



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case No: 00678/2022

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: NO
	4 March 2024
	DATE

In the matter between:

BP SOUTHERN AFRICA (PTY) LTD
(Registration Number: 1924/002602/07)

Applicant

and

BAYAFSA CC t/a BP KENSINGTON
(Registration Number: 2010/128700/23)

Respondent

JUDGMENT

NOKO J

Introduction

[1] The applicant (*BP*) launched application for the eviction of the respondent from a fuel and service station carried on portion 1002 (a portion of portion 58) of the farm Doornfontein 92, situated at Broadway Avenue, Kensington, Johannesburg (*leased premises*). The applicant further sought a declaratory order directing that the respondent's right of occupying the leased premises is terminated on 10 December 2021.

[2] The respondent is opposing the application and has also launched a counter application for several orders including the stay of the application for eviction pending arbitration instituted in terms of section 12B of the Petroleum Products Act 120 of 1977 (*PPA*).

Background.

There are three lease agreements relevant to this *lis* between the parties¹.

Head lease (between Salvation Army and Oblix).

[3] The leased premise is owned by Salvation Army Property Company (*Salvation Army*) over which Salvation Army and Oblix Investments (Pty) Ltd (*Oblix*) entered into a 30-year notarial deed of lease.

Sub – lease (between Oblix and BP).

[4] A notarial sub-lease agreement was executed between Oblix and BP on 12 September 2000 for a period of 20 years from the date of commencement ending on 11 September 2020. The applicant and Oblix subsequently entered into an addendum on 12 December 2014 in terms of which a lease period was extended to 31 December 2029.

¹ Including Salvation Army and Oblix.

The addendum also provided that Oblix would ‘... *appoint its own retailer to operate a BP-branded fuel service station on the leased premises*’² after the expiry of the lease agreement with the respondent. Oblix paid the applicant amount of R6 406 050.00 for ‘... *agreeing to the amendments of the periods under the sub-lease*’.³

Sub-sub lease (between BP – BAYAFSA)

[5] The applicant and the respondent entered into a sub-sub lease to conduct a garage, petrol-filling, and service station⁴ (to conduct a BP-branded fuel service station) on 13 May 2011. This lease agreement lapsed, and the parties entered into a further sub-sub lease on 7 September 2015. The commencement date in respect of the second sub-sub lease was agreed to be 1 January 2015.

[6] The sub-sub lease between the parties was preceded by a franchise agreement signed by the parties on 11 May 2011.

[7] The sub-sub lease was for an indefinite period and may be terminated by the applicant by a six month notice after a period of 4 years and six months which was ending on 1 July 2019. It follows that the lease would at least be for a period of 5 years ending on 31 December 2019, inclusive of 6 months termination notice.

[8] The period of 5 years having passed the applicant notified the respondent in writing on 4 February 2020 that the lease agreement expired on 31 December 2019⁵ and a common law month to month lease agreement kicked in though on the same terms and conditions as they are in the said expired lease agreement.

² See para 57 of the Applicant’s Heads of Agreement at 022-21.

³ See clause 3.3.2 of the addendum. See also para 75 of the Respondent’s Answering Affidavit where it is stated that ‘*The addendum appears on the face of it to be a simulated agreement.*’

⁴ See para 20 of the Respondent’s Heads of Argument at 026-13.

⁵ In fact, the minimum period for which the lease obtained lapsed on 1 June 2019 from which date a month to month kicked in subject to a six-month termination notice. It is therefore not correct that the lease agreement expired on 31 December 2019.

[9] The applicant further informed the respondent in writing on 9 October 2020 that the fixed lease agreement would not be renewed and further that the notice to terminate the lease would be furnished in due course at which time the respondent's operations would have to be brought to a close.

[10] The applicant delivered a notice of termination to the respondent on 11 June 2021 and demanded respondent to vacate the premises on or before 10 December 2021. The respondent replied thereto through its attorneys⁶ on 5 August 2021 that a dispute in terms of section 12B of the Petroleum Products Act 120 of 1977 (*PPA*) would have to be adjudicated first. Further that it is unfair and unreasonable to terminate the lease agreement without compensating the respondent for the business and goodwill. The respondent therefore demanded a fair and market related consideration or a renewal of the lease for a period of 5 years.

[11] The referral for arbitration was served on the applicant on 22 October 2021 in which the respondent alleged that the applicant's conduct constituted unfair and unreasonable contractual conduct as reasonable expectation for the renewal of the lease was created and further that the termination prevented the respondent from selling its business.

[12] The respondent having refused to vacate the premises on 10 December 2021, as per notice of termination, the applicant launched this proceedings on 12 January 2022.

