing goods and products not supplied to it by the applicant as being those of the applicant

1.7 making any Shell product with any other product or substance;

1.8 diluting, adding to or in any way altering the composition of any of the Shell products delivered to the respondent;

2. that the respondent shall forthwith return to the applicant:

2.1 all signs, advertising, publicity and promotional materials, stationary, invoices, forms, specifications, designs, records, data, samples, models, programs and drawings pertaining to or concerning the business or the Shell retail franchise or bearing any of the intellectual property as defined in the agreements between the parties;

2.2 all copies of the manuals as defined in the franchise agreement whether current or not;

2.3 all items of Shell equipment held on loan or hire from the applicant in the same good working order and repair, fair wear and tear excepted;

3. that the respondent shall immediately vacate the premises at the corner of Malibongwe and Witkoppen Drives, Randburg, failing which the Sheriff is authorised and instructed to eject the respondent and all those occupying through it from the said premises;

4. the respondent be ordered to pay the applicants costs on the attorney client scale.

Background

5. The following facts are common cause. The parties entered into an agreement on 29th June 2011, relating to the Velgro Garage in Randburg comprising a franchise agreement to which were attached several schedules, to be read together with the franchise agreement. In terms of the agreement the respondent was entitled to conduct the business of a fuel filling station, convenience store and restaurant, using the applicant's equipment, intellectual property and know how. The schedules included a property lease agreement (schedule 4), a petroleum products supply agreement (schedule 5) and other agreements. In terms of the property lease agreement applicant let the property to which this application relates to the respondent. The petroleum product supply agreement obliged the respondent to purchase the petroleum products which it sought to sell from the applicant.
6. The “premises” as defined in the franchise agreement is “the area forming part of the property currently utilised for the operation of the businesses (as defined in the franchise agreement) and being indicated on the sketch plan contained in Schedule 3 hereto together with all buildings and other improvements thereon at corner Malibongwe and Witkoppen Drive.”
7. On 14th august 2012 applicant advised the respondent by letter that it was cancelling the agreement for the operation of Velgro Garage. It advised that it would appoint a new retailer and the respondent would be notified of the date on

which it was required to vacate the premises. The reason for the termination was the alleged failure of the respondent to settle an outstanding entry fee of R2 300 000.This alleged obligation did not appear in the franchise agreement read together with its schedules. Subsequent to the letter, various discussions were held between the parties in order to resolve the dispute that surrounded their business relationship but on 26th September 2013 the applicant advised the respondent that it intended to persist with the termination of the contract and demanded that the respondent vacate the premises by no later than 27th September 2013. The applicant stopped supplying the respondent with fuel on 23rd September 2013. The respondent disputes that termination was lawful.

8. The applicant alleges that on 1st October 2013 through remote electronic monitoring of the respondent's fuel tanks it established that the respondent was filling its tanks with fuel supplied by a third party in contravention of its agreements with the applicant. On 3rdand 4thOctober 2013 applicant's attorneys sent letters to the respondent asking them for an undertaking to refrain from purchasing fuel or related products to be sold at the Shell Select store at the Velro Garage from any unauthorised suppliant.
9. The respondent's attorneys replied demanding that the fuel supply be restored by the applicant, and threatening legal action. No undertaking to refrain from purchasing fuel from third parties was forthcoming. The respondent also advised the applicant by letter from its attorneys that it refused to surrender the business to the applicant and stated that it was agreeable pending the resolution of the dispute to continue procuring fuel from the applicant. The applicant did not continue to supply fuel and the respondent continued to sell fuel, procured elsewhere, from the garage.
10. The respondent alleged that on 15th November 2013, staff of the applicant endeavoured to unlawfully close down the station by locking the pumps. After the respondent had communicated the attempted spoliation to the applicant through its attorneys the applicant intervened and caused the operation to be halted.
11. The application was launched on 18th February 2014. The respondent has *inter alia* disputed the lawfulness of the termination of the agreement and has raised constitutional arguments disputing that the applicant has possessory rights which entitle it to evict the respondent. A constitutional challenge aimed at declaring the business model used by the applicant and other petroleum products

wholesalers as being unconstitutional was refused by the Constitutional Court on 14th November 2013.

