Reportable:	YES/NO
Circulate to Judges:	YES/NO
Circulate to Magistrates:	YES/NO
Circulate to Regional Magistrates:	YES/NO

IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE DIVISION, KIMBERLEY)

Case No: 1753/2022

In the matter between:

DESERT OIL (PTY) LTD Applicant

and

GRIEKWALANDWES KORPORATIEF BEPERK
t/a VAALRIVIER DIENSSTASIE Respondent

Coram: Lever J

JUDGMENT

Lever J

1. This is a matter originally brought on urgency, for an interim interdict pending the outcome of a trial action to be instituted within 30 days of

an order in this matter granting such interdict, to prevent the respondent from implementing a purported cancellation of a commercial contract entered into with the applicant. The contract concerned was for the supply of certain fuels to the respondent's service station.

2. Urgency has been dealt with by way of certain interim arrangements agreed to between the parties.

3. There is a long history of litigation between the parties. It is not necessary for me to set out and deal with this history. What is relevant for the present application is that such litigation culminated in a settlement that was made an Order of Court on 22 April 2022.

4. In terms of the said settlement the applicant had 60 days within which to exercise an option to continue supplying the respondent's service station with fuel products on the same terms as set out in the "Total" contract. The Total contract was from a competing supplier of fuels and comprised of a suite of documents that were annexed to the relevant Court Order already referred to.

5. The said Court Order gave the parties one month from the date that the option was exercised by the applicant to negotiate a supply agreement on terms acceptable to both parties. It provided that the

terms of the supply agreement could differ from the Total agreement. It also provided that the parties could extend the said one month period in writing. It further provided that in the event of the parties failing to agree on a mutually acceptable supply agreement within such one-month period or such extended period as agreed in writing, that the Total agreement would govern the relationship between the parties.

6. The applicant's attorney then on behalf of the applicant exercised the said option. The respondent's attorney acknowledged and accepted such notice to exercise the said option.

7. The applicant's attorney then wrote to the respondent's attorney outlining certain logistical issues and requested an agreement to extend the one-month period in order to pursue a supply agreement that was mutually acceptable to their respective clients. The respondent's attorney replied and set certain conditions. Correspondence ensued about the said conditions. At this point suffice it to say that whether or not there was a *de facto* extension of the said one-month period by virtue of the relevant correspondence, is one of the disputes placed before this court.

8. Further correspondence ensued. The correspondence between the attorneys seemed to have raised the temperature between the parties. The applicant's attorney purported to enforce a term in the relevant

credit agreement to unilaterally change the terms of credit upon which fuel was supplied to the respondent.

9. The respondent's attorney wrote to applicant's attorney purportedly implementing a clause of the Total agreement, giving notice to applicant to correct certain alleged breaches of the Total agreement within ten days failing which the agreement would be terminated.

10. The respondent then purported to cancel the Total agreement in writing, alleging that the breaches complained of had not been corrected or purged.

11. The issues to be decided by the court are: has the applicant met the requirements for an interim interdict; has the applicant made out a *prima facie* case that the respondent's purported cancellation is bad in law; and has the alleged conduct of the respondent's attorney established that the respondent had elected not to enforce the purported cancellation.

12. The requirements for an interim interdict have been set out by Corbett J (as he then was) in the matter of **L.F. BOSHOFF INVESTMENTS v CAPE TOWN MUNICIPALITY**[1] as follows:

> "(a) that the right which is the subject-matter of the main action and which he seeks to protect by means of interim relief is

[1] 1969 (2) SA 256 (CPD).

clear or, if not clear, is *prima facie* established, though open to some doubt;

(b) that, if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;

(c) that the balance of convenience favours the granting of the of interim relief; and

(d) that the applicant has no other satisfactory remedy."[2]

13. The second issue, in this case, being whether the applicant has *prima facie* established that the respondent's purported cancellation of the relevant agreement is bad in law, is subsumed into the first requirement for establishing an interim interdict. In other words, the applicant only has a right to claim an interdict to enforce the Total contract against the respondent if the purported cancellation is *prima facie* bad in law.