[13] The respondent avers that it acquired the fuel retail business from the previous operator and had paid 5,7 million rand for its goodwill. In support hereof the respondent

⁶ See letter from Govender Patel Dladla attorneys dated 5 August 2021 attached as annexure 7 to the Respondent's Answering Affidavit at 011-2.

attached '*documents titled Kensington Site Change Over*'⁷ from the erstwhile retailer reflecting the amount payable for the goodwill.⁸

[14] The respondent has in opposition of the application for the eviction raised the following defences, first, that the notice of termination is defective as it was not given on the first day of the month. Secondly, that the reason for the termination of the lease was dishonest and unreasonable as it was on the premises that the Oblix refuses to extend the applicant's lease whereas the said lease was extended till 2029. Thirdly, that the respondent had a right of first refusal in terms of franchise agreement before entering into a new franchise agreement with a third party. Forth, the termination deprived the respondent of the right to sell its business. Fifth, the respondent had reasonable expectation of the renewal of a fixed term contract. Sixth, a point *in limine* of non-joinder of both the Salvation Army and Oblix.

[15] Seventh, that the applicant had unlawfully competed with the respondent by entering into a contract with Oblix in contravention of clause 34 of the lease agreement read with 7.4 and 7.5 of the franchise agreement. In this regard the respondent seek an order in the counter application in terms of which it should be deemed to be the applicant's nominee in terms of clause 34 and ensure that Oblix's nominee pays the respondent an amount determined on a 36-month EBITDA basis⁹ alternatively that the applicant be directed to pay the amount as determined on 36-month EBITDA as damages or the determination thereof should be referred to oral evidence.

[16] Lastly, that the common law must be developed to include the duty of good faith and mutual cooperation in the lease agreements in the petroleum industry.

⁷ See para 49 of the Respondent's Answering Affidavit at 019-22.

⁸ See annexure ZA2 of the Respondent's Answering Affidavit at 019-23.

⁹ The respondent alleges that this formula was agreed upon between the applicant and its dealers.

[17] The respondent has launched a counter application in terms of which it seeks an order, *inter alia*, to stay the application for eviction pending the adjudication of the dispute pending referral to the Controller of Petroleum Products in terms of section 12B of the PPA, an order directing the applicant to perform in terms of both franchise and lease agreements, an interdict against the applicant and Oblix for unlawful competition, an order that the Oblix be deemed to be applicant's nominee in terms of clause 34 of the lease agreement coupled with an order that Oblix pay the respondent amount determined on a 6-month EBITDA basis alternatively such payment be made as damages. Finally, an order that the duty of good faith and mutual cooperation be declared implied terms into Petroleum Products Franchise agreements.

[18] The clauses in the agreements entered into between parties which are implicated in this *lis* are the following:

Lease agreement

[19] Clause 8.1. which provides that *'the Lease Period means a period commencing on the commencement date ... enduring until terminated by [BP] on not less than six months written notice to the [respondent], which notice may not be given less than four years and six months after the Commencement Date.*

[20] Clause 34¹⁰ of the lease agreement which provides for the respondent's right to dispose of its right in the business to a third party read with clause 34.4¹¹ which provides that an interested third party intending to buy the business would have to make a bona fide offer. The said sale would be subject to the approval by the applicant.

¹⁰ See para 28 Respondent's Heads of Argument at 026-15.

¹¹ Clause 34.4 provides that *'If the Lessee wishes to transfer the Business to a third party, it shall obtain a written bona fide offer from third party'*. At 003-60.

Franchise agreement

[21] Clauses 4.1.1. provides that ‘the Agreement of Lease and/or Supply Agreement remain in full force and effect.

[22] Clause 4.2.1.¹² provided that ‘*the Agreement of Lease or Supply Agreement, as the case may be, is terminated for any reason; and or ...*’.

[23] Clause 7.2 provides that the franchise agreement will terminate upon termination of the lease agreement.

[24] Clauses 7.3, provides that

‘Notwithstanding anything to the contrary contained in this agreement, should any law governing any aspect of this agreement change in such a way that BP, in its sole and absolute discretion, is of the opinion that such change would affect the implementation of this Agreement or adversely affect BP or cause BP loss or to be subject to added costs or expense or in any way render continued operation of BP’s Business under this Agreement commercially unattractive or less viable or subject to BP to obligations or liabilities that it did not hitherto have or increase such obligations or liabilities such as to render the continued operation of BP’s Business under this Agreement more onerous (which change may include but not be limited to the re-regulation of the petroleum industry or any part thereof), then BP shall be entitled (but not obliged) to resile from this Agreement on not less than 3 (three) calendar months written notice to the Franchisee to such effect and neither party shall have any claim against the other as a consequence of such termination. (underling added).

