IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 1916/2018P

In the matter between:

BRIGHT IDEA PROJECTS 66 (PTY) LTD T/A ALL FUELS — Applicant

and

CROMPTON STREET MOTORS CC
T/A WALLERS GARAGE SERVICE STATION — Respondent

ORDER

(a) The respondent is ordered to vacate the premises which it currently occupies at 7 Main Road, Hammarsdale.

(b) The respondent is ordered to pay the costs of the application.

JUDGMENT

Delivered on: 06 June 2019

Ploos van Amstel J

[1] This is an application for the ejectment of the first respondent from business premises at 7 Main Road, Hammarsdale, where it conducts the business of a retail fuel service station. The applicant is the owner of the premises. Its case is that the lease agreement in respect of the premises has expired and that the first respondent remains in occupation against its will. The second respondent is Chevron South Africa (Pty) Ltd, formerly known as Caltex Oil (SA) (Pty) Ltd. It played no part in these proceedings, save that it delivered a notice of its intention to abide the outcome. For the sake of brevity I will refer to the first respondent as 'the respondent'. Where necessary, I shall refer to the second respondent as 'Chevron' or 'Caltex', depending on the context.

[2] In the light of the defences raised by the respondent it is necessary to refer to the agreements which governed the relationship between the parties.

[3] In February 2003, in terms of a written franchise agreement, Caltex granted to the respondent the right to operate a Caltex Service Station on the premises, which were then owned by Caltex. The period was five years, with an option to renew for two further periods of five years. Both options were exercised, and the third period expired on 28 February 2018. The franchise agreement included a written lease agreement, for the same period, which was annexed to the franchise agreement.

[4] In terms of the franchise agreement Caltex supplied petroleum products to the respondent for onward sale to its retail customers at the service station. Caltex changed its name to Chevron with effect from 1 October 2005.

[5] In December 2011 Chevron ceded and assigned its rights and obligations in terms of the franchise agreement to the applicant. They also concluded a written Branded Marketer Agreement in terms of which Chevron appointed the applicant as wholesaler to promote and sell Chevron products, and granted it the exclusive right and licence to sell Chevron petroleum products to the retail sector in the KwaZulu-Natal South geographical area, which includes the Hammarsdale area.

[6] The applicant further acquired from Chevron the immovable property on which the premises are situated, including the tanks, machinery and equipment thereon. The deed of transfer in respect of the immovable property was issued on 14 January 2013. The respondent was informed of these developments in writing, and an appropriate addendum to the franchise agreement was signed.

[7] The respondent continued to trade and the applicant supplied it with petroleum products in accordance with the franchise agreement.

[8] On 25 August 2017 the applicant's attorney wrote to the respondent's attorney and recorded that the agreement between the parties would terminate by effluxion of time on 28 February 2018. He requested the attorney to inform the respondent that the applicant had decided not to grant any further extension of the agreement and that the respondent would be required to vacate the premises on or before 28 February 2018. Mr Bester, the sole member of the respondent, says in the answering affidavit he was advised by the respondent's attorney not to respond to this letter as the attorney first wanted to look at the agreement between Chevron and the applicant in order to see what the respondent's rights and obligations were.

[9] A letter to much the same effect was again sent on 6 February 2018, and the applicant's attorney requested an unequivocal written undertaking from the respondent that it would vacate the premises on 28 February 2018. The response from the respondent's attorney on 14 February 2018 was that he was in the process of drafting an application for arbitration and that the respondent would not be vacating the premises on 28 February 2018.

[10] The application was launched on 16 February 2018. As this was before the expiry date of the lease, the applicant sought a declaratory order with regard to the termination of the lease on 28 February 2018, and an order directing the respondent to vacate the premises by that date. The respondent opposed the application and delivered a conditional counter application for an order directing the applicant to provide the respondent with a new franchise agreement for signature, and an order declaring that the respondent is entitled to conduct its business on the premises for a further period of five years, commencing on 1 March 2018.

[11] The grounds on which the respondent opposed the application on the papers are that it should be stayed pending arbitration in terms of s 12B of the Petroleum Products Act of 1977, or in terms of clause 20 of the original franchise agreement; that the applicant has undertaken to renew the franchise agreement until 28 February 2023; and that the applicant is seeking to enforce rights which it does not enjoy or which are in conflict with its contractual obligations towards Chevron and the respondent, and the provisions of the Petroleum Products Amendment Act of 2003. As I will explain later, the submissions in court on its behalf were a little different.

[12] I deal firstly with the contention that the application should be stayed pending arbitration. Section 6 (1) of the Arbitration Act[1] provides that if any party to an

[1] 42 of 1965

arbitration agreement commences any legal proceedings in any court against any other party to the agreement in respect of any matter agreed to be referred to arbitration, any party to such legal proceedings may at any time after entering appearance but before delivering any pleadings or taking any other steps in the proceedings, apply to that court for a stay of such proceedings. Subsection (2) provides that if on any such application the court is satisfied that there is no sufficient reason why the dispute should not be referred to arbitration in accordance with the agreement, the court may make an order staying such proceedings, subject to such terms and conditions as it may consider just.