14. The other issues raised primarily have to do with whether the applicant has established a *prima facie* right, though open to some doubt. These issues are: applicant contends that at the time the notice to correct the alleged breaches was sent, the Total contract had not yet come into operation; applicant submits that the alleged breaches are not material; applicant argues that the alleged breaches set out in the notice to purge or correct the alleged breaches are not the same as those set out in the notice of cancellation; and whether, as applicant alleges, the respondent had waived its right to rely on the breach.

[2] L.F. Boshoff case above at 267B-D.

15. As is to be expected in a case of this nature, there are disputes that revolve around many of these issues. Insofar as there may be disputes of fact between the parties, the correct approach is:

> "In an application for a temporary interdict, applicant's right need not be shown by a balance of probabilities; it is sufficient if the right is *prima facie* established, though open to some doubt. The proper manner of approach is to take the facts set out by the applicant together with any facts set out by the respondent which the applicant cannot dispute and to consider whether, having regard to the inherent probabilities, the applicant <u>should</u> on those facts obtain final relief at a trial. The facts set up in contradiction by the respondent should then be considered, and if serious doubt is thrown upon the case of the applicant he could not succeed."[3] (my emphasis to show the qualification set out in the Gool case)

16. In order to analyse the issues raised by the parties, it is necessary to set out Orders 8 and 9 of the Order made by agreement on the 22 April 2022. The said Orders read as follows:

"8. In the event that Desert Oil exercises the option within the said 60 (sixty) day period (or such further period as the parties may agree in writing). Desert Oil shall be afforded a further period of 1 (one) month in order to negotiate and conclude a written supply agreement with GWK, which may be on different terms and conditions from those contained in the 2019 Total contract ("the supply agreement").

9. In the event that the supply agreement is not concluded within the one-month period referred to in paragraph 8 above (or such further period as the parties may agree to in writing), the parties shall be deemed to have entered into a supply agreement on all the terms and conditions of the 2019 Total contract, and the relationship between the parties shall, from that date onwards, be governed by the 2019 Total agreement, which is to be read as referring to Desert Oil in the place and stead of Total."

[3] This is the test for interim relief as set out in WEBSTER v MITCHELL 1948 (1) SA 1186 (W) at 1189 as qualified in GOOL v MINISTER OF JUSTICE & ANOTHER 1955 (2) SA 682 (C) at 688C-F.

17. It is common cause that the applicant exercised its option in the manner contemplated by the court order of the 22 April 2022. Such option was exercised on the 15 June 2022, within the 60-day period contemplated in the said court order. From the terms of the court order quoted above the applicant would have a further period of one month from the date that the said option was exercised to negotiate a mutually acceptable written agreement. This means that the further period of one month would commence to run from the 16 June 2022 up until the 16 July 2022.

18. Then on the 17 June 2022 the applicant's attorney (Korber) wrote to the respondent's attorney (Addinall) pointing out that there were a number of logistical difficulties and that an extension of the month-long period to conclude a new supply agreement may be required. Korber also called for proposals or suggestions from the respondent in this regard.

19. Respondent's attorney (Addinall) responds on the 17 June 2022 confirming receipt of the 'option notice' of the 15 June 2022 and also confirming receipt of Korber's letter of the 17 June 2022. Addinall states that he sent a copy of Korber's letter of the 17 June 2022 to his client (the respondent) and indicated that he trusts he would be in a position to correspond with Korber during the course of the following week. Presumably in response to Korber's request for an extension of the

period in which a supply agreement was to be negotiated. That being the part of Korber's letter that called for Addinall to take instructions from the respondent and advise Korber of respondent's attitude to the requested extension.

20. On the 22 June 2022 Korber writes to Addinall referencing his letter of the 17 June 2022 as well as the logistical difficulties in reaching a new supply agreement in the relevant one-month period and states that he sees no reason why the parties cannot accommodate each other in regard to extending the period within which to conclude a new supply agreement. Korber expressed the view that this would be in the interests of both parties.