[25] Clause 7.4. provides that:

¹² See para 22 of the Applicant’s Heads of argument at 022-10.

'If BP will have terminated this Agreement or given the Franchisee notification of its intention to do so in terms of clause 7.3, and BP expresses the willingness to enter into a fresh agreement of Lease or Supply Agreement; and a fresh version of this Agreement, either with the Franchisee or any third party on terms and conditions different from those under which the existing Agreements are constituted, the Franchisee shall have the right of the first refusal to enter into such agreements on such varied basis as may be offered by BP either to the Franchisee or to any third party'.

[26] Clause 7.5 provides that

'BP. Should it wish to enter into such an agreement with any third party or any other contract, shall be obliged to give the Franchisee written notice setting out details of the varied agreement that it proposes to enter into and the Franchisee shall have the right within 30(thirty) days of having received such notice to notify BP whether it wishes to enter into an agreement on term and conditions no less onerous than those offered by BP either to the Franchisee or to any third party. Should the Franchisee elect not to enter into such agreements it shall have no further right of first refusal.'

Addendum agreement

[27] Clause 3.5.2. provides that

'Upon termination and/or expiry of this sub-sub-lease agreement `between BP and its operator, BP undertakes to sub-let the lease premises to a nominee of the Lessor ("the Proposed Dealer"), subject to the following terms and conditions:

[28] Clause 3.5.3 provides that:

'It is recorded that it is the intention of the parties that the sub-sub-lease agreement between BP and the Proposed Dealer shall commence on the expiry by the effluxion of time or termination of the existing sub-sub- lease agreement between BP and its current sub-sub-lease agreement between BP and its current

dealer (for any reason whatsoever other than the effluxion of time) or on 12 December 2020 whichever date is earlier, provided that the Proposed Dealer will have compiled with all of the requirements set out in clause 3.5.2.'

Issues for determination

The issues for determination are as set out below.

[29] Whether the agreement was terminated in accordance with the terms of the lease and franchise agreement.

[30] To determine the point *in limine* of non-joinder, the respondent's claim of a reasonable expectation, the respondent's right of first refusal, the respondent's the right to the sale of business.

[31] Whether the respondent has made out a case for the stay of the application of the eviction pending adjudication of the referral to arbitration in terms of section 12B of the PPA.

Submissions and contentions by the parties.

Non-Joinder

[32] The respondent contends that both Salvation Army and Oblix have interest in this *lis* and should have been joined as parties. Further that Oblix's interest is predicated on the basis that the respondent intends instituting the proceedings against Oblix for unfair competition and the said suit will be consolidated with this *lis*.¹³

¹³ See para 80 of the Respondent's Answering Affidavit at 019-33.

[33] The applicant contends in retort that Salvation Army has no rights to exert during the currency of the notarial lease entered into with Oblix and therefore has no interest in the *lis* between the parties. On the other hand, Oblix stated through a correspondence to the applicant that it would abide by the court decision.

Unfair and unlawful competition

[34] The respondent contends that the ‘... *it is a form of unlawful competition to misappropriate a competitors performance*’.¹⁴ The applicant and Oblix should be interdicted from conducting themselves in such a way that they intend to unfairly interfere with the business of the respondent by breaching clause 7.5 of the franchise agreement which affords the respondent the right of first refusal. The applicant having contended the reference to clause 7.5 of the franchise agreement was ill-advised.

Right of first refusal

[35] The applicant contends that the termination clause makes no requirement for the reason for termination of the agreement and to this end the reasons for termination are of no consequence. Be that as it may, so the counsel continued, the applicant has made commitments to Oblix as its lessor that the lessor reserves the right to appoint its own operator/sublessee upon the termination of the sublease with the respondent. Since the lease with the respondent has been terminated Oblix is entitled to exercise its rights in terms of the addendum agreement.

[36] The respondent persists with the argument that the reason advanced to cancel the agreement was not honest as the lease with Oblix was extended until 2029. This is

¹⁴ Para 58 Respondent’s Heads of Argument at 026-37

contrary to the assertion by the applicant that Oblix has conveyed that it has no interest to extend the lease.

[37] In addition, the respondent contends that it has a right of first refusal in terms of clause 7.4 and 7.5 of the franchise agreement and allowing Oblix to take over the business is in contravention of the said clauses.