[13] The first basis on which the respondent contends that the proceedings should be stayed is a proposed arbitration in terms of s 12B of the Petroleum Products Act. That section provides that the Controller of Petroleum Products may require parties to submit a matter to arbitration where a licensed retailer or a licensed wholesaler has alleged an unfair or unreasonable contractual practice on the part of the other. The alternative basis for the stay is a proposed arbitration in terms of clause 20 of the franchise agreement.

[14] The respondent did not apply for a stay of the proceedings in the manner prescribed in section 6 (1). It should have done so after delivery of notice of its intention to oppose the application, but before it took any other steps in the proceedings. Instead it delivered a comprehensive answering affidavit in which its defence to the application was dealt with, and an application to stay the proceedings was incorporated. Nothing was made of this procedure by the applicant in argument.

[15] Nevertheless, I have a discretion in terms of section 6 (2) with regard to a stay of the proceedings. In terms of the subsection I may order a stay if I am satisfied that there is no sufficient reason why the dispute should not be referred to arbitration in accordance with the agreement.[2]

[16] It seems to me that there is sufficient reason why the dispute before me should not be referred to arbitration. The matter has grown into an opposed application consisting of more than 700 pages. It was argued on the opposed roll before me, both on the merits and on whether or not the proceedings should be stayed pending arbitration.

[17] The applicant launched the application in February 2018 and is entitled to have the matter heard without undue delay. The respondent, as one often finds in

[2] In terms of s 40 of the Arbitration Act the provisions of the Act shall apply to any arbitration under any law, as if such law were an arbitration agreement.

ejectment proceedings, is in no hurry. It did not bring an application to stay the proceedings immediately after its notice of intention to oppose, and elected to deliver voluminous affidavits on the merits of the matter, together with an application for a stay.

[18] I found it difficult to get to grips with counsel's submissions as to the nature of the contractual practice which is said to be unfair or unreasonable as contemplated in s 12B, and should go to arbitration. As I understood the argument the conduct on the part of the applicant which is said to be unfair or unreasonable is its refusal to extend the existing franchise and lease agreements, or conclude new ones. I do not see how its refusal to do so can be said to be a 'contractual practice' which can be 'corrected' by an arbitrator as contemplated in s 12B.

[19] In terms of section 6 the court may be asked to stay the proceedings if the matter before it is a matter which had been agreed will be referred to arbitration. The dispute in the application before me concerns the law of contract. The issue that I have to decide is whether the applicant bound itself contractually to conclude a new franchise agreement and lease. In doing so I must have regard to the facts and the law. The issues before me have nothing to do with an unfair or unreasonable contractual practice as contemplated in s 12B[3].

[20] The arbitration contemplated in clause 20 is about any dispute between the parties 'concerning the agreement'. The dispute before me does not concern the franchise agreement or the lease. They have both expired through the effluxion of time. What is in issue on the papers before me is whether the applicant undertook to conclude new agreements after the expiry of the existing ones. I do not consider that clause 20 is of application here.

[21] The respondent did not specify on the papers what issue it wishes to be decided by arbitration in terms of clause 20, nor did its counsel do so in argument. Clause 20 was mentioned almost as an afterthought, and counsel did not elaborate on it. I should add that there is no evidence on the papers that the respondent has initiated the procedure in clause 20, namely calling for negotiation and then mediation.

[22] The merits of the matter were dealt with fully on the papers, and argued before me. It will be a waste of time and costs to stay the proceedings at this stage,

[3] Of the Petroleum Products Act.

and will serve no purpose, other than to allow the respondent to extend its occupation of the premises.

[23] Dealing now with the merits of the dispute before me, the respondent says it is entitled to remain on the premises on the basis of an agreement between the parties that they would conclude a new franchise agreement, substantially on the same terms as Chevron's standard franchise agreement.

[24] Mr Bester, who is the sole member of the respondent, says shortly after the applicant became the branded marketer for Chevron, at a time when the franchise agreement had about six years to run, he asked Aben Naidoo, who was Chevron's regional manager, what would happen at the end of the franchise agreement. This was in the presence of one Mubeen, who was then the applicant's chief executive officer, and his assistant, Anwar Goolam. Naidoo told him that nothing would change and that the applicant would treat the respondent as Chevron treats their retailers. He says both Mubeen and Goolam confirmed this.

