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

**Case No: 006480/2023**

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED YES/~~NO~~

**SIGNATURE: ..... DATE: 29/2/2024**

**Applicant**

**and**

**INTRAX INVESTMENTS 28 (PTY) LTD** **First respondent**

**ASTRON ENERGY (PTY) LTD** **Second respondent**

**Delivered**: This judgment was prepared and authored by the Judge whose name is reflected in it 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 for hand-down is deemed to be 29 February 2024.

## JUDGMENT

**DUNN AJ**:

## [A]. ORDER GRANTED

[1] On 6 September 2023, I made the following order:

[1.1] The first respondent's supplementary answering affidavit filed of record (on 8 May 2023) is permitted to be filed as a further affidavit;

[1.2] the costs of the application for its filing are reserved for the main application; and

[1.3] by agreement between the parties, it is recorded that:

[1.3.1] the first respondent has undertaken to provide the applicant with a copy of the alleged '*first franchise agreement*' and the accompanying lease agreement by Monday, 11 September 2023; and

[1.3.2] the applicant shall file its supplementary answering affidavit (if any) by Friday, 29 September 2023; and

[1.4] the main application is postponed *sine die* and the costs thereof are to be costs in the main application.

[2] The reasons for the above order are set out below.

## [B]. INTRODUCTION

### *General*

[3] Initially two applications were due to be argued before me.

[4] The first application (**the main application**) was instituted by the applicant, i.e., the City of Ekurhuleni Metropolitan Municipality (**Ekurhuleni**), against the first respondent, i.e., Intrax Investments 28 (Pty) Ltd (**Intrax**), and the second respondent, Astron Energy (Pty) Ltd (**Astron**). The relief sought therein is essentially for the eviction of Intrax from an immovable property known as Portion 4 of Erf 1357, Etwatwa Township, Gauteng Province (**the property**) within a specified period of thirty (30) days from the date of granting of the envisaged court order.[1]

[5] The main application is – and remains – opposed by Intrax. It delivered a substantial answering affidavit setting out several defences.[2] Thereafter, Ekurhuleni delivered its replying affidavit.[3]

[6] Pursuant to Ekurhuleni's delivery of its replying affidavit, Intrax, on 8 May 2023, delivered a further so-called '*supplementary answering affidavit*' in which its deponent, Mr Isreal Vusumuzi Radebe Mthimkhulu (**Mr Mthimkhulu**), states that its aim is to deal with the issues raised by

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1 Notice of Motion – eviction application: para 1, CaseLines, p. 02-2, read with the founding affidavit (**FA**): para 9, CaseLines, p. 02-8.

2 Answering affidavit (**AA**): CaseLines, pp. 01-98 to 01-138.

3 Replying affidavit (**RA**): CaseLines, pp. 01-50 to 01-81.

Ekurhuleni in its replying affidavit, which – in Mr Mthimkhulu's submission - ought to have been raised in its founding affidavit.[4]

[7] Ekurhuleni opposes the filing of the supplementary answering affidavit by Intrax. Such opposition is based on, among other things, the contention that the supplementary answering affidavit should be considered as *pro non-scripto* because Intrax had failed to obtain the court's prior leave before delivering it.[5] The deponent to Ekurhuleni's opposing affidavit, Mr Selven Davey Frank (**Mr Frank**), also contends that Intrax's supplementary answering affidavit does not assist in resolving any existing disputes, but merely seeks to create confusion.[6]

[8] Ekurhuleni's opposition to the filing of the supplementary answering affidavit, prompted Intrax, on or about 21 June 2023, to launch an application for its admission.[7] Intrax's application for leave to file its supplementary answering affidavit (**Intrax's interlocutory application**), is the second application the court is currently seized with.

[9] Astron played no role in either the main application or Intrax's interlocutory application because no relief was sought against it. Counsel for both Ekurhuleni and Intrax were *ad idem* that if I were to grant Intrax leave to admit its - *already filed* – further affidavit, then the main application should be postponed *sine die* to enable Ekurhuleni to

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4 Intrax's supplementary answering affidavit (**SAA**): para 4, CaseLines, p. 01-143.

5 Ekurhuleni's opposing affidavit: CaseLines, pp. 01-1 to 01-12, especially at para 6, p. 01-6. See too, in this regard, Ekurhuleni's heads of argument: paras 6 to 10, CaseLines, para 10, p. 01-7.

6 Ekurhuleni's opposing affidavit: CaseLines, para 10, p. 01-7.

7 Intrax's interlocutory application: CaseLines, 01-36 to 01-49.

file a further supplementary replying affidavit in response thereto. In the result, both counsel only dealt with Intrax's interlocutory application in argument.

***Background: A synopsis of the parties' dispute***

[10] Ekurhuleni's application for Intrax's eviction is essentially based on the so-called *Graham v Ridley*[8] approach. This approach is to the effect that where an applicant proves that he/she/it is the owner of property and that respondent is in possession of that property, the applicant is *prima facie* entitled to an order giving him/her/it possession thereof, i.e., essentially an order for the ejectment of the respondent from the property in question.