[38] In response, the applicant contends that clause 7.3 to 7.5 are triggered by the cancellation of the lease agreement at the instance of the applicant pursuant to unfavourable changes in any law governing any aspect of the agreement. In such an instance the applicant would give the respondent three months' notice to cancel and would also give the respondent right of first refusal if the applicant later intends resuming the business. The applicant contends that the circumstances of these clauses have not been engaged or triggered and their invocation is ill-advised.

Reasonable expectation

[39] The respondent contends that there were WhatsApp communications in March 2019 between the dealers whose agreements were due for extension and employees of the applicant where it was stated that the dealers should submit their 5-year business plans for considerations before deciding on the extensions. Despite having submitted its business plan no extension was forthcoming.

[40] The applicant in retort stated that there is no indication in those WhatsApp exchanges that the applicant has committed to extend the respondent's lease agreement.

Stay of the proceedings.

[41] The applicant contends that the argument by the respondent that the proceedings must be stayed pending the arbitration should have first being brought by way of an application. There is no such application before the court and therefore the argument for the stay is stillborn. In any event authorities, so it was argued, state that the intention to apply for the stay should be effected immediately after the respondent has delivered its notice of intention to oppose. In this instance the respondent served its answering papers and should then be considered to have acquiesced in the jurisdiction of the court.

[42] The foregoing was in response to the respondent having averred that it would not bring a separate application to stay to minimise legal costs and regard being to the fact that it as a good defence to the eviction application. The respondent having stated that *'... it would be inappropriate to file a sperate application to stay, considering that Bayafza has a good defence to the eviction. Bayafza will limit costs of all parties and will ensure that the Court is not faced with a multiplicity of claims.'*¹⁵

[43] The applicant contended that the court has discretion with regard to the stay of the eviction process pending the arbitration and contended that the facts of this case do not warrant the exercise of the discretion to make such an order. The factors which the court should consider, so it was argued, in exercising the discretion against the request for stay includes, the fact that arbitration process has not as yet kicked started and yet the eviction process is almost concluded. The respondent did not comply with the procedural requirements that the stay application should be launched after notice to oppose and before filing any affidavit. In this instance the respondent did not only file the answering it has in addition launched a counter application.

¹⁵ See para 83 of the Respondent's Answering Affidavit at 019-33.

[44] The respondent contends that the stay of the proceedings is sought in terms of section 6(1) and (2) of the arbitration Act 42 of 1965.¹⁶ It is submitted by the respondent that the issues to be traversed before the arbitration are the same as issues raised herein and it would therefore be incompetent for this court to adjudicate over the said issues pending elsewhere.

[45] The respondent referred to the *Mfoza*¹⁷ and *Rissik Street*¹⁸ judgment where the constitutional court emphasised the importance of arbitrations where the parties have agreed to it.

Development of common law

[46] The respondent contends that steps should be undertaken to develop common law and impose the duty of good faith in petroleum and fuel service agreements. This should also be guided by what the international jurisdictions have adopted in terms of which duty of good faith is recognised as an imperative in the franchise agreement. The plea to consider developing common law was predicated on the following factors. First, that the applicant failed to disclose to the respondent the contents of the addendum agreement entered into between the applicant and Oblix. Secondly, that the applicant converted the six-month contract to a month-to-month agreement which is prejudicial to the respondent. Thirdly, there are factors which created an expectation that there would be renewal of the lease agreement for a further term. Fourthly, there was a also stratagem by both Oblix and the applicant to take over the business of the respondent without any compensation. The conduct of the applicant is due to the differentials in

¹⁶ It was held in *Mfoza* that there is no parallel between arbitration in terms of Arbitration Act and the arbitration as contemplated in terms of the PPA and the latter has restrictions to only correcting the practice.

¹⁷ *Ibid.*

¹⁸ *Rissik Street One Stop t/a Rissik Street Engen and Another v Engen Petroleum Ltd* (CCT 196/21) [2023] ZACC 4, 2023 (4) BCLR 425 (CC) (1 February 2023).

bargaining power between the parties and the respondent like other small players would readily be frustrated in entering and or remain in the petroleum business.

[47] The applicant in retort contended that the agreement between the parties was in full and final understanding between the parties and invocation of Consumer Protection Act could not be sanctioned. Further that the grievance highlighted by the respondent are unfounded and unsustainable and the applicant acted honestly and in accordance with the express terms of the lease and franchise agreements. There is therefore no justification for the development of common law in this instance.