[25] About three years later Mr Bester heard that the applicant was not intending to allow the renewal of franchise agreements. He contacted Goolam and asked him for a copy of the applicant's franchise agreement. Goolam sent him a copy of the existing Chevron franchise agreement. He emailed Goolam and said he needed the applicant's agreement and not the Caltex agreement. Goolam replied as follows: 'It is one and the same. Caltex have ceded the agreement between you and them to us. This is the same agreement that will continue until terminated. Once terminated All Fuels will sign new agreements.' Bester says this satisfied him that the respondent's franchise agreement would be renewed at the end of the franchise period.

[26] On the basis of this meagre evidence the respondent contends that the parties had concluded an enforceable agreement in terms of which the applicant was obliged to conclude a new franchise agreement with the respondent on terms consistent with the previous Chevron franchise agreement. The contention is without merit. The evidence does not establish such an agreement. Goolam's response seems to me to say nothing more than that at the end of the period of the Caltex agreement the applicant would use its own agreement. It is noteworthy that when the respondent received the letter of 25 August 2017 it did not protest that there was an agreement in place regarding the conclusion of a new franchise agreement on the expiry of the existing one.

[27] Counsel for the respondent submitted that even if the agreement contended for was not proved, then the applicant had an obligation to follow a fair process in

considering whether or not to conclude a new agreement, which included allowing the respondent to make representations in this regard.[4] When I enquired from counsel what the source of such an obligation was he submitted that the effect of s 12B was to introduce an implied term to that effect. There is no substance in this submission. I see no basis on which it can be said that s 12B had anything to do with the applicant's right to decide who it wished to contract with, on what basis and for how long.

[28] In the alternative counsel submitted that the franchise agreement and the lease contained a tacit term which imposed such an obligation to be fair and reasonable on the applicant. I see no basis for importing such a term into the agreement. There is simply no evidence from which it can be inferred. Fairness is not a freestanding requirement for the exercise of a contractual right.[5] A tacit term is not to be imported into a contract on the basis that it would be reasonable to do so. In *City of Cape Town (CMC Administration) v Bourbon-Leftley*[6] Brand JA said: '… A tacit term is based on an inference of what both parties must or would necessarily have agreed to, but which, for some reason or other, remained unexpressed. Like all other inferences, acceptance of the proposed tacit term is entirely dependent on the facts. But, as also appears from the cases referred to, a tacit term is not easily inferred by the courts. The reason for this reluctance is closely linked to the postulate that the courts can neither make contracts for people nor supplement their agreements merely because it appears reasonable or convenient to do so… The court must be satisfied that the parties would necessarily have agreed upon such a term if it had been suggested to them at the time.'

[29] I also point out that clause 19.2 of the franchise agreement provides that the contract constitutes the entire agreement between the parties, who acknowledge that there are no other oral or written understandings or agreements between them relating to the subject matter of the contract. It states that no amendment or other modification of the contract shall be valid or binding on a party thereto unless reduced to writing and executed by both parties thereto.

[30] In a supplementary answering affidavit the respondent contends that if I find that the agreement to enter into a new franchise agreement and lease is not enforceable in terms of the common law, then I should find that the applicant's

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[4] This is the subtle difference in the argument to which I referred earlier.

[55] *Bredenkamp v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA)

[6] City of Cape Town (CMC Administration) v Bourbon-Leftley 2006 (3) SA 488 (SCA) para 19.

refusal to conclude such agreements is contrary to the values enshrined in the Constitution and public policy and deprives the agreement of business efficacy. My finding is that the evidence does not establish the agreement contended for. One does not even get to a consideration of whether such an agreement would be enforceable in terms of the common law. None of the constitutional points raised in the papers were pursued in argument before me.

[31] I am not concerned in this matter with whether or not the applicant's refusal to conclude a new franchise agreement with the respondent was fair and reasonable. It is under no obligation to do so and has a free choice in the matter.

[32] The respondent's invitation that I should develop the common law is out of place. Even if it may be argued that where a party has undertaken to negotiate a new contract or an extension of an existing one, it has to do so in good faith, the evidence before me does not establish any such undertaking on the part of the applicant.

[33] To sum up - the franchise agreement and the lease agreement expired by effluxion of time. Over the years the respondent exercised an option to renew on two occasions, and was there for a total of fifteen years. There is no evidence on which one can find an agreement, made *animo contrahendi*, in terms of which the applicant bound itself to conclude a new agreement with the respondent, or to follow a fair and reasonable process in deciding whether or not to do so.

[34] The order that I make is as follows:

(a) The respondent is ordered to vacate the premises which it currently occupies at 7 Main Road, Hammarsdale.

(b) The respondent is ordered to pay the costs of the application.

Ploos van Amstel J

Appearances:

For the Applicant	:	D Ramdhani
Instructed by	:	Norton Rose Fulbright South Africa Inc.
	:	C/o Venns Attorneys
	:	Durban
For the Respondent	:	D P Crampton
Instructed by	:	Kobus Swart & Company
	:	C/o Stowell & Company
	:	Durban
Date Judgment Reserved	:	31 May 2019
Date of Judgment	:	06 June 2019