[11] Ekurhuleni relies on data obtained through a *Lexis WinDeed* property search to in seeking to confirm its ownership of the property.[9] It contends that Intrax has no valid right/s in law to occupy the property and that it is therefore an unlawful occupier thereof.[10]

[12] However, the narrative deposed to by Mr Frank to support his conclusion that Intrax's possession of the property is (allegedly) unlawful, is relatively lengthy. Synoptically, it covers a range of events, including the following:

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8 1931 TPD 476 at p. 479.

9 FA: para 13, CaseLines, p. 02-8, read with annexure **COE 2**, pp. 02-33 and 02-34.

10 *Ibid*., para 101, CaseLines, p. 02-25.

[12.1] It commences with the conclusion of notarial lease (**the notarial lease**), on or about 8 October 1991, between the erstwhile City Council of Daveyton (one of a number of municipal areas that was incorporated into, or merged to form, Ekurhuleni) and one of Astron's predecessor-in-title, i.e., Caltex Oil South Africa (Pty) Ltd, which initially changed its name to Chevron South Africa (Pty) Ltd and, ultimately, to Astron.[11] For the sake of convenience, and irrespective of all such changes, Astron and its predecessors-in-title will simply be referred to herein as '**Astron**'.

[12.2] Astron operated a filling station on the property. The notarial lease was to endure for a period of twenty (20) years. It commenced on 27 February 1992 and expired by effluxion of time on 26 February 2012.[12]

[12.3] After the expiry of the notarial lease, Astron continued occupying the property in terms of a month-to-month lease. Such lease was confirmed in writing by Ekurhuleni in a letter it addressed to Astron on 23 March 2016.[13]

[12.4] In this last-mentioned letter, Ekurhuleni notified Astron that it intended to invite tenders for a new lease agreement for the property and that it anticipated that Astron might be one of the

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11 *Ibid*., paras 18 and 19, CaseLines, p. 02-9, read with annexure **COE 3**, pp. 02-35 and 02-64.

12 *Ibid*., para 20, CaseLines, p. 02-9.

13 *Ibid*., para 21, CaseLines, p. 02-10, read with annexure **COE 4**, pp. 02-65 and 02-66.

tenderers.[14] The letter further notified Astron that if its tender were unsuccessful, it would be given two months' notice to vacate the property.

[12.5] Through a public tender process issued by Ekurhuleni during January 2018, prospective tenderers were invited to submit tenders for a new lease coupled with the right to operate a filling station, garage, and ancillary facilities on the property.[15]

[12.6] Ekurhuleni's bid adjudication committee, having evaluated all the tenders received through the public tender process, subsequently allocated the highest score to Astron's tender. An entity called '*Barvallen Convenience CC*' (**Barvallen**) scored the second highest points according to the bid adjudication committee's evaluation. The tender was thus awarded to Astron, but – according to Mr Frank – it was withdrawn thereafter because of Astron's failure to timeously comply with certain suspensive conditions in the proposed new lease agreement.[16]

[12.7] On 25 May 2020, Astron's attorneys at the time, Messrs Wright Rose-Innes (*per* Mr R Carrington), responded to Ekurhuleni's letter notifying Astron of the withdrawal of the tender.[17] The

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14 *Ibid*., para 22, CaseLines, p. 02-10.

15 *Ibid*., para 24, CaseLines, p. 02-10.

16 *Ibid*., paras 27 to 31, CaseLines, pp. 02-11 and 02-12, read with, respectively, annexure **COE 5**, pp. 02-67 and 02-68, as well as annexure **COE 6**, pp. 02-69 and 02-70.

17 *Ibid*., paras 27 to 31, CaseLines, pp. 02-11 and 02-12, read with, respectively, annexure **COE 7**, pp. 02-71 and 02-73.

content of Wright Rose-Innes's letter provides some important context for the remainder of the unfolding narrative in Ekurhuleni's founding affidavit. The germane portion of this letter reads as follows:

> '5. Our client has been in dispute with the current occupier Intrax Investments 28 (Pty) Ltd who *[**sic**] have been unlawfully occupying the site without any contractual arrangements with our client for a number of years.
>
> 6. Our client informs us that it did not have any knowledge of withdrawal of the approval of the original tender and it is notable that essentially your correspondence under reply constitutes the first formal notification that our client received in this regard. Our client found out about the withdrawal by chance upon receipt of an Answering Affidavit filed by the current occupier late last year.
>
> 7. Our client understands that at present there is a lease agreement signed between … *[**Barvallen**] … and your client in respect of the site. Our client has informed us that it is presently conducting negotiations with Barvellen in order to secure occupation of the site as a sub-tenant conditional however upon Barvellen *[**sic**] evicting the occupiers Intrax Investments 28 (Pty) Ltd who *[**sic**] currently occupy the site unlawfully.
>
> 8. …
>
> 9. Your client has given our client notice to vacate the premises. With the best will in the world our client is not able to do so. Our client does not occupy the premises. The premises occupied are by Intrax Investments 28 (Pty) Ltd who [**sic**] have refused to vacate the premises despite having no rights of tenure and no contractual relationship with our client for an extended period of time. Should your offices wish to proceed with a main application our client will probably consent to the aforesaid Order insofar as it is found that our client does occupy the premises.
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> 10. …
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> 11. We also bring to your attention that our client has its branding and equipment including tanks and dispensing units situate at the site. This equipment is currently being used by the unlawful occupier without our client's consent. Our client would also need to make arrangements with your offices in order to remove the equipment should this be the agreement reached with your offices and/or Barvellen *[**sic**]. The Environmental Laws and Regulations in respect of petroleum equipment removal and site remediation will need to be adhered to by all parties.'