Right to sell business

[48] The applicant contends that the claim by the respondent that it has the right to sell its business has no basis in law as the assets which are being used for business by the respondent are owned by the applicant whilst the land is owned by Salvation Army. The respondent has very few assets to sell. The respondent only owns the members interest in the close corporation, stock, and the car wash.¹⁹ The agreement provides for an instance when the retailer may sell its business, referring to either shares or interest in the CC as it is the case with the respondent alternatively, stock if available. The said sale will have to be during the currency of the lease²⁰ and must approved by the applicant. In this case there is no mention of the sale of the close corporation and or the stock hence the argument regarding the sale of the business is hollow.

[49] In addition, the applicant contends that the parties have agreed in terms of clause 32.3 of the standard terms and clause 17.3 of the franchise agreement that goodwill

¹⁹ See para 138 of the Applicant's Founding Affidavit at 020-372.

²⁰ The applicant stated in the letter to DMRE dated 15 November 2021 that ordinarily sale of business should be embarked upon during the currency of the lease. See letter on 019-104.

associated with BP shall remain the asset of BP and the respondent will not lay any claim thereon.

[50] The respondent on the other hand contended that clause 34.4 of the lease agreement provides for the transfer of the business to a third party in exchange for value. The effect of the termination, so it is argued, and the ability of Oblix to nominate an operator denies the respondent this opportunity.

[51] The respondent further averred that a discussion about sale of businesses by the dealers and the applicant was undertaken previously at which the applicant advised that the purchase price should be on the basis of 36 months EBIDTA.²¹ In addition, it was also mentioned at those meetings that dealers who were engaged on a month-to-month basis were allowed time to sell their businesses.²² If for any reason the applicant intends to raise a dispute, so it is argued, about the formula then this issue should be referred to oral evidence for determination.²³

[52] The respondent persisted with the contention that there is goodwill which has been created during its tenure and has value which must be acquired by a party who is interested in purchasing the business. The goodwill is constituted by production capacity, good reputation of the site, loyalty, growth in turn over should be considered and be paid for. The method to determine the value, for both the business and the goodwill would have to be the outcome of an investigation into the market which will help guide the process to follow.

²¹ See para 29.3 of the Respondent's Heads of Argument at 026-16. The applicant having also suggested and agreed on the formula as a compromise after the applicant having complained that dealers are overpricing their business sites, as per draft document attached to the Respondent's Answering Affidavit marked ZA 4 at 019-104.

²² See Respondent's Answering Affidavit at 019-108,

²³ See para 240 of the Respondent's Answering Affidavit. The respondent further attached a power point presentation which refers to sites whose lease were no renewed and were to sell on the basis of the 36-month EBITDA formula. BP would assist by advertising such sale internally and subsequently external in the event of no taking up.

[53] The respondent prayed in the counter application that an interdict be issued against the taking over by Oblix alternatively that the nominee of Oblix be determined to be BP's nominee in terms of clause 34.7(a) and then BP procure its nominee which should pay the respondent amount calculated on 36-month EBITDA basis further alternatively that the applicant pay that amount as damages.²⁴ *'Compensation will be sought in the section 12B arbitration – this compensation will consider the patrimonial loss of Bayafsa'*.²⁵

Termination of the lease

[54] The applicant contends that the lease agreement lapsed at the end of 5 years and six-month termination notice was accordingly issued in compliance with the lease agreement. To this end the respondent has no right to continue the occupation of the leased premises. This assertion was in response to the respondent's contention that the notice is not in accordance with the lease agreement and is therefore ineffectual. The definition of a month is in terms of claims 1(aa)²⁶ which refers to the calendar month, the definition continues and state that the period will run from a specific date which does not ordinarily imply that it should be the beginning of the month as the respondent contends. The clause, so the applicant submits, means that the notice can be given on the first day *'... of a given month or any date in a given month. The date must just be a date and a specific date'*.²⁷

²⁴ See para 11 of the Respondent's Answering Affidavit at 019-51.

²⁵ It is to be noted that compensation and ward for damages are not within the jurisdiction of the arbitrator in terms of section 12B (4)(a) of the PPA- see *Mfoza Service Station (Pty) Ltd v Engen Petroleum Limited and Another* (CCT167/21) [2023] ZACC 3; 2023 (4) BCLR397 (CC); 2023 (6) SA 29 (CC) (1 February 2023).

²⁶ Month means a calendar month and specifically:

- (i) In reference to a number of months from a specific date, a calendar month commencing on that date or the same date of any subsequent month; and
- (ii) In any other context a month in the calendar that is one of the twelve months of the calendar; and "Monthly has a corresponding meaning".

²⁷ See para 63 of the Applicant's Heads of Argument at 020-19.