21. On the 29 June 2022 Addinall wrote to Korber wherein he states that his instructions from the respondent are:

> "1. Our client is willing to agree to (sic) extension of maximum 10 (ten) days in order to receive your written proposal.
> 2. The above mentioned will be on condition that the proposal also contains a compromise on the legal cost (sic) that still needs to be taxed."

22. Then on the 14 July 2022, Korber writes to Addinall. In the said letter he states that the applicant is not in a position to negotiate a new supply agreement in the time available. That he did not believe it was justified for the respondent to impose a condition on even extending the time period within which applicant must revert to Addinall. Korber

pointed out that it was in both parties' interests to negotiate a new supply agreement and that he saw no reason to make such agreement contingent upon a reduction in the cost liability of the respondent. Korber then indicated that he had instructed their cost consultant to prepare the necessary bills of costs which he would then proceed to have taxed. That the parties could revisit the question of a reduction in the cost liability of the respondent after conclusion of a new written supply agreement. Korber concluded this letter by setting out that if respondent saw reason and allowed a further month in which to conclude a new supply agreement without it being contingent upon a compromise on the costs liability of the respondent, the applicant would be prepared to negotiate on that basis.

23. On the 29 July 2022 Addinall wrote to Korber, the material part of the said letter reads as follows:

> "Our instruction is that our client is not willing to consent to a further extension in order to receive a proposed draft supply agreement with different terms than that of the 2019 TOTAL contract.
> We are of the opinion that the court order dated 22nd of April 2022 specifically determines the relationship between our clients as from the 15th of July 2022.
> Our client will implement the (TOTAL) agreement as from the 1st August 2022.
> In light of the abovementioned kindly confirm the following:
>
> a) The price of the petroleum products with regard to the discount as per the 2019 Total contract;
>
> b) The collection point for collecting the petroleum products at the coast.

We confirm that payment will be 30 days after statement as from the 15th July 2022.

Kindly request your client to confirm the dates of upgrading of the station."

24. On the 2 August 2022 Korber wrote to Addinall purporting to implement clause 2.2 of the credit application agreement which provided that payment was cash against delivery unless applicant in its discretion provided credit to the respondent, which was subject to respondent providing security which was also in the discretion of the applicant. In terms of this clause, applicant purported to cancel the provision of credit to the respondent. Korber then invited the respondent to negotiate a new supply agreement. Korber then pointed out the discounts that would be provided to the respondent and also informed the respondent that by virtue of the agreement applicant had with its supplier, respondent was precluded from 'own collection'.

25. On the 5 August 2022 Addinall wrote to Korber purporting to implement the terms of clause 19 of the Total agreement. The material portion of the said letter reads as follows:

"5. This letter also serves to give notice to your client in terms of clause 19 of the Total Agreement in that your client is in breach of the agreement for the following reasons:

5.1 Your client failed to grant our client the agreed upon discounts. The failure by your client amounts to the amendment of the agreed upon discounts and as such your client also failed to, in terms of clause 4 of Schedule 1, give our clients 30 (thirty) days notice of your client's intended amendment;

5.2 Your client did not allow our client to pay 30 (thirty) days from statement from the 15th July 2022 up until your letter dated the 2nd August 2022;

5.3 Your client also failed to allow our client to collect the petroleum products at own cost which meant that our client in all probability paid an increased price towards the delivery of the petroleum products.

6. Should your client fail to remedy its breach within 10 (ten) days from date of this letter, our client will exercise its rights in terms of the agreement."

26. On the 11 August 2022 Korber wrote to Addinall wherein he provided a factual basis for refuting the allegations made by Addinall that applicant was in breach of the 2019 Total agreement.

27. On the 18 August 2022 there were certain discussions between Korber and Addinall this is where Korber asserts that respondent by virtue of representations and statements made by Addinall elected not to 'breach' the applicant. This is disputed by Addinall in the affidavits filed on behalf of the respondent.