The interdict

12. In terms of the petroleum product supply agreement, the respondent undertook that it would not:
    a. pass off or represent goods and products not supplied to it by the applicant pursuant to the petroleum product supply agreement as being applicant's products (clause 8.1);
    b. mix any of the applicant's products with any other product or substance, and dilute, add to or in any way alter the composition of any of the applicant's products, delivered to respondent(clause 8.2);
    c. adulterate, contaminate to incorrectly label any of the applicant's products (clause 8.4);
    d. sell or deliver any of the applicant's products which the applicant knows or reasonably suspects are contaminated, adulterated or as incorrectly labelled (clause 8.5);
    e. sell the applicants products in any other than the authorized packaging (clause 8.6);
13. This agreement also required the respondent to purchase all its petroleum fuel requirements and any other products comprising applicant products from the applicant or its nominee and from no other source of supply. (Clause 11.1)
14. The applicant averred that based on computer generated information regarding the respondent's fuel tanks measured on 1 October 2013 and the fact that it no longer supplied the respondent with fuel, it could be concluded that the respondent had obtained fuel supplies from a third party in direct contravention of its agreement with the applicant. It submitted that petroleum products are highly inflammable substances and if not manufactured and used carefully constitute severe incendiary hazards to people and property. Inferior petroleum products also damaged engines in which they are used. It stated that the applicant could suffer incalculable loss if it were to be held liable for petroleum products sold from its branded premises if such products were to cause damage to persons or property.

15. The applicant also stated that the petroleum products sold by it are unique to it since it adds various unique additives to its products. It stated that for obvious reasons it guards its brand jealously and is fastidious about the petroleum products that are sold under its brand name. Insofar as the business being conducted by the respondent is on premises that are branded with the applicant's branding the public at large will with good reason conclude that the petroleum products produced by the business had been supplied by the applicant. If substandard petroleum products are sold to the public, applicant's the brand could suffer incalculable and irreparable harm.
16. The respondent replied that the applicant had, unilaterally and without signalling its intent, failed to make delivery of fuel due on the 3rd and 4th October 2014. In general the respondent did not deal with the applicant's factual averments in the customary manner, but made general submissions in its answering affidavit. In argument, it referred to founding affidavit in an application brought by it and others in the Constitutional Court.[1] The deponent, an attorney, had made submissions in paragraph 3.7.4 thereof that all fuel sold in South Africa was manufactured locally and is of the same quality, hence no prejudice could be suffered by the respondent as a result of the sale of fuel sourced elsewhere than from the applicant. These submissions are not of an expert nature but even if they are, they cannot form the basis of an argument that the respondent could never have sold adulterated fuel to the public. The prohibited conduct includes mixing and diluting of products as well as selling fuel sourced from third parties and could be transgressed by the mixing or diluting of fuel sourced locally.
17. The respondent has advanced no defence to the claim that it is unlawfully selling petroleum products under the applicant's brand name which it has acquired from other parties and that in so doing it is misleading the public into believing that the fuel supplied by it at Velro Garage is supplied by the applicant. The respondent avers that the agreement has not been validly cancelled in which case this is conduct which is in breach of the clause 8 of the petroleum products supply agreement. In the case of disputes arising between the parties in relation to matters connected with the agreement and its schedules the parties agreed in terms of section 31.1 of the franchise agreement to refer such disputes to

[1]Gundu Service Station CC and others versus Engen Petroleum Limited and 15 others. CCT 134/13

arbitration. The respondent has failed to do so and instead has sought to procure fuel from elsewhere while still running a service station bearing the applicant's brand name.

18. As stated in *Setlogelo v Setlogelo*1914 AD 221 at 227:

> "The requirements for an interdict are well known, a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy."

The applicant has established a clear right based on contract and its right to protect its intellectual property, actual and reasonably apprehended invasion of that right, and the absence of similar protection by any other ordinary remedy. Accordingly the requirements for an interdict relating to the sale of the applicant's products from the premises have been met and I am willing to grant the relief prayed for in this regard.

Possessory rights of the applicant

19. The respondent in its heads of argument submitted that with the advent of Act 58 of 2003 which came into operation on 17 March 2006, the Petroleum Products Act 120 of 1977 has been fundamentally changed. In accordance with the new definitions of "hold" in respect of land on which the retail filling station is to be located, read with the definition of "retail", "outlet", "retail license" and "site" read with section 2A (1)(c) and read with section 2A (4)(b) the only person who may have possessory rights over land on which the retail operation exists is the land owner provided it has been issued with a "site license" and the only exception to this is the proprietor (under section 2A(4)(c) read with section 2A(1)(d) of the retail business to whom the retail rights under the retail license must be granted.) The two licenses have to be issued conjointly – Reg(2) and R286 of the 27th March 2006, read with section 2B(3)(c) and 2B(4). The validity of the site license is dependent on the ongoing validity of the retail license – section 2B(3)(c). Counsel for the respondent argued that the upshot of the aforegoing is that other than these two entities i.e. the owner of the land and the owner of the retail business, no one in the Republic can possibly legally have possessory rights over the land on which the retail site exists. Accordingly no right of action for eviction can legally exist in the hands of applicant, who does not allege to be the owner of

the land or holder of the site license. The applicant disputed the relevance of these contentions to the application.