[12.8] Mr Frank then proceeds to explain how it came about that Intrax became an occupier of the property. According to Mr

Frank's evidence, Intrax became a franchisee of Astron on or about 20 September 2001, being the date on which these parties concluded a franchise agreement.[18]

[12.9] Although the franchise agreement was concluded on the signature date (i.e., 20 September 2001), it had already commenced on an earlier date (i.e., 1 August 2001). Its stipulated duration was for five years, but two successive options were granted to Intrax, *qua* franchisee, to extend it for a further five years in respect of each of the two options. In essence: (i) the original franchise period endured from 1 August 2001 until 31 July 2006; (ii) the first option period ran from 1 August 2006 to 31 July 2011; and (iii) the second option ran from 1 August 2011 until 31 July 2016.[19]

[12.10] When the second option period expired on 31 July 2016, Intrax's remained in occupation of the property. Ekurhuleni's founding affidavit suggests that this occurred in terms of an oral agreement that was concluded between Astron and Intrax on or about 7 December 2016.[20] Ekurhuleni's evidence does not explain Intrax's occupation for the four (4) months between 1 August 2016 and 1 December 2016.

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[18] *Ibid*., paras 43 to 46, CaseLines, pp. 02-14 and 02-15, read with, respectively, annexure **COE 12**, pp. 02-91 to (seemingly) 02-164. The franchise agreement is of such a poor quality that it is mostly illegible. Only legible copies of documents should be used as annexures, and – if there is not such a copy – the document ought to be retyped and certified as a true and correct rendition of the document in question.

[19] *Ibid*., paras 47 to 51, CaseLines, p. 02-15.

[20] *Id*.

[12.11] A brief pause in the unfolding narrative deposed to in the founding affidavit is required. This is merely to enable reference to an intervening event that occurred during the existence of the franchise agreement between Astron and Intrax. On or about 16 March 2010, Intrax allegedly approached Ekurhuleni with an unsolicited offer to purchase the property. Ekurhuleni directed Intrax to complete certain '*prescribed forms for unsolicited bids*', which the latter apparently did on or about 22 June 2010.[21]

[12.12] However, Intrax's offer to purchase the property was unsuccessful. The reason given for the rejection of Intrax's offer – as *per* a decision of 25 November 2010, which was adopted at the meeting where the offer was considered - was that the property was '*an asset needed to provide the minimum level of basic municipal services and that it is not available for alienation or lease*'. According to Mr Frank, Intrax was apprised of this decision in writing by Ekurhuleni on 13 December 2010.[22]

[12.13] Resuming the narrative deposed to by Mr Frank: On 10 May 2017 Astron's attorneys, Adams & Adams, addressed a letter to Intrax notifying it that the oral franchise agreement - referenced in paragraph 12.10 above – will be terminated with

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[21] *Ibid*., paras 35 to 37, CaseLines, p. 02-13, read with, respectively, annexure **COE 8**, p. 02-74, as well as annexure **COE 9**, pp. 02-75 and 02-76.

[22] *Ibid*., paras 38 and 39, CaseLines, pp. 02-13 and 02-14, read with annexure **COE 10**, p. 02-77.

effect from 11 June 2017, and insisting that Astron would take the property by that date.[23]

[12.14] Intrax, despite the notice of cancellation sent by Adams & Adams, failed (or refused) to vacate the property. However, Astron only instituted motion proceedings to evict Intrax from the property approximately two years and five months later, i.e., on or about 15 November 2019 (**Astron's eviction proceedings**), but these proceedings were subsequently withdrawn.[24] This also occurred *after* Ekurhuleni had notified Astron that the tender initially awarded to it was to be withdrawn as a result of Astron's failure to timeously comply with certain suspensive conditions in the proposed new lease agreement.[25]

[12.15] After the withdrawal of the tender awarded to Astron, Ekurhuleni awarded the tender to Barvallen. During February 2021, Barvallen instituted motion proceedings against Intrax and Astron for their eviction from the property. Ekurhuleni's founding affidavit suggests, or at least appears to suggest, that had it already instituted a similar application for the eviction of Intrax and Astron (**Ekurhuleni's first eviction application**) prior to Barvallen having done so. However, given the respective case numbers of the two applications (Barvallen's

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23 *Ibid*., para 52, CaseLines, p. 02-16, read with annexure **COE 14**, pp. 02-165 to 02-167.

24 *Ibid*., paras 53 to 55, CaseLines, p. 02-16, read with, respectively, annexure **COE 15**, pp. 02-168 to 02-183, as well as annexure **COE 16**, pp. 02-184 and 02-185.

25 See, paragraph 12.6 above.

being 3715/2021, while Ekurhuleni's was 10600/2021), it appears that Barvallen's eviction application probably was instituted first.