28. On the 18 August Korber writes a contemporaneous letter to his client, the applicant, setting out that on his understanding of the conversation with Addinall, the respondent had elected not to 'breach' the applicant.

29. On the 24 August 2022 Addinall phones Korber and gives a warning of the cancellation letter that is to follow.

30. On the 24 August 2022 Addinall addresses a cancellation letter to Korber, the material part of the said letter reads as follows:

> "2. Your attention is drawn to the following:
> 2.1 At paragraph 5 of our letter dated the 5 August 2022 it is recorded that your client is in breach of the agreement in that it failed to grant our client the agreed upon discounts; in that it did not allow our client 30 days from statement to pay for petroleum products that were delivered to our client and that your client failed to allow our client to collect the petroleum products at own cost, which meant that it paid an increased price towards the delivery of the petroleum products by your client.
> 2.2 In response to the aforesaid letter your client (as per your letter dated 11 August 2022) undertook:
> 2.2.1 to deliver petroleum products to our client directly at the discounted price for own collection; and
> 2.2.2 to credit our client with any 'overpayment' for the period 16 July 2022 to 31 July 2022; and
> 2.2.3 to allow our client to pay for the petroleum products on 7-day terms (calculated from date of delivery) for a period of 30 days commencing at the end of August 2022.
> 3. Your client has failed to deliver petroleum products to our client at the aforesaid discounted rate for own collection, to credit our client with any overpayment and to allow our client 7 days (from date of delivery) to pay for the petroleum products.
> 4. Your client's conduct as aforesaid, constitutes a continuous breach of the agreement in that it has failed to remedy its breach within 10 business days after delivery of our letter dated 5 August 2022 as it is contemplated in clause 19.1 of the 2019 Total Agreement.
> 5. Our client, consequently, hereby and herewith cancels/terminates the aforesaid agreement with immediate effect."

31. Korber responds to the said letter of cancellation on the 25 August 2022 and sets out the applicant's position in regard to the 'breaches'

alleged therein and places the respondent on terms to withdraw the cancellation letter.

32. Addinall responds to Korber's letter on the 26 August 2022. The mere fact that this application proceeded shows that the letter of cancellation was not withdrawn.

33. The timeline set out above essentially sets out the factual matrix within which this court has to decide whether the applicant has established a *prima facie* right, though open to some doubt, that would entitle the applicant to the interim relief sought.

34. It is applicant's case that the respondent had elected through the statements and actions of its attorney, Mr Addinall, on the 18 August 2022 not to rely on its purported right to cancel the contract. It is further applicant's case that respondent is bound by the statements of Mr Addinall on the basis of the doctrine of ostensible authority.

35. Respondent has filed a denial by Mr Addinall. On the authorities cited above, it is the task of this court to decide whether in the context and the probabilities the denial by Mr Addinall casts so much doubt on the case set out by the applicant that it cannot be said that the applicant has a *prima facie* right, though open to some doubt, which if established at the trial would entitle applicant to the relief sought.

36. The applicant relies on a contemporaneous letter from its attorney, Mr Korber, to the applicant explaining his understanding of the conversation with the respondent's attorney, Mr Addinall.

37. Mr Addinall's denial is based on his letter of 26 August 2022 where he states that he did not hold any instructions from the respondent on the 18 August 2022. As well as the fact that respondent asserts in its answering affidavit that it would be improbable that Mr Addinall would waive the right to rely on the alleged breach in view of the fact that respondent was awaiting advice on the revocation of respondent's credit facilities by the applicant.

38. The respondent simply places denials before the court in respect of the conversation between Mr Addinall and Mr Korber on the 18 August 2022. Mr Addinall's version of what he said to Mr Korber is not placed before the court.

39. The inferences the respondent seeks to draw based on the possible referral of the credit facilities issue to arbitration are not credible. I reach this conclusion on the simple logic of contemplating referring a dispute regarding credit facilities to arbitration presupposes an acceptance that there is an existing contract where ongoing credit facilities are relevant. If the contract had been cancelled by virtue of a breach or even if the respondent was still considering its position on

the alleged breach, the respondent would not refer to the contemplated arbitration proceedings but would either reserve its position pending a decision on cancellation or alternatively assert that the contract would be or had been cancelled.

