

IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE

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

DATE

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SIGNATURE

In the matters between:

Case No 11660/2015

EASI GAS (PTY) LIMITED

APPLICANT

And

GAS GIANT CC t/an INDEPENDENT GAS

FIRST RESPONDENT

GROENEWALD, BERNARDUS HERMANUS

SECOND RESPONDENT

Case No 11656/2015

ORYX OIL SOUTH AFRICA (PTY) LIMITED

APPLICANT

And

GAS GIANT CC t/a INDEPENDENT GAS

FIRST RESPONDENT

GROENEWALD, BERNARDUS HERMANUS

SECOND RESPONDENT

JUDGMENT

FRANCIS, AJ:

- [1] On 15 April 2015 interim interdicts and ancillary relief sought on an *ex parte* basis in Part A of the notice of motion was granted in each of the matters with immediate effect. I deal with both matters in this judgment where the final interdict and ancillary relief sought in Part B of the notice of motion is consolidated in one judgment.
- [2] The respondents, their servants and employees were interdicted and restrained from filling or distributing any liquefied petroleum gas (LPG) in cylinders which was the property of the applicant and or to which the applicant have a lawful claim and which bear the applicant's brand names and logo 'Easigas', 'Oryx' and 'BP' (the applicants cylinders).

- [3] The issues for adjudication are whether the applicants have satisfied the requirement for the granting of a declaratory order and the final interdicts sought. In both matters the applicant sought relief against the respective respondents aimed at preventing the respondents from acting unlawfully and from using the applicant's property without its permission. The ownership of the gas cylinders is central to this determination. The next issue is whether any case has been made out against the second respondent in his private capacity. And the final issue for determination is whether the applicants' conduct constitutes a contravention of the provisions of the Competitions Act 89 of 1998.
- [4] The declaratory order and final interdicts sought are contested and opposed on the basis that the applicant has not proved that it is the owner of each of the cylinders inventoried, attached and containing a unique serial number. If the applicant fails to prove its alleged ownership of each of the gas cylinders concerned and that the first respondent conducts itself and or operates its business in contravention of the applicant's alleged rights and or statutory prohibitions the applicant cannot be entitled to the declaratory order and the final interdicts sought.
- [5] The applicant's complaint is that it has purchased large quantities of gas cylinders at considerable cost to it and in order to obtain a return on its capital investment, the applicant expects to sell its LPG in its cylinders. It is common cause that new cylinders, unfilled with LPG, excluding vat have a landing cost of approximately R271.57 for a 9kg cylinder; R434.49 for a 14kg or 19kg cylinder; R752.53 for a single-value 48kg cylinder; and R 995.57 for a double-value 48kg cylinder. The applicant expects and wants to ensure the return of its cylinders from time to time by way of the exchange practice. Its ability to service the market depends on an adequate stock of cylinders being circulated by any of its authorized gas distributors or suppliers. The need for its cylinders to remain in

circulation in the market and for it to have the ability to regain possession of its empty cylinders, to inspect, refill and re-introduce them into the market is the purpose for the relief sought.

- [6] The exchange system operates in a manner in which a customer may return an empty cylinder (A) to a supplier (Easigas) of LPG and receive her standard deposit or replace the empty cylinder for a full cylinder (B) and pay only for the LPG. The deposit for a cylinder is standard in the industry and is presently R150.00 excluding VAT, irrespective of the size of the cylinder. The empty cylinder (A) returned to the supplier, if it is a cylinder belonging to another supplier (Oryx), will be returned to that supplier for exchange of its own branded cylinder or the standard deposit of R150.00 will be received. A supplier (Easigas) may only refill its own cylinders or refill cylinders belonging to other suppliers who have authorized by agreement to refill and distribute its cylinders. The refilled cylinder (A) will be distributed to another customer and similarly be exchanged repeatedly in the LPG market.
- [7] The applicant encounters the on-going problem that unauthorized suppliers such as the first respondent retain and utilize cylinders belonging to the applicant to refill and sell their LPG in the market. Where suppliers unlawfully make use of the applicants' cylinders to sell their LPG, the applicant experiences a shortage of cylinders with which to supply its customers. This alleged unauthorized conduct also deprives the applicant of the commercial and economic benefit from cylinders which it has, as owner of the cylinders supplied into the market. As a result unauthorized suppliers do not incur the costs of providing their own cylinders they are able to undercut legitimately operating suppliers and distributors.