[12.16] Ekurhuleni then applied to be joined as a party to Barvallen's eviction application. It was joined therein as the third respondent. Its own eviction application (*viz*., Ekurhuleni's first eviction application) supposedly was then held '*in abeyance*'.[26]

[12.17] Prior to the hearing of Barvallen's eviction application, Intrax launched a review application on 9 April 2021 for orders: (i) to review and set aside Ekurhuleni's award of the new lease to Barvallen; and (ii) to compel Ekurhuleni to decide on its unsolicited offer to purchase the property (**Intrax's review application**).[27]

[12.18] Barvallen's eviction application was then postponed *sine die* to enable Intrax's review application to be heard first.[28] The adjudication thereof ultimately yielded a favourable result for Intrax, as the court (*per* Matsemela AJ): (i) directed Ekurhuleni to make a decision on Intrax's offer to purchase the property; (ii) reviewed and set aside Ekurhuleni's decisions to award the tender to Barvallen and to reject Intrax's tender submitted in respect of the public tender process undertaken in 2018; and

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[26] *Ibid*., paras 62 to 71, CaseLines, pp. 02-17 to 02-19, read with, respectively, annexure **COE 15**, pp. 02-168 to 02-183, as well as annexure **COE 16**, pp. 02-184 and 02-185.

[27] This subject-matter was referred to in paragraphs 12.11 and 12.12 above.

[28] *Ibid*., paras 72 to 76, CaseLines, pp. 02-19 and 02-20, read with annexure **COE 17**, pp. 02-186 to 02-194.

(iii) ordered Ekurhuleni to begin the whole tender process afresh.[29]

[12.19] On or about 31 August 2022, Ekurhuleni (*per* Mr Frank) notified Intrax in a written communication that it did not accept the unsolicited offer to purchase the property and confirmed that it could only sell immovable property through an open tender process. Ekurhuleni further emphasised that the property was not for sale and that, given its asset value, Ekurhuleni intended deriving rental income from it through a fixed term lease procured in terms of its supply chain management policy.[30]

[12.20] Against this background, Mr Frank further explains that Ekurhuleni's first eviction application, which had been held in abeyance until then, had to be substituted with this present main application. This, Mr Frank asserts, was required to ensure proper compliance with the second part of the order granted in Intrax's favour in its review application, *viz*., to avoid any potentially protracted litigation between Intrax and any successful bidder appointed pursuant to the renewed tender process ordained by that court order.

[12.21] This overly lengthy history of the parties' dispute/s, sets the table for the consideration of Intrax's interlocutory application.[31]

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29 *Ibid*., paras 77 to 78, CaseLines, p. 02-20, read with annexure **COE 18**, pp. 02-195 to 02-223, especially at paras 1 to 3, p. 02-222.

30 *Ibid*., paras 83 to 85, CaseLines, pp. 02-21 and 02-22, read with annexure **COE 20**, pp. 02-228 and 02-229.

31 See paragraph 8 above.

## [C]. INTRAX'S INTERLOCUTORY APPLICATION

### *Overview*

[13] Intrax's professed aim with its supplementary answering affidavit is supposedly to deal with the issues raised by Ekurhuleni in its replying affidavit, which, so Intrax contends, ought to have been raised at the outset in its founding affidavit.

[14] While Ekurhuleni's founding affidavit - based as it is on the so-called *Graham v Ridley*[32] approach[33] - disavows the existence of any agreement authorising Intrax's possession of the property, it nonetheless proceeds to emphasise at some length how Intrax initially came into possession thereof in the first instance, i.e., as Astron's franchisee and subtenant with effect from 1 August 2001,[34] and then additionally explains how Astron's notarial lease, subsequent monthly tenancy and the franchise agreement came to be terminated and, by necessary extension, also how Intrax's rights of occupation were allegedly terminated.

[15] In dealing with Intrax's unsolicited offer to purchase the property on 16 March 2010,[35] Mr Frank made no distinction between the corporate entity, Intrax, and its sole director, Mr Mthimkhulu. It was the latter, in his personal capacity, that seemingly made the offer to purchase the

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32 1931 TPD 476 at p. 479.

33 See paragraph 10 above.

34 See paragraphs 12.9 and 12.10 above.

35 It will be recalled that this offer allegedly was rejected by Ekurhuleni on two occasions, namely: (i) on or about 25 November 2010; and (ii) on 31 August 2022 (See, in this regard, paragraphs 12.12 and 12.19 above).

property and not Intrax itself,[36] but for purposes of Ekurhuleni's founding affidavit the corporate entity (i.e., Intrax) and the natural person (i.e., Mr Mthimkhulu) conveniently were conflated by Mr Frank.

[16] On the other hand, Mr Mthimkhulu consistently fails to draw any distinction between Intrax and himself (as the driving force behind Intrax's filling station business).

[17] Two of the main aspects in which Intrax's version materially diverges from Ekurhuleni's can be summarised as follows:

[17.1] First, while Ekurhuleni fixes Intrax's occupation of the property to the date 20 September 2001, being the date on which Astron and Intrax concluded the franchise agreement,[37] the version deposed to by Mr Mthimkhulu supposedly traces Intrax's alleged involvement with the property back to 1990. This part of Mr Mthimkhulu's evidence reads as follows:

> '7. As early as 1990, the first respondent *[**Intrax**] was involved in the Property that is the subject matter of the applicant's *[**Ekurhuleni's**] main application. **The first respondent's involvement with the Property predates the involvement of the second respondent** *[**Astron**], this I fully set out below.
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> 8. Subsequently, I approached the then Daveyton City Council to enquire about the area where the Property is situated, which was undeveloped and just bare and open land, at the time. I informed the Daveyton Council that I wanted to develop a business of a petrol service station and shops on the Property with the hope to better the socio-economic status of the township. This was also to

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[36] See annexure **COE 9**, pp. 02-75 and 02-76, especially the name of the bidder on p. 02-76, which is recorded as being '*Vusumuzi Mthimkhulu*'.