[55] The respondent persisted with the argument that the parties had a month-to-month agreement which commences on the first day of the month. To this end it is expected of the applicant to properly comply with that period. In terms of the respondent's calculation the notice was given 11 days preceding the end of the month. In addition, the respondent contended that the applicant's letter stating that the lease agreement is on a month-to-month basis with a one month notice for termination is a repudiation of the six-monthly contract.

Respondent's counter application.

[56] In view of the findings set out below it follows that the reliefs sought by the respondent are premature and shall therefore not be decided upon, except where a pronouncement has accordingly been made.

Legal analysis and evaluation

Non-joinder and unlawful competition

[57] It was held in *Amalgamated Engineering Union*²⁸ that '*[T]he question of joinder should- ... not depend on the nature of the subject matter of the suit ... but ... on the manner in which, and the extent to which, the court's order may affect the interest of third parties*'.²⁹ The respondent's point *in limine* for non-joinder is premised on the argument that both Salvation Army and Oblix should have been joined for convenience is unsustainable as they both do not have an interest in the dispute about the business between the applicant and the respondent. In addition, it has not been demonstrated as to how the outcome of the *lis* will affect them.

²⁸ *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A).

²⁹ at 653.

[58] A further basis for non-joinder being that the respondent would wish to institute proceedings against Oblix alleging unfair/unlawful competition and would later consolidate matters. Until a civil suit is launched as alleged there is no evidence to establish the basis for the contention of competition between Oblix and the respondent. The order against Oblix would therefore be incompetent.

[59] The addendum provides for Oblix nominating operator at the end of the contract between the applicant and the respondent and not during the subsistence of the agreements between the applicant and the respondent. To this end it follows that the point *in limine* and argument for unlawful competition are unsustainable and bound to fail.

Right of first refusal.

[60] The applicant has correctly contended that the right of first refusal would be invoked only where the circumstances referred to in clause 7.3 of the franchise agreement are implicated. The respondent has failed to demonstrate that the current lease agreement has been terminated on the basis of circumstances set out in 7.3 and to this end the contention that the provisions of 7.3 are triggered is ill-advised and unsustainable.

Reasonable expectation.

[61] The contention on reasonable expectation is based on communications which took place during March 2019 before lapse of the minimum period of the lease agreement being 1 July 2019. Subsequent correspondence between the parties on 4 February 2020 and 9 October 2020 militate against the conclusion that the respondent had a reasonable expectation of the renewal of the lease agreement. These

correspondence in 2020 unsettle the alleged expectation which was created by the inchoate communication of possible extension a year before. The respondent's argument has therefore no proper legal foundation and is bound to fail.

Stay of the application

[62] The respondent stated that indeed no formal application has been made for the stay of the application pending the arbitration as it has a strong defence to the eviction application. This was in retort to the applicant's contention that the respondent has failed to launch a proper application to stay as it is set out in the authorities relied at. In principle the respondent posit the view that the application for the stay will not be pursued with the necessary vigour hence non-compliance.

[63] That notwithstanding the court has the powers in terms of section 173 of the Constitution stay the eviction proceedings pending the finalisation of the arbitration if the interest of justice so demand. Bearing in mind that the arbitrator, may as his corrective measure issue an award that the dealer or operator continue occupation of the premises pending the sale of the business.³⁰ The court could have regard to a variety of reasons in the exercise of the discretion including but not limited to judicial resources.³¹ The judicial resources was sufficient to refuse to exercise the discretion to stay the application pending the arbitration.³²

[64] The respondent submitted that the application to stay will not vigorously be pursued with the requisite vigour and therefore I do not find the issue deserving of more attention of this court.

³⁰ See n 26 above.

³¹ *Crompton Street Motors v Bright Idea Projects 66 (Pty) Limited* CCT 19/2020.

³² *ibid.*

Development of common law

[65] The respondent contended that there is a need for development of common law in the petroleum industry more importantly due to the unequal bargaining power. It is noted that Mhlantla J explained that:

“One of the purposes of the [Petroleum Products] Amendment Act is set out in its preamble and is, amongst others, ‘to promote transformation of the South African petroleum and liquid fuels industry’. Schedule 1 of the Amendment Act goes on to introduce an industry charter ‘on empowering historically disadvantaged South Africans in the petroleum and liquid fuels industry’. Unequal bargaining power in the petroleum industry is pervasive even in more developed countries such as our common law comparator, England, whose history of inequality pales in comparison with our own.”