- [8] It is common cause that the first respondent does not have a participatory or distribution agreement with the applicant. The applicant's evidence is that the first respondent is conducting a substantial LPG distribution business using cylinders belonging to the applicant, bearing its branding and without its permission. On the basis that the applicant faces competition from competitors in the LPG industry it is entitled to prevent unauthorized parties such as the first respondent to sell its own LPG using the applicant's cylinders. The LPG price is regulated by statute. This has the result that suppliers and distributors may compete only on service.

Ownership

- [9] It is trite that the applicant must establish a clear right of its alleged ownership of the cylinders concerned. Each of the gas cylinders is identifiable by means of a unique serial number, specific brand name and logo. The respondents argue that the applicant lacks ownership by virtue of there being more than one category of cylinder in circulation in the market. They submit that there are four different categories of cylinders in the market namely:-

[9.1] in the first category there are cylinders bearing the name and logo of the applicant that was 'purchased' by the respondent from an authorized distributor of the applicant;

[9.2] the second category refers to cylinders received from the applicant's authorized distributor;

[9.3] in the third category are cylinders received from members of the public (the end user); and

[9.4] the fourth category does not fall within any of the other categories.

- [10] Our courts have over the years recognized the existence of the reservation of ownership in LRP cylinders, the deposit system and the trade practice more specifically the exchange system. See *Mobil Oil Southern Africa (Pty) Ltd v Afrox Ltd* 1983 (1) SA 649 (C); *Tolgaz (SA)(Pty) Ltd v Solgas (Pty) Ltd and Another; Easigas (Pty) Ltd v Solgas (Pty) Ltd* 2009 (4) SA 37 (W), *BP Southern Africa (Pty) Limited & Nfrosoft CC and Others* (unreported case no 47010/2012 of South Gauteng High Court) (BP).
- [11] The respondent argues that the precedent set in the *Tolgaz* decision referred to the cylinders in the third category only. The facts in the present matter are fundamentally distinguishable from those in *Tolgaz* as it refers to cylinders in three more categories than that considered in *Tolgaz*. I turn to consider these other categories on the question of the applicant's vested ownership of the cylinders.
- [12] It is not in dispute that more than half of the cylinders found on the premises of the first respondent and attached by the sheriff in terms of the interim interdict were found to be legally obtained from a distributor nominated by the applicant. These are the cylinders that fall within the first category as described by the respondents.
- [13] In this respect the respondent submitted annexures G3.1 to G3.25 which are invoices for purchase of filled gas cylinders bearing the colours, logo and originally branded seals of Easigas, which it legally purchased. Annexures G4.1 to G4.7 are invoices reflecting the purchase of Oryx gas cylinders that the first respondent legally purchased from Oryx's nominated distributor. The number of Oryx gas cylinders referred to in annexures G4.1 to G4.7 exceeds the number of Oryx gas cylinders found at the first respondent's premises. In respect of all of

these cylinders the applicant concedes that the cylinders should not have been attached and removed and further that these cylinders be released from attachment and returned to the first respondent.

- [14] The crisp question remains whether the applicant or the first respondent is the owner of the cylinders falling in the first category? The first respondent contends that it has been purchasing filled cylinders from the applicant's distributors for years which have the original branded seals of the applicant. Despite the notice on the cylinder that it remains the property of the applicant the evidence of the first respondent is a legal distributor of the applicant has 'sold' cylinders to the first respondent for the purchase price of 285.00 per cylinder. The respondent relies on annexure G3.13 which refers to a tax invoice detailing a unit price of 285.00 for a 9kg Easigaz cylinder. The same unit price of 285.00 is charged for a 19kg cylinder, and similarly for a 48 kg S/V cylinder. The price charged excludes the charge for the LPG contained in the cylinder. A separate price is charged for the LPG.
- [15] The unit price charge of 285.00 is not claimed to be the standard deposit amount. The applicant does not dispute the unit price of 285.00 being a purchase price of the cylinder but counsel argues that where an authorized distributor sells its cylinders with LPG it does not result in ownership passing. Although no further explanation is offered for the said charge, it is noteworthy that the cylinders 'purchased' contained LPG and was not empty.
- [16] In *Tolgaz* it was accepted that major suppliers, *did not sell its cylinders to others* and it was the practice that empty cylinders once received by a supplier or distributor was returned to the owner.(my emphasis) For this reason it was held that ownership of the cylinders was retained by the applicant. The basis of the