[37] See paragraphs 12.8 and 12.9 above.

deal with the insecurity of tenure suffered by myself and many others who lived in the area around the Property at the time.

9. The Daveyton City Council informed me that the area was actually earmarked and zoned for a petrol service station and that it also had the intention to develop the township and make sure that the economy of the area is stable by creating employment within the vicinity where people live, and further, to develop businesses owned by black people within the community. In essence, this kind of initiative by the Daveyton City Council could be described as "*black empowerment*" initiative that was much needed by the first respondent and the residents of the area who were severely stricken by poverty and racially discriminative laws.

10. During 1991, that Daveyton City Council ("the Council") then advised me since I was a novice in the petrol station business, that I needed to compile a business plan, which I did do on behalf of the first respondent and later formally presented to the Council. **The Council gave me feedback that the first respondent cannot run the business of petrol station** *[**sic**] **on its own because of lack of experience in running a service station and did not have the necessary experience and financial capacity. Therefore, I should approach a well-established well company for partnership or franchise agreement**.

11. **Furthermore, the Counsel advised me that it was only willing to enter into a lease agreement for the property with an oil company that would be chosen by the first respondent, as the first respondent lacked the necessary experience and financial capacity**. The Council further advised the first respondent that such a lease agreement would be reviewed after 20 years wherein the Council would afford the first respondent the opportunity to purchase the property or enter into a 99-year lease with the applicant.

12. **In compliance with the above condition, the first respondent approached Caltex (Pty) Ltd (now Astron Energy (Pty) Ltd)** (herein after *[**sic**] the second respondent) **to assist in implementing its plans and business with its much-needed financial muscle. The applicant then informed the second respondent that it would enter into a lease agreement with the second respondent because the first respondent did not have the financial means to develop the Property on its own and conduct the business. This is how the**

> **applicant entered into a lease agreement in respect of the Property with Caltex who** *[**sic**] **was in turn to give or lease the property to the first respondent with a franchise agreement**.
>
> 13. The first respondent then entered into a franchise agreement with the then Caltex (second respondent), in 1991 for *[**sic**] period of 20 years. **Prior, to the conclusion of the franchise agreement the applicant told the first respondent that, in accordance with its empowerment initiative, at the end of the 20-year period for the lease agreement it would give the first respondent a 99-year lease or allow it to purchase the Property and there would be no need for the first respondent to enter into another franchise agreement with the second respondent as I (on behalf of the first respondent) would operate on my own**.
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> 14. **The first respondent continued to operate the franchise on the Property for an uninterrupted period of 32 years** (from 1991 till date) and as a result, through the development is implemented by the first respondent (some on its own and others with the assistance of the second respondent), created a lot of opportunities and jobs for the community.'
>
> (Own emphasis and *insertions).

[17.2] Second, Mr Frank contends that Intrax's unsolicited offer to purchase the property was rejected by Ekurhuleni as far back as 25 November 2010, i.e., and that Intrax had already been apprised thereof on 13 December 2010.[38] On the other hand, Mr Mthimkhulu emphasises that: (i) such decision – if it indeed was taken by Ekurhuleni at the time stated by Mr Frank – specifically ought to have been raised and relied on by Ekurhuleni in Intrax's initial review application,[39] but that Ekurhuleni failed to do so at the time;[40] and (ii) Intrax, in the meantime, had instituted a new review application (**Intrax's**

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38 See paragraph 12.12 above.

39 See paragraph 12.19 above.

40 AA: CaseLines, para 26, p. 01-157, as well as para 66.1.2, p. 01-173.

**present review application**) on or about 23 November 2022, in which it applies for the judicial review and setting aside of Ekurhuleni's decision to reject such offer on 25 November 2010, as well as its subsequent rejection thereof on 31 August 2022.[41]

[18] A few *prima facie* comments – without making *any* definite findings in respect of any one or more of them - on these aspects of divergence between Ekurhuleni's founding affidavit and Intrax's answering affidavit seem apposite:

[18.1] First, Intrax's present review application is not currently before me, and it is impermissible for me to have regard to the content thereof, let alone try and gauge the prospects (*if any*) of its potential success, whether reasonable or otherwise.

[18.2] Second, Mr Mthimkhulu's assertion - in above-quoted paragraph 13 of Intrax's answering affidavit – to the effect that: '*The first respondent then entered into a franchise agreement with the then Caltex (second respondent), in 1991 for* *[**sic**] *period of 20 years*', is rather puzzling and legitimately can be questioned. If it were correct, there does not appear that have been any need or incentive for these parties to have entered into a further franchise agreement on 20 September 2001 – i.e., because the one mentioned by Mr Mthimkhulu (*if it indeed*

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[41] *Ibid*., paras 27 and 28, pp. 01-157 and 01-158, as well as annexure **IVRM 1**, pp. 01-178 to 01-184.