40. Thus, the probabilities, as they are revealed in the papers favours the applicant's version on the issue of the respondent abandoning its right to rely on the alleged breach.

41. The applicant then contends that on the doctrine of ostensible authority, that the respondent is bound by the statements and actions of Mr Addinall, even if Mr Addinall did not in fact have authority to make the relevant statements. In making this submission, the applicant relies on the authority of the following two cases: Firstly, MEC for Health and Social Development of the Gauteng Provincial Government v Mathebula and Others[4]; Secondly, MEC for Economic Affairs, Environment Eastern Cape v Kruisenga and another.[5] In my view, the applicant's submission in this regard is correct.

42. I am not required to make a definitive finding on this issue for present purposes. Although there is a conflict between Mr Addinall's version and that of Mr Korber, which will be decided at the trial after cross-examination of both Mr Korber and Mr Addinall. For present purposes and as a result of the improbabilities associated with Mr

[4] (2012/22469)[2016] ZAGPJHC 194 (4 July 2016) at para [26].
[5] 2010 (4) SA 122 (SCA) at para [20].

Addinall's version, already referred to, I cannot find that the respondent has cast serious doubt, to the extent required, on the version put forward by Mr Korber. If the evidence of Mr Korber, now *prima facie* established, is established at the trial, the applicant would have established a right and applicant would be entitled to the relief it claims.

43. Subject to my findings on the other requirements for an interim interdict, the above finding is sufficient to grant applicant the relief it seeks. However, in case I am wrong in this finding I will proceed to consider the other grounds relied upon by the applicant for the relief claimed. The further requirements for an interim interdict will be considered in due course.

44. The next issue to be considered is whether the respondent has properly complied with the clause in the Total contract that deals with the right to terminate. This would include considering whether the 'breaches' relied upon by the respondent were material. Whether the termination clause has been properly applied. Whether, in regard to some contractual obligations arising from the Total agreement, the respondent would be entitled to require the applicant to fulfil such obligation in *forma specifica* or whether in the circumstances the applicant can tender and deliver an equivalent substitute.

45. Here, aside from considering and applying the law for a *lex commissoria,* one would have to consider when the Total contract came into existence both in relation to the notice to correct the breach and the notice of cancellation and the grounds for cancellation in both of those respective documents.

46. The relevant clause in the Total agreement reads as follows:

> "19.1 Each party may terminate this agreement if:
> 191.1.1 the other party commits a material breach (which shall include every payment obligation) of this agreement and fails for any reason whatsoever to remedy such breach within 10 business days after delivery of written notice to such other party setting out the breach in question."

47. Where a party wishes to enforce a *lex commissoria* strict compliance with the terms of that cancellation clause are required.[6]

48. Clause 19 of the Total agreement requires that in order to give rise to a right to cancel there must be: a material breach of the agreement; delivery of a written notice setting out the breach in question; and a failure to remedy the said breach within 10 business days. If any one of these requirements is not met, then there will be no right to cancel.

[6] Hano Trading CC v JR 209 Investments (Pty) Ltd 2013 (1) SA 161 (SCA) at para [31]; De Wet N.O. v Uys N.O. en andere 1998 (4) SA 694 (T) at 706D.

49. The term ‘material’ is not defined in clause 19 or elsewhere in the Total agreement. The question of ‘materiality’ depends on an understanding of the contract as a whole in its context or put differently, all the circumstances of the case. This has been set out by Pickard ACJ in the matter of SIBANYONI and OTHERS v UNIVERSITY OF FORT HARE as follows:

> “However, the materiality of a breach cannot be assessed at the hand of general propositions. Each case has to be considered on its own merits and, to determine the extent to which a breach is material or goes to the root of the contract, one must look at the whole of the contract and the circumstances surrounding it and all the relevant facts. A breach which may be of a minor nature in one instance may well, under different circumstances, go to the very root of the contract and be so material as to be absolutely vital to the very existence or continuance of the contract.”[7]