20. Substantially the same arguments were raised previously in two matters before this court and found to be without merit, namely in *Engen Petroleum and Gundu Services Station*, case number 16333/12, and *Engen Petroleum Ltd and Mighty Solutions CC T/A Orlando Service Station* case number 16333/12 20344/13. I can find no reason to differ from the analysis and conclusions contained in these judgments.
21. Section 2A(1) prohibits a property owner from establishing a site zoned and approved for retailing petroleum products without a site licence and similarly prohibits a person from retailing petroleum products without a licence. Section 2A(4) requires an applicant for a site licences under 2A(1) to be the owner of the property concerned. In the case of a retail licence the person applying must be the owner of business concerned.
22. I fail to see how these provisions have the result argued by counsel for the respondent, that no one other than the owner of the land and the owner of the retail business can possibly legally have possessory rights over the land on which a retail site exits. The owner who acquires a site licence and develops a site would surely be entitled, for example, to employ the services of an intermediary who performs management functions under a sublease agreement, and where such intermediary in turn leases the premises to the retailer. The argument that the applicant does not have possessory rights over the premises concerned is without merit.

Cancellation of the agreement and eviction

23. The Applicant argued that the Respondent is in unlawful possession of the property leased to it in terms of the agreement, based on the fact that the lease agreement has been cancelled and/or the entire agreement has run its course. On this basis it is entitled to an order for the eviction of the respondent and the return of its products. This, it argued is evident from one or more of the following events:
    a. the termination date in paragraph 1 of the franchise agreement being 31st March 2014; and/or

b. the cancellation of the agreement as evidenced in the applicant's letters of 14th August 2012 and or/or 4thOctober 2013;
c. if neither of the above, cancellation is effected by the notice of motion in the present case.

Termination by effluxion of time

24. The applicant averred that the franchise agreement together with the other agreements and the property lease agreement had been cancelled on 14th August 2012 as a result of the respondent's breach of contract in not paying at least R1,653 million in "key money" a concept not referred to in the agreement. In its replying affidavit, dated 14th April 2014 the applicant also stated that the contract had by this time come to an end by virtue of the termination date, which it averred was the 31st March 2014. The first issue for determination is the date of termination of the contract, in the ordinary course by effluxion of time.
25. The franchise agreement defines the "end date" in the definitions section as follows:
    a. "means subject to clause 6 below is the date on which this agreement will expire, being 31 March 2014. (ie 3 years from the Commencement Date)."
    b. "commencement date" is defined in the definitions clause of the agreement as "the first day of the month following the date of last signature hereof or the date that the franchisee obtains a retail licence to operate the business from the Department of Energy of the government of South Africa or such party succeeds to its functions whichever occurs last." The retail licence was obtained on 28th November 2011. The last date of signature was on 29th June 2011.
    c. clause 6.1 states "this agreement shall commence on the commencement date and, unless terminated earlier in terms of this agreement, shall endure for an initial period of three years subject to the provisions of clause 6.2 and 6.3 below." (emphasis added)

26. The date 31st March 2014, which is inserted in the definition of "end date" is an agreed earlier date for termination of the contract by the parties, and therefore excludes other later dates. The agreement therefore terminated on that date if it

had not been lawfully terminated before that. Reliance by the applicant on the averment that the contract had terminated in the interim after this application had been launched, amounts to a new basis on which to claim the relief sought.The respondent argued that the Uniform Rules of the High Court require the application to stand or fall by the averments in its founding papers, and that since the date of termination of the contract, though the effluxion of time, had not yet come to pass when the application was launched reliance could not be placed on it. The respondent also disputed that 31st March 2014 was the date of termination of the agreement arguing that it could be interpreted to mean that the end date was much later.