*had been concluded for a duration of twenty (20) years in 1991*) would then still have been in existence. Moreover, Mr Mthimkhulu's assertion also appears to contradict that which he deposed to elsewhere in Intrax's answering affidavit when he asserted, in response to Mr Frank's statement about the franchise agreement having been entered into on 20 September 2001, the following:[42]

> '67.1 **The first franchise agreement between the first and second respondent was concluded in 1991**. A copy of the franchise agreement is annexed hereto marked "**IVRM 2**".
>
> 67.2 **The second franchise agreement was signed on 2 August 2001 and commenced on 1 August 2001**.
>
> 67.3 The remainder of the allegations in these paragraphs are denied and the applicant is put to the proof thereof.'
>
> (Own emphasis).

(At this stage, I point out, in parenthesis, that no so-called '*first franchise agreement*', supposedly being annexure **IVRM 2** to Intrax's answering affidavit, was attached to it at the time of the hearing. This is the document that Intrax undertook to furnish to Ekhuruleni by 11 September 2023 and which forms part of the order made in paragraph 1 above).[43]

[18.3] Third, despite Mr Mthimkhulu's version of precisely when the franchise agreement/s were supposedly concluded, Ekurhuleni's replying affidavit does not address who, or which entity, the franchisee was of the petrol station on the property in

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42 AA: CaseLines, paras 67.1 to 67.3, p. 01-174.

43 See paragraph 1.3.1 above.

the period between 1991 (immediately *after* the conclusion of the notarial lease on 8 October 1991) and 2001 (immediately *before* the conclusion of the franchise agreement on or about 20 September 2001). This is a factual issue that is pertinent to one of Intrax's defences in this matter, namely its defence that it required the property by '*acquisitive prescription*'.[44] In this regard, Mr Mthimkuhlu submits that Intrax has fully made out a case in the *present review application* for such relief and that, in addition to what is stated in Intrax's answering affidavit, it is entitled to ownership of the property in terms of section 1 of the Prescription Act 68 of 1969 (**the Prescription Act**) read together with section 25 of the Constitution.[45]

[19] The salient features of Ekurhuleni's replying affidavit include the following:

[19.1] In the first instance, Ekurhuleni denies that Intrax has been in undisturbed possession or occupation of the property for thirty-two (32) years which would have enabled it to have acquired ownership thereof by acquisitive prescription.[46] Ekurhuleni's above denial is evidently based on two considerations, namely that Intrax only came into existence on 5 September 2000,[47] and further that it has been faced by four applications for its

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[44] AA: CaseLines, para 27, pp. 01-157 and 01-158; para 30.2, p. 01-159; paras 39 to 43, pp. 01-163 to 01-165.

[45] *Ibid*., CaseLines, para 43, pp. 01-185.

[46] Replying affidavit (**RA**): CaseLines, para 23 (*inclusive* of subparas 23.1 to 23.3), p. 01-137; and paras 25.1.3 and 25.1.4, p. 01-139.

[47] *Ibid*., CaseLines, para 9.3, p. 01-124; para 11.1.3, pp. 01-125 and 126.

eviction from the property since then and can hardly contend that its occupation and possession has been undisturbed.[48]

[19.2] Secondly, Ekurhuleni denies that its predecessor (i.e., the erstwhile City Council of Daveyton) gave any form of undertaking, or made any promise, to Mr Mthimkhulu involving either the grant of a 99-year lease to him or Intrax, or of an offer to sell the property to him or Intrax.[49]

[20] Intrax's supplementary answering affidavit notifies Ekhuruleni that if any objection to its filing was going to be raised, Intrax then would formally apply for its admission.[50] The supplementary answering affidavit then proceeds to cover the following main areas of disputation between Intrax and Ekurhuleni:

[20.1] First, it deals with the earliest and ongoing involvement in, with and on the property. This commences in 1991 when Mr Mthimkhulu started operating the '*Etwatwa Service Station*'. Thereafter the petrol station was taken over by a registered corporation called '*Etwatwa Service Station Close Corporation*'. The latter close corporation was registered in 1992 with Mr Mthimkhulu being the sole (100%) member thereof.[51]

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48 *Ibid*., CaseLines, paras 13.2, p. 01-130.

49 *Ibid*., CaseLines, paras 11.2 to 11.12, pp. 01-126 to 01-129; para 20.1, pp. 01-133 and 134; para 24.1, p. 01-138; and para 29, p. 01-140.

50 *Ibid*., CaseLines, para 30, p. 01-219.

51 Supplementary answering affidavit (**SAA**): CaseLines, paras 10 to 17, pp. 01-212 to 01-215.

[20.2] Second, it deals Mr Mthimkhulu's discussions with various oil companies in those early years, including Astron, whose business proposal Mr Mthimkhulu favoured, and explains further how Astron eventually entered into a lease agreement with Ekurhuleni and how he (and his successors-in-title) became Astron's franchisee/s.[52]

[20.3] Third, it deals with the expansion of the business on the property and Mr Mthimkhulu registering a company called '*Mthimkuhlu Food Enterprises (Pty) Ltd*' in 1998.[53] However, it is by no means clear what this specific company's objective and business purpose was.