50. The terms of clause 19, quoted verbatim above, clearly contemplate affording the guilty party an opportunity to correct its default. In these circumstances, the breach must be identified with sufficient particularity to allow the guilty party to understand its default and understand how its performance or non-performance as the case may be is deficient so that the guilty party is properly placed in a position where it can correct its default. In the matter of Kabinet van SWA v Supervision Food Services (Pty) Ltd, Strydom J described the purpose of such notice as follows:

> “Tweedens sou so ’n kennisgewing, waar dit die nie nakoming van die terme van die ooreenkoms onder die aandag van die respondent wil bring, duidelik en ondubbelsinnig moet wees sodat die respondent in

[7] Sibanyone and Others v University of Fort Hare 1986 (1) SA 19 (Ck) at 32H-I.

staat sal wees om te kan bepaal in welke opsig hy faal en sodat hy in staat kan wees om dit reg te kan stel."[8]

51. It follows from this that where an innocent party seeks to cancel an agreement following the notice contemplated in clause 19 of the Total agreement, the cancellation must be on the basis that the guilty party has not corrected the specific breach identified in the relevant notice. Such cancellation cannot be premised on a different breach which has not been preceded by a notice to remedy.

52. The applicant argues that the respondent's purported cancellation of the total agreement is invalid for three main reasons, which it sets out as follows: Firstly, the respondents notice to remedy failed to properly set out the breach it relied upon; Secondly, the applicant had not in fact committed a material breach as at the 5 August 2022 and accordingly the said notice to correct the breach was not competent; and Thirdly, the breach relied upon by the respondent in paragraph 2.2.1 as read with paragraph 3 of the cancellation notice dated the 24 August 2022 differed from the one identified in paragraph 5.3 of the notice to remedy of the 5 August 2022. Each of these arguments will be considered in turn. The relevant portions of both the letter of the 5 August 2022 and the letter of 24 August 2022 are quoted verbatim above.

[8] Kabinet van SWA v Supervision Food Services (Pty) Ltd 1989 (1) SA 967 (SWA) at 972D-E.

53. The first ground upon which applicant argues that the notice to remedy letter is invalid deals essentially with paragraphs 5.1 and 5.3 of the letter dated the 5 August 2022.

54. Applicant submits that a notice to remedy that does not even identify the provisions of the contract that respondent alleges the applicant to have breached falls short of what is required and does not provide sufficient particulars to enable the applicant to remedy the breach.

55. In respect of paragraph 5.1 of the notice to remedy, applicant points out that annexure "C" of the Total agreement sets out two different sets of discounts and deferred the higher set of discounts to after completion of the renovation of the relevant service station.

56. In respect of paragraph 5.3 of the said notice to remedy, respondent complains that as it was not able to collect its own fuel at the coast *"... in all probability is paid an increased price towards the delivery of the petroleum products."*

57. Applicant argues that paragraph 5.3 cannot be regarded as a clear and unequivocal notice of breach. On this aspect, I believe applicant to be correct.

58. In respect of paragraphs 5.1 and 5.3 of the notice to remedy applicant argues that they do not give sufficient particularity of the alleged breaches to give rise to a valid right to cancel in respect the said alleged breaches. In my view, this argument is correct.

59. Turning now to the second argument for the purported cancellation by the respondent being invalid namely, that as at the 5 August 2022 there was no material breach by the applicant.

60. This argument is based on two alternative grounds. The first being that the contract based on the Total agreement between the applicant and the respondent in fact only came into operation between the applicant and the respondent on the 1 August 2022 despite the fact that the applicant exercised its option on the 15 June 2022. The second alternative ground for arguing that there was no material breach as at the 5 August 2022 is that even if the Total contract became effective on the 16 July 2022 there was in fact no material breach of the Total agreement in July 2022.

61. Paragraph 9 of the Court Order of 22 April 2022, which is quoted above, contemplates the extension of the one-month period to negotiate a supply agreement under certain conditions