[66] It was also held in *Beadica*³³ case that our ‘... law has always, to a greater or lesser extent, recognised the role of equity (encompassing the notions of good faith, fairness ad reasonableness) as a factor in assessing the terms and the enforcement of contracts.’³⁴

[67] In assessing the submissions by the respondent against the above background it is noted that the term in the lease agreement with Oblix, as the lessor to the applicant does not appear to be oppressive of the interest of the respondent. It is not obligatory for the applicant to renew the agreement with the respondent. There is nothing which stops or stopped the respondent to put up his business for sale in terms of clause 34. It however appears that it would have been difficult to implement same since such a purchaser may have to be approved by Oblix who had the option to nominate a dealer/operator. It should not however be pre-empted in this judgment that Oblix would have rejected the request to waive its right to choose on request by the applicant who committed itself to

³³ *Beadica 231 CC and Others v Trustees for the Time being of the Oregon Trust and Others* (CCT109/19) [2020] ZACC 13; 2020(5) SA 247 (CC); 2020(9) BCLR 1098 (CC)

³⁴ At para 80.

the respondent in terms of clause 34. The contention that the applicant would not be able to give more rights than it has would expose the applicant to a possible suit for damages which could be suffered as a result of its inability to give effect to clause 34 of the lease agreement. In general, the grounds and facts put forward by the respondent to advance for the development of common law do not demonstrate the lack or want in common law to protect parties rights without adding the element of duty of good faith in lease agreements at least for the purposes of this *lis*.

[68] The development of the law should not be erratic and should engender certainty and uniformity. The clause agreed upon should be dealt with in accordance with the principles of *pact sun servanda* but may not be given effect to where it is clear that they are ‘... *so unfair, unreasonable or unjust so as to be contrary to public policy*’.³⁵

Sale of business

[69] The sale of business should include the stock and the goodwill. The applicant has stated that the respondent owned the car wash business. The respondent was alive to the fact that the lease was for a minimum of 4 and half years and should have then sold the business during the lease period. The argument that the applicant is frustrating possible sale is unfounded as there has not been any offer which was brought forward to the applicant for consideration and approval. In view of the finding below that the notice of termination is ineffective there is nothing which bar the respondent to sell the business which must be approved by the applicant in terms of the agreement between the parties. It is noted that the respondent would still have a final say, on who satisfies the requirements of a dealer in terms of the applicant’s policies, despite Oblix having been given the right to nominate a dealer/operator.

³⁵ See n 33 above.

[70] It is however unsettling that the applicant received payment of 6 million just to give away its right to choose the operator or dealer. The process of giving away the right may compromise the prospect of the applicant (but not extinguish it since Oblix may still agree to an operator willing to buy the respondent's business) being able to give effect to clause 34 of the agreement with the dealers and specifically the respondent. The respondent might have a recourse for damages against the applicant.

[71] It is also strange that the applicant chose not to present any direct evidence to contradict the allegation that the applicant came with the practise that the businesses would be sold using the 36-month EBIDTA formula as averred by the respondent who attached document suggesting that the formula was a proposal by the applicant as a compromise to avoid overpricing of the businesses. In addition, the applicant failed to deny that those dealers who are on a month-to-month agreement were allowed to conclude sale of businesses agreements. The applicant's difficulty in not confronting these assertions may be considered as a sign that the applicant may find it difficult to obtain a buy in from Oblix to assist in complying with clause 34 of the lease agreement more particularly as payment has been received to waive that right.

[72] Goodwill '*denotes the benefit and the advantage of the good name, reputation and connection of a business*'.³⁶ The SCA went further to state that "*goodwill, being the relationship between a business and its customers can only be enforced by the business as long as it exists*".³⁷ In the premises the contention by the applicant that the respondent has agreed that the goodwill associated with its business cannot validly stand against the goodwill which was created and attaches to the respondent and not the assets of the applicant. If the said respondents goodwill is appropriated without compensation by Oblix or the applicant, it may be construed as unjustified enrichment or even justify an

³⁶ See para 28 in *Koni Multinational Brands (Pty) Ltd v Beiersdorf AG* (553/19) [2021] ZASCA 24 (19 March 2021).

³⁷ See n 26 above, para 29.

argument that such appropriation amount to the unjustified deprivation of property as envisaged in terms of section 25 of the Constitution.

[73] It should be noted that if sale of the business takes place as a going concern ‘goodwill must of necessity be one of the assets being purchased’.³⁸

[74] It was held in *Rissik Street One Stop*³⁹ that evicting the operator/dealer prior selling the business may mean that the operator loses the opportunity to recoup the goodwill built up over a period of time and at the same time Franchisor would unduly benefit from such entrenched value. Further that this will be inconsistent with transformative objectives of the PPA. The operator in this case was entitled to 12 months to sell the business once the lessor notified the lessee of the intention not to renew the operating lease and to this end the said case is distinguishable.