[20.4] Fourth, it explains that when Mr Mthimkhulu experienced financial difficulties in about 1999/2000, he was advised to have a company (and not a close corporation) to operate the petrol station, which resulted in him acquiring Intrax (as a shelf company) to hold the petrol station in.[54]

[20.5] Fifth, it sets out how Mr Mthimkhulu – either as a sole member of Etwatwa Service Station Close Corporation or as the sole director of Intrax – has been operating the service station on the property for a continuous period of more than thirty (30)

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52 *Id*.

53 *Ibid*., CaseLines, para 18, p. 01-215.

54 *Ibid*., CaseLines, paras 19 and 20, pp. 01-215 and 01-216.

years, which is *one* of the vital of elements of a defence of acquisitive prescription.[55]

[21] A further aspect raised in the Intrax's supplementary answering affidavit, concerns a challenge to Mr Frank's authority to institute the main application.[56] This is somewhat surprising especially since Mr Mthimkuhlu initially admitted that Mr Frank had the required authority to do so.[57] However, during the course of argument first respondent's lead counsel abandoned this point and accepted that Mr Frank did have the required authority to launch these proceedings and to depose to the affidavits required for that purpose.

[22] In ***Hano Trading CC v JR 209 Investments (Pty) Ltd and Another***[58] the Supreme Court of Appeal (**SCA**) sets out the position concerning the usual number of affidavits (i.e., three sets) permitted in terms of the Uniform Rules of Court (**the Rules**). In dealing with the issue of the filing of any further affidavits, the SCA emphasised that is only permitted with the indulgence of the court:[59]

> '[10] A litigant in civil proceedings has the option of approaching a court for relief on application as opposed to an action. Should a litigant decide to proceed by way of application, rule 6 of the Uniform Rules of Court applies. This rule sets out the sequence and timing for the filing of the affidavits by the respective parties. An advantage inherent in application proceedings, even if opposed, is that it can lead to a speedy and efficient adjudication and resolution of the disputes between parties. Unlike actions, in application proceedings the affidavits take the place not only of the pleadings, but also of the essential evidence which would be led at a trial. **It is accepted that the affidavits are limited to**

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55 *Ibid*., CaseLines, para 21, p. 01-216.

56 *Ibid*., CaseLines, paras 26 and 27, pp. 01-217 and 01-218.

57 AA: CaseLines, para 60, p. 01-190.

58 2013 (1) SA 161 (SCA) at paras [10] to [14], p. 164 B – p. 165 D, but especially at para [13], p. 164 A – C.

59 *Id*.

**three sets**. It follows thus that great care must be taken to fully set out the case of a party on whose behalf an affidavit is filed. **It is therefore not surprising that rule 6(5)(e) provides that further affidavits may only be allowed at the discretion of the court**.

[11] **Rule 6(5)(e) establishes clearly that the filing of further affidavits is only permitted with the indulgence of the court. A court, as arbiter, has the sole discretion whether to allow the affidavits or not. A court will only exercise its discretion in this regard where there is good reason for doing so**.

[12] This court stated in ***James Brown & Hamer (Pty) Ltd (Previously named Gilbert Hamer & Co Ltd) v Simmons NO*** 1963 (4) SA 656 (A) at 660D – H that:

> "It is in the interests of the administration of justice that the well-known and well-established general rules regarding the number of sets and the proper sequence of affidavits in motion proceedings should ordinarily be observed. That is not to say that those general rules must always be rigidly applied: some flexibility, controlled by the presiding Judge exercising his discretion in relation to the facts of the case before him, must necessarily also be permitted. **Where, as in the present case, an affidavit is tendered in motion proceedings both late and out of its ordinary sequence, the party tendering it is seeking not a right, but an indulgence from the Court: he must both advance his explanation of why the affidavit is out of time and satisfy the Court that, although the affidavit is late, it should, having regard to all the circumstances of the case, nevertheless be received**. Attempted definition of the ambit of a discretion is neither easy nor desirable. In any event, I do not find it necessary to enter upon any recital or evaluation of the various considerations which have guided Provincial Courts in exercising a discretion to admit or reject a late tendered affidavit (see e.g. authorities collated in ***Zarug v Parvathie*** 1962 (3) SA 872 (N)). It is sufficient for the purposes of this appeal to say that, on any approach to the problem, the adequacy or otherwise of the explanation for the late tendering of the affidavit will always be an important factor in the enquiry."

[13] It was then later stated by Dlodlo J in ***Standard Bank of SA Ltd v Sewpersadh and Another*** 2005 (4) SA 148 (C) in paras 12 – 13:

> "**The applicant is simply not allowed in law to take it upon himself and [to] file an additional affidavit and put same on record without even serving the other party with the said affidavit. . . .**
>
> **Clearly a litigant who wished to file a further affidavit must make formal application for leave to do so. It cannot simply slip the affidavit into the Court file (as it appears to have been the case in the instant matter). I am of the firm view that this affidavit falls to be regarded as *pro non scripto***."