respondent's defence is that all suppliers of LPG in practice lose their ownership of gas cylinders concerned after introduction thereof into the market. Ownership passes many times during the lifespan of a gas cylinder.

- [17] In particular ownership in a movable thing passes to another where the owner delivers it to another with the intention of transferring ownership to him and such intention may be proved in various ways: *Trust Bank van Afrika Bpk v Western Bank bpk en Andere NNo* 1978 (4) SA 281 (A) at 302, *Cape Explosive Works Ltd and Another v Denel (Pty) Ltd and Others* 2001 (3) SA 569 (SCA). The respondents' content that one of the ways in which ownership passes is the applicant loses total control over each of the gas cylinders introduced by itself into the market. It does not keep records of serial numbers of its cylinders and to whom the cylinders have been supplied to. The respondents contend that this lack of the applicant's exercise of rights of ownership results in transfer of ownership or alternatively in the abandonment of ownership.
- [18] To abandon moveable property, the intention of the owner to abandon the said property must be present. See *Meintjes v Coetzer* 2010 (5) SA 186 (SCA) and *Minister van Landbou v Sonnendecker* 1979 (2) SA 944 (A) at 946 H. To effect transfer of ownership the subjective intention of the owner to transfer is required also - see *Legator Mckenna Inc and Another v Shea and Others* 2010(1) SA 35 (SCA). Similarly in *Dreyer and Another NNO v AXZS Industries (Pty) Ltd* 2006 (5) SA 548 (SCA), the court held that without the intention to pass ownership, ownership of movables passing by delivery did not pass. Intention will remain the crucial factor for transfer or abandonment of ownership. It follows that the applicant has persisted that it had and/or have no intention to transfer or abandon its ownership. Moreover the applicant has taken steps to identify its property with specific branding, logos, colours, and a visible notification on the cylinder of reservation of ownership which identifies its property specifically and

its vested ownership. I accept the argument of the applicant that the transaction is not a sale or an alienation of the cylinder into the market but can be aptly described as an 'agreement of use' to enable it to supply and sell LPG in the market.

- [19] Regulations and safety standards prescribe the giving of permission by an owner of a cylinder in writing except where the cylinder is owned by the end user to entitle another to refilling and distributing its cylinders. Sections 42 read with 43 of the Occupational Health and Safety Act 85 of 1993, incorporate Safety Standard 9.5 of SANS 10019 of the Code of Practice of the South African Bureau of Standards, which reads:-

...'(d) permission to fill the container has been granted by the owner of the container, in writing, except where the cylinder is owned by the end user. This requirement is for safety reasons, since the cylinder containment history is an essential reference for correct filling.'

- [20] These regulations and safety standards impose rigid conditions on the service and maintenance of LPG cylinders which must be carried out on each and every occasion when a cylinder is refilled. There is a duty to ensure that all cylinders, including their fittings are on their return to owners, visually inspected and checked for damage or corrosion. Defective ones are repaired or discarded. The exchange practice allows end users to purchase LPG without costs of purchasing cylinders and the responsibility of maintaining them and ensuring they remain safe for use. The regulations and the applicable safety standards prohibit the unauthorised filling of the LPG cylinders. It requires the express authority of the owner to refill the cylinder as confirmed in *Tolgaz*. The safety measures as prescribed are well founded to ensure the protection from the dangers inherent in the use thereof and places the duty legally upon owners of cylinders, specifically distinguishing between ownership by a primary supplier and an end user. The

duty exclusively placed on an owner who is a supplier arises from the recognition of its vested ownership of the cylinders supplied in the LPG market. It follows therefore, in my view that in the first category as described by the respondents', ownership of the cylinders continues to vest in the applicant.