[75] The respondent has not received an offer in terms of clause 34 and any decision regarding sale of the business in this judgment will be presumptuous.

Notice to terminate

[76] It is confirmed in *Luanga* judgment⁴⁰ that the common law states that ‘...notice of termination of a monthly lease must run concurrently with a period of the lease and expire at the end of the month.’⁴¹ Kerr⁴² had regard to this issue and concluded that ‘...if a period of the lease is a calendar month, beginning on the first date of each month,

³⁸ See *Butterworths and Precedent-Commercial Transactions 2* LexisNexis at 718.

³⁹ See n 26 above, at para 70.

⁴⁰ *Luanga v Perthpark Properties Ltd* (A99/2018) [2018] (20 September 2018) WCHC. See also judgments referred herein, *Fulton v Nunn* 1904 TS 123, *Tiopaizi v Bulawayo Municipality* 1923 AD 317 and *Stocks and Stocks Holdings Ltd and Another v Mphelo* 1996 (2) SA 864 (T)

⁴¹ See *ibid*, para 16

⁴² See AJ Kerr “*The Law of Sale and Lease*” 2nd edition, Butterworths, 2003.

*notice given on 12 December to terminate on 12 January is ineffective and so it is notice given on 4 October to terminate on 24 December.*⁴³

[77] The applicant contends that there could be several interpretations but failed to advance a persuasive argument why its chosen interpretation should override the other(s). From the agreement it appears that the agreement started on 1 January 2015, and four and half years would have ended on 1 June 2019 and fifth year would have ended on 31 December 2019. The letter dated 4 February 2020 reminded the respondent that the agreement was on a month-to-month basis without stating that a month would hence forth commence on the 11th of each month. There is no evidence which buttress the assertion that a month would have started on any date except the first day of the month. It must also be noted that the first day of the month is a specific date and ‘*a specific date*’ cannot exclusively mean any other day as argued by the applicant. In the premises a notice issued on 11 June 2021 should have been effective from 1 July until 31 December 2021 without which it was then ineffective. ‘*If it is given after the first day, the lease will only expire at the end of the following month*’.⁴⁴ It therefore follows that the notice to vacate on 10 December 2021 is ineffective and it further follows therefore that the relief for a declarator is bound to fail. Any other interpretation may fall foul of the common law principle relating to integration rule in terms of which “[I]f a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not be contradict, add or modify its meaning...”.⁴⁵ Any attempt to extrapolate some interpretation from elsewhere or being ingenious should be discouraged.

⁴³ Ibid, on 436.

⁴⁴ See Robert Sharrock ‘*Business transactions Law*’ Juta and Co. Ltd, 2002, 6th ed.

⁴⁵ See *KPMG Chartered Accountants (SA) v Securefin Ltd & Another* 2009(4) SA 399 (SCA), at para 39 quoted with approval in *Beijers v Harlequin Duck Properties 231 (Pty) Ltd t/a Office Space Online* (1216/2017) [2019] ZASCA 89 (31 May 2019). The Constitutional Court having stated in *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC) at par 68 that the “[T]he rule is concerned with cases where the evidence in question seeks to vary, contradict or add to (as opposed to assist the court to interpret) the terms of the agreement...”.

[78] One may be tempted to conclude that the 11 days should be discounted since the respondent has been on the leased premises for an extended period since the said termination. This was not raised by the parties at all or comprehensively, if any. Having to comply with the common law principle of *pacta sunt servanda*, which is also espoused by the applicant, compliance with the letter of the agreement is paramount and the argument to discount the 11 days finds no foundation in the jurisprudence of the law of contract.

[79] Having regard to the finding as stated below all other issues raised by the parties need not detain me further.

Conclusion

[80] The authorities referred to above do not support the interpretation of the notice date as advanced by the applicant instead it is clearly demonstrated that the notice crafted by the applicant is ineffective. To this end the lease agreement between the parties is not terminated.

[81] The grounds upon which the respondent sought to obtain orders as set out in the relief are not supported by the arguments advanced by the respondent and are also premature. None of the reliefs sought is sustainable and are bound to fail.

Costs

[82] There are no reasons advanced to unsettle the general principle that the costs should follow the results.

Order

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[83] The following order is made:

1. The application for eviction is dismissed with costs.
2. The counter application by the respondent is dismissed with costs.

Mokate Victor Noko
Judge of the High Court

This judgement was prepared and authored by Noko J and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **4 March 2024**.

Date of hearing: 2 October 2023
Date of judgment: 4 March 2024

Appearances

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