27. Under rule 6(5)(e) of the Uniform Rules, the general rule, as stated in *Erasmus Superior Court Practice*[2], regarding factual matter introduced for the first time in a replying affidavit is that:

> "all the necessary allegations upon which the applicant relies must appear in his or her founding affidavits as he or she will not generally be allowed to supplement the affidavits by adducing supporting facts in a replying affidavit. This is however not an absolute rule for the court has discretion to allow new matter in a replying affidavit giving the respondent the opportunity to deal with his in a second set of replying affidavits. Thus a distinction must be drawn between a case in which the new material is first brought to light by the applicant who knew of it at the time when his or her founding affidavit was prepared and a case in which facts alleged in the respondent's answering affidavit reveal the existence or a possible existence of the further ground of relief sought by the applicant. In the latter type of case the court would obviously more readily allow an applicant in his or her replying affidavit to utilize and enlarge upon what has been revealed by the respondent and to set up such additional ground for relief as might arise there from. The court will not allow the introduction of new material if the new material sought to be introduced amounts to an abandonment of the existing claim and the substitution therefore of a fresh and completely different claim based on a different cause of action. Nor will the court permit an application to be made in a case where no case at all was made out in the original application."

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[2]*Superior Court Practice - Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the Supreme Court of South Africa* service 45, 2014 B1-45

28. In the present case the applicant seeks to rely on information that it knew would come to pass a month after it launched the application, namely the date of termination of the contract by the effluxion of time. In the face of the respondent's challenge to the lawfulness of its termination of the contract in 2012, the applicant has sought to bolster its case relying on new grounds for the first time in its replying affidavit. A basis has not been set out as to why a departure from the rules in this instance would be justifiable or desirable and accordingly the respondent's objection is upheld. An applicant who wishes to rely on a fresh cause of action set out in its replying affidavit should indicate its intention to do so and invite the respondent to deal with it, and should seek the leave of the court to rely on such cause of action, at the hearing of the application. This creates certainty and fairness in the conduct of litigation.
29. The argument that the contract terminated by effluxion of time and that the applicant is entitled to rely on this for the relief sought therefore fails.

Cancellation due to breaches of contract

a. The Applicant argued that the Respondent is in unlawful possession based on the fact that the lease agreement has been cancelled as evidenced in the applicants letters of 2012 and/or 4th October 2013.
b. If neither of the above, cancellation is effected by the notice of motion in the present case.

Cancellation in terms of the letter of 14 August 2012

30. Counsel for the respondent argued that no case has been made out as to any conduct of the respondent which might be classified as a breach of any of the contracts which the applicant says it cancelled. Further that the founding affidavit gave no explanation as to when the cancellation had taken place.
31. The letter of 14 August 2012 purported to terminate the franchise agreement based on conduct of the respondent that had arisen in the context of a separate agreement that is not before me and was not indicated to be part of the franchise agreement. The respondent's answering affidavit disputed that there had been a lawful cancellation of the franchise agreement, and advanced certain facts in reply to the applicant's averments.

32. Paragraph 29 of the franchise agreement states that it "constitutes the entire agreement between the parties and supersedes all previous oral or written understanding or agreement/s of any kind relating to the business, the premises or the subject matter hereof." Breaches of the franchise agreement are defined in detail in clause 14. They do not refer to breaches of other agreements extraneous to it.
33. In light of these facts and the respondent's denial of the lawfulness of the cancellation it is not possible for me to determine on the papers that the letter of 2012 lawfully cancelled the agreement.
34. The applicant's counsel contended that the respondent, in paragraph 10 of its answering affidavit had alleged that the franchise agreement was invalid and unenforceable and relying on this, contended that as a result the respondent has no right to be in occupation of the premises or to conduct its business in the applicant's getup. I have considered this paragraph and it is ambiguously worded, but does not convey the view as contended for by the applicant.

Cancellation in terms of the letter of 4th October 2013

35. The applicant's founding affidavit alleged that the respondent had breached the agreement by passing off fuel sourced elsewhere, as being that of the applicant, and that despite demand the respondent had refused to refrain from this conduct. It annexed a copy of the demand dated 3rd October 2013 and the respondent's refusal to comply with this request. Furthermore it stated that the agreement had been cancelled. The respondent did not remedy this breach, nor deny it in its answering affidavit and in fact annexed several letters from the applicant thereto which show that the breach was brought to its attention, but not rectified. These letters, state that the applicant regards the said conduct as unlawful and reiterate that the franchise agreement is in dispute or has been terminated and the continued occupation of the premises as unlawful. (see letters of 4th and 9th October and 15th November annexed to the respondent's answering affidavit). As stated previously the answering affidavit did not address the applicant's averments *seriatim* making it unclear which facts the respondent intended to put in dispute.
36. If the contract had not been terminated lawfully before 3rd October, this breach was a basis for lawful termination on the 4th October 2013, as will be set out more

fully hereunder. There is thus no substance to the respondent's argument that the applicant failed to prove any breach of contract, which could have provided a basis for lawful termination of the contract.