- [21] Referring to the third category of cylinders the first respondent justifies its conduct by maintaining that it and its customers have always regarded the customer as the end user of a specific gas cylinder, who is not only entitled to give same in exchange for a filled gas cylinder, but is also entitled to fill it where authorized. Once the pre-filled gas cylinder is exchanged for an empty gas cylinder, the first respondent becomes the common law owner of the empty cylinder by virtue of exchange or transfer and is thereafter permitted as owner to fill the gas cylinder. Although this category of cylinders obtained from the end user was considered in *Tolgaz*, the issue of transfer of ownership was not. However, for reasons I have set out earlier, irrespective of whether the end user had the intention of acquiring ownership (as supported by affidavits of two end users), ownership will pass when the original owner intends to relinquish ownership. Above all ownership was not relinquished by the applicant and therefore it could not be acquired by the end user or subsequently by the first respondent.
- [22] The second category of cylinders which the first respondent received from the applicant's authorized distributor relates to the trade practice. The trade practice envisages the exchange, refilling and distribution of cylinders. The first respondent calls into question the exchange system that the practice that exists is not uniformly observed, not reasonable, not certain and there is no control over the gas cylinders. The respondent's evidence is that the applicant (Oryx) a party to the exchange agreement acts in contravention of the agreement by exchanging gas cylinders of the other wholesaler suppliers with the first

respondent in exchange for empty cylinders of Oryx. Instead, these empty cylinders should have been given to Easigas and not to the first respondent. Therefore they describe the exchange system as unreliable and further that non-participants to the exchange agreement are forced into the exchange system.

[23] The disadvantage of the exchange system is acknowledged by the applicants for a different reason in that an unauthorized distributor or filler can take advantage of cylinder support by acquiring cylinders belonging to the applicants and other suppliers at below the cost of the cylinder and by using them to supply their own LPG. However it is common cause that the first respondent freely participates in the exchange practice but disregards the vested ownership of the applicants. It was confirmed in *Tolgaz* that ownership of the cylinders vested in the applicant on the basis that the respondents acknowledged the exchange practice. Flaws in the exchange practice described by the parties are evident but it does not exonerate the first respondent from disregarding the vested ownership of the applicant, the trade practice and its unauthorised re-filling of the applicant's cylinders. The first respondent is free to either introduce its cylinders into the market or to conclude agreements with suppliers of cylinders that would permit the first respondent to fill and distribute the cylinders of such suppliers. The applicant in my view is entitled to expect others to adhere to the exchange practice to ensure the safety of its cylinders and safeguard its cylinder investment.

[24] The respondents further allege that the purpose of the exchange agreement is to protect the interest of the dominant role players being the four largest wholesale suppliers and it is therefore monopolistic or anti-competitive as it excludes legitimate competition in contravention of chapter 2 of the Competition Act 89 of 1998. The purpose of the exchange agreement is to ensure that other role players within the LPG market such as the first respondent is prevented from re-

filling an empty gas cylinder obtained by the first respondent in exchange for a pre-filled gas cylinder of the first respondent. This agreement is aimed at and has the effect of substantially preventing or lessening competition in the LPG market. For the reasons already discussed earlier the regulations and the health and safety standards render the unauthorized filling of cylinders unlawful and the respondents' single claim that prevention of it re-filling cylinders of the applicant constitutes unlawful competition is misguided. On similar facts unlawful competition was fully considered by Jaybhay, J in *Tolgaz* at 50 G-H where it was held that

'...several factors are relevant and must be taken into account and evaluated. These factors include the honesty and fairness of the conduct involved, the morals of the trade sector involved, the protection that positive law already affords, the importance of competition in our economic system, the question whether parties are competitors, conventions with other countries and the motive of the actor.'