[14] To permit the filing of further affidavits severely prejudices the party who has to meet a case based on those submissions. Furthermore, no reason was placed before the court *a quo* for requesting it to exercise a discretion in favour of allowing the further affidavits. Consequently the court *a quo* was correct in ruling that the affidavits were inadmissible.'

(Own emphasis).

[23] The specific passage referred to and quoted in paragraph [13] of ***Hano*** case, was relied on by Ekhuruleni's counsel in urging me to find that Intrax's supplementary answering affidavit should be considered as *pro non scripto*. The present case is distinguishable from the position described by Dlodlo J in ***Standard Bank of SA Ltd v Sewpersadh and Another***. In the present instance, Intrax's attorney of record did not merely '*put*' the supplementary answering affidavit on record (i.e., loaded it on CaseLines) *without* delivering it to Ekurhuleni's attorneys of record. It was served on the latter attorneys as far back as 8 May 2023.[60] By the time of the hearing there was also a formal application to permit the supplementary answering affidavit, as was foreshadowed in the affidavit itself.[61] Ekurhuleni filed an answering affidavit in response to the interlocutory application and Intrax thereafter filed a replying affidavit, but no one could have been surprised by its subsequent filing and service.

[24] In any event, I am not persuaded that Intrax's supplementary answering affidavit should be treated as being *pro non scripto*. It might well have been somewhat audacious for Intrax to summarily have delivered its supplementary answering affidavit in anticipation of its being authorised by the court, but this step does not necessarily justify such an overly strict approach.

[25] In my view, Mr Mthimkuhlu's statement concerning the need for the supplementary answering affidavit, i.e., specifically to address issues raised by Ekurhuleni in its replying affidavit that ought to have been dealt

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60 Notices: CaseLines 2 (10), Proof of service, pp. 02- 254 and 255.

61 SAA: CaseLines, para 30, p. 01-219.

with in its founding affidavit, cannot just be accepted without more. In my view the need is somewhat exaggerated. Ekhuruleni was entitled to rely on the so-called *Graham v Ridley* approach, and Intrax was faced with the burden of justifying its occupation of the property. The difficulty that emerged from this approach, was that Ekhuruleni then sought to elaborate on the reasons why Astron and Intrax were no longer entitled to remain in occupation of the property, but, in the process, also omitted to distinguish between Mr Mthimkuhlu's involvement with it and those of his successors-in-title. Obviously, Intrax was seized with the burden of justifying its continued occupation and possession thereof. It relies on, among others defences, two defences, to do so, i.e., (i) an undertaking to sell the property to it by Ekhuruleni's predecessor; and (ii) the defence of acquisitive prescription. These defences apparently form the mainstay of Intrax's present review application.[62]

[26] In the light of the aforegoing background and the considerations mentioned therein, the main reasons for permitting Intrax's supplementary answering affidavit to stand – or admitting it of record - are:

[26.1] Ekurhuleni's omission to deal with the occupation and possession of the property from the outset, e.g., by providing no evidence of Intrax's involvement, as well as that of its predecessors (including, among others, Mr Mthimkuhlu himself), from 1991 onward, as briefly outlined in paragraph

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[62] AA: CaseLines, para 43, pp. 01-185.

[18.3] above, *coupled* with Mr Mthimkuhlu's assertion that he - as set out in Intrax's supplementary answering affidavit - was at the forefront of all developments on the property since, at least, 1991, albeit through various corporate entities that were established and/or interposed from time to time;

[26.2] The parties' conflation of the corporate entity, Intrax – as well as the corporate entities of its predecessors (if any) - and its sole director, Mr Mthimkhulu, which could influence the relevant factual enquires in issue;

[26.3] Mr Mthimkuhlu submission that Intrax has *fully* made out a case in *Intrax's present review application* for relief based on acquisitive prescription and that, in addition to what he deposed to in Intrax's answering affidavit, Intrax is entitled to ownership of the property in terms of section 1 of the Prescription Act read together with section 25 of the Constitution, cannot simply be ignored. The underlying reasons for this viewpoint are: *First*, Intrax's present review application is not before me and it would be idle to speculate on the relative strength of its merits or otherwise; *second*, although it might currently be difficult to conceive how, in the fullness of time, Intrax might be able to justify the alleged defences it has raised, it would be folly and to try and pre-empt the outcome of such review. This might well give rise to a conflicting judgment on the exact same rubric(s), which – in these circumstances – ought to be

avoided. One might well ask how these factors have anything to do with the discretion that I was required to exercise *vis-á-vis* the admission of Intrax's supplementary answering affidavit. It influences the discretion because it ultimately will allow for the main application to be adjudicated fairly on the entire conspectus of correct facts, including those deposed to in Intrax's supplementary answering affidavit which deals with the new and somewhat unexpected emphasis adopted in Ekhuruleni's replying affidavit and the identified shortcomings emerging from it. This, in my view, is in the interests of justice; and

[26.4] The need to obviate any potential prejudice to Intrax and its predecessors coupled with the fact that the appropriate orders for costs surely will eliminate any prejudice that might be caused by the filing of Intrax's supplementary answering affidavit, as well as Ekhuruleni's supplementary replying affidavit.

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**EW DUNN**
Acting Judge of the High Court
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Date of hearing: 6 September 2023

Date of Judgment: 29 February 2024

Judgment handed down electronically