37. The letter of 3rd October 2013 relates to conduct defined in terms of section 8 of the petroleum products supply agreement. The letter states that the respondent's current occupation is disputed and that:

> "this notwithstanding any purchase of any fuel or related items from any un authorised supplier is unlawful. To this end please would you supply us with an undertaking that no fuel or related products or items to be sold at the Shell Select store, will be purchased from any unauthorised reseller at any stage and under any circumstances."

The letter gave 12 hour's notice to the respondent to refrain from the conduct concerned. The respondent refused to do so. On the 4th October 2013 the applicant reiterated the demand and the fact that the respondent's occupation was disputed.

38. Counsel for the applicant, referring to the judgment in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (3) SA 503, argued that the letter of 4th October's reference to the fact that the respondent's occupation is disputed, if seen in context, can only be a reference to previous correspondence cancelling the contract, and is an indication that the applicant persisted in the intention to cancel the contract.

As stated in by Wallis JA, in this judgment at paragraph 18.

> "Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The

process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document."

39. Reading the letter of 4th October 2013 in the context of the applicant's previous correspondence with the respondent, which purports to cancel the franchise agreement leads me to conclude that this letter intended to reiterate that the agreement had been cancelled. A premature act of rescission of contract will be effective if, when the proper time for rescinding the contract arises, the innocent party makes it clear by words or conduct that he or she persists in the intention to put an end to the contract. (*LAWSA volume 5: Contract*, paragraph 500). See also *Chesterfield Investments (Pty) Ltd v Venter* [1972] 1 All SA 398 (W) at 406, where Viljoen, J stated:

    "The original cancellation may be premature and of no force or effect, but if, at the date on which the seller is entitled to cancel, he evinces an attitude that the contract has been cancelled, I do not think it matters whether he relies on the original premature cancellation or on a fresh cancellation, save, maybe, if the date upon which his case of action arose becomes important."

    The letter of 4th October 2013, drafted by the applicant's attorneys, clearly evinces an attitude that the applicant persisted in the intention to end the contract.

40. The applicant averred in its founding affidavit that the respondent is prohibited from purchasing petroleum products from any other supplier as a result of its contract with the applicant, as well as from the fact that its licence to purchase such products requires that it purchases petroleum products from the applicant. The letter of 3rd October indicates that the respondent is acting in contravention of section 8 of the agreement and that such conduct is also unlawful. The applicant's founding affidavit referred to clause 16.1.1 which entitled the applicant to summarily cancel petroleum products supply agreement under certain circumstances. It states:

    "Notwithstanding anything to the contrary contained in this agreement Shell may at any time by delivering written notice to that effect to the Franchisee terminate this agreement if :

16.1.1 Shell believes that the continued implementation thereof would contravene any law or directive issued by any competent authority."

41. Cclause 14.1.8 of the franchise agreement states that should any of the schedules to this agreement terminate because of a breach thereof by the franchisee the applicant shall immediately be entitled to cancel the agreement in terms of clause 14.1.10 (c) on written notice to the franchisee signed by the relevant district manager or person with similar authority

41. On 4th October the applicant conveyed to the respondent that it persisted in its intention to cancel the contract, as discussed above. It was entitled to cancel the petroleum products supply agreement in terms of paragraph 16 thereof and immediately cancel the franchise agreement in terms of Clause 14.1.10 (c) thereof. This letter thus constitutes lawful cancellation of the franchise agreement and its schedules. The respondent cannot dispute that continued statements made by the applicant after this date, which are attached to its replying affidavit are anything other than confirmation of the cancellation of the franchise agreement.

42. Clause 15.2.10 of the property lease agreement requires the respondent to immediately vacate the premises upon termination of the franchise agreement. Clause 15.2.2 of the franchise agreement requires the respondent to immediately cease to operate the business and to use the applicant's retail franchise on termination of the franchise agreement.

    Clause 15.2.4 of the franchise agreement requires the respondent to return to the applicant or destroy assets listed as pertaining to the Business of Shell Retail Franchise. Clause 15 and clause 27 of the franchise agreement require the respondent to immediately cease to use the applicant's intellectual property and to return the applicant's assets, supplied under the agreement.

43. It is not disputed that the applicant was the lessor and that the premises were leased by it to the respondent in terms of the franchise agreement, and that in terms of clause 4.2 thereof no tenancy rights were created by the franchise agreement save insofar as the property lease agreement may have done so. It is also common cause that the respondent has refused to vacate the premises and to hand to over the applicant's assets to it.

44. The facts stated by the respondent together with the facts contained in the applicant's affidavits which are admitted or have not been denied, show that there can be no doubt that the applicant had indicated its intention to persist in the cancellation of the agreement and had repeatedly done so after failing to secure the respondents co-operation in not passing off fuel sourced elsewhere. Sufficient facts have been deposed to for the order sought by the applicant to be made (See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)).

The notice of motion

45. In the light of the above it is not necessary to consider whether the notice of motion constitutes notice of cancellation of the agreement.

Costs

46. The applicant prays for an order of costs on the scale as between attorney and client. The agreements do not make provision for costs on this scale. The respondent's answering affidavit and heads of argument in this matter contain several references to the applicant in intemperate, abusive and vexatious language, referring to it as *inter alia* foolish, stupid, shameless, arrogant, and as "an organisation systematically committed to on-going criminal conduct including blackmail, coercion and defeating the ends of justice and violations of the Competition Act". Counsel for the applicant raised strenuous objection to this conduct, in heads of argument and in his address to court, stating that such conduct cannot be countenanced, as litigants are not free to use intemperate language in court proceedings. No facts have been tendered by the respondent to substantiate or justify the use of unfounded, scurrilous allegations and derogatory language. The applicant asked that the relief sought in the notice of motion be granted with costs on a punitive scale.
47. The respondent also sought a costs order "both on an attorney and client scale as well as jointly and severally with the applicant, *de bonis propriis* against all the registered directors of the applicant and all officials who have signed letters in annexures hereto on behalf of the applicant."
48. Notwithstanding the applicant's complaint, counsel for the respondent continued to use intemperate language in supplementary heads of arguments, referring to

applicant's arguments as "wholly cock eyed" and its conduct as "abject, obstinate and petulant" without any justification. This is language that undermines the dignity of proceedings in the High Court, and cannot be tolerated. Many of these statements were made in heads of argument, although some do appear in the respondent's answering affidavit. am reluctant to punish the respondent for the misdemeanours of its legal representatives, as it appears to have been acting on their advice following actions which were admitted to have constituted attempted spoliation by the applicant.

49. As an indication of my disapproval of the conduct of the respondent's legal representatives, the respondent's attorneys are ordered to pay the costs of the applicant's counsel for the second day of hearing herein *de bonis propriis*.

I make the following order:

a. That the respondent is interdicted from
    1. operating a business as a retailer of petroleum products;
    2. using the Shell Retail Franchise;
    3. holding itself out in any way as a franchisee or agent of the applicant;
    4. using in any way whatsoever any of the applicant's intellectual property;
    5. sellng, using, distributing, advertising or storing anywhere on or from the premises at the corner of Malibongwe and Witkoppen Drives, Randburg any product other than that supplied by the applicant;
    6. passing off or representing goods and products not supplied to it by the applicant as being those of the applicant;
    7. making any Shell product with any other product or substance;
    8. diluting, adding to or in any way altering the composition of any of the Shell products delivered to the respondent.

b. that the respondent shall forthwith return to the applicant:

2.1 all signs, advertising, publicity and promotional materials, stationary, invoices, forms, specifications, designs, records, data,

samples, models, programs and drawings pertaining to or concerning the business or the Shell Retail Franchise or bearing any of the intellectual property as defined in the agreements between the parties;

2.2 all copies of the manuals as defined in the franchise agreement whether current or not;

2.3 all items of Shell equipment held on loan or hire from the applicant in the same good working order and repair, fair wear and tear excepted

c. that the respondent shall within 15 days of date of this judgment vacate the premises at the corner of Malibongwe and Witkoppen Drives, Randburg, failing which the Sheriff is authorised and instructed to eject the respondent and all those occupying through it from the said premises.

d. the respondent is ordered to pay the applicant's costs on the scale as between party and party. The respondent's attorneys are ordered to pay the costs of applicant's counsel for 4th September 2014, being the second day of hearing herein on the scale de *bonis propriis*.

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A ANDREWS
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION,
JOHANNESBURG

DATE HEARD : 4th September 2014

DATE DELIVERED : 28 October 2014

For the Plaintiff : Adv Hitchings

Instructed by : Cliffe Decker Hofmeyer Inc.

For the Defendant : Adv Savvas

Instructed by : Venn & Muller Attorneys