- [25] Notably all of these relevant factors should be weighed in terms of good morals and understood in terms of the values of the Constitution of RSA, 1996. Similar to that held in *Tolgaz* all relevant factors necessary to consider a determination of wrongfulness are absent and no finding can be made that the applicant's conduct constitutes unlawful competition.
- [26] Relief sought against the second respondent is based on him being a joint wrong doer. The second respondent argues that there is an independent legal existence of the first respondent and that on the papers there is no evidence that the business operation of the first respondent and the conduct that is complained of is conducted by the second respondent in his personal capacity. The second respondent acts as a representative of the first respondent and joint wrong-doing is factually and legally misplaced.

[27] In *Nel and others v Metequity Ltd and another* 2007(3) SA 34 at 38, Streicher JA said that:

“A company has a legal personality separate from that of its shareholders. That separate personality may, however, in certain circumstances be disregarded by a court. The mere fact that a company has only one shareholder who is in full control of the company does, however, not constitute a basis for disregarding its separate legal personality.”

[28] However, it is evident that where there are circumstances that justify lifting the corporate veil, where an element of improper conduct is established joint liability will follow. See *Shipping Corporation of India Ltd v Evdomon Corporation and Another* 1994 (1) SA 550 (A) at 566C-F. The applicant seeking an interdictory relief is entitled to proceed against a joint wrong-doer. In similar decisions the courts have unequivocally held the second respondent's blameworthy conduct in being a party to the activities of the first respondent to constitute a basis for joint wrongdoing. And further, referring to *BP Southern Africa (Pty) Limited v Nfosoftware CC and others* (for citation see para 10 above), if the court does not grant an interdictory relief against the second respondent, he will simply evade the relief granted by continuing the prohibited conduct in the name of a different entity. The second respondent admits that he fills the applicant's cylinders and this admission is sufficient to enable the applicant to obtain a final interdict against him.

[29] Above all the LPG market operates in a manner in which a deposit system and reservation of ownership in the cylinders subsists. It is evident that there is a visible notification on the cylinder that the applicant is the owner of its LPG cylinders and it has a clear right to prevent unauthorised filling and dealing with its cylinders. The applicant has a well-grounded apprehension of irreparable

harm by losing incalculable revenue. No satisfactory remedy is available to the applicant. Consequently I am satisfied that the applicant has made out a case on the balance of probabilities for the declaratory order and the final interdicts sought for the unlawfully acquired gas cylinders.

[30] The final order is granted in terms of amended Part B of the notice of motion.

It is ordered that:-

30.1 The unlawfully acquired cylinders (excluding those cylinders inventoried with the applicant's branded seals), inventoried and attached at the premises as belonging to the applicant are to be released from attachment and returned to the possession of the applicant, with the applicant having to refund the deposit for the cylinder.

30.2 Interdicting and restraining the respondents or any of them, and/or any servant or employee or other person purporting to act on their behalf from receiving or being in possession of any of the unlawfully acquired cylinders of the applicant.

30.3 Interdicting and restraining the respondents or any of them, and/or any servant or employee or other person purporting to act on their behalf from filling or distributing any of the applicant's cylinders.

30.4 Representatives of the applicant are permitted to attend at and to enter upon the premises or any other premises within the jurisdiction of this court from which the respondents conduct business, on a weekly basis during normal

business hours, and that the respondents are directed to surrender and hand over to the applicant and/or any other person duly authorised thereto by the applicant, any of the unlawfully acquired cylinders of the applicant, which can be identified as such and/or which are in the possession of the respondents.

30.5 Failing compliance by the respondents with the terms of 30.4 above, the relevant sheriff (who may be accompanied by a representative of the applicant), is directed to take possession of any of the unlawfully acquired cylinders of the applicant which are found by the sheriff in the possession of the respondents at any premises where the respondents may be trading, or which are found by the sheriff on any vehicle or vehicles which are identified as those of the respondents, or any of them, or which are being used to convey any such cylinders for or on behalf of the respondents, either presently or in the future, and whether such cylinders contain LPG or not and that the sheriff is authorised forthwith to hand these over to the applicant and/or the applicant's duly authorised representatives.

30.6 The respondents are ordered to return to the applicant any of the unlawfully acquired cylinders of the applicant in their possession from time to time.

30.7 As agreed between the parties, with the resultant outcome, each party is to bear its own costs.

R. FRANCIS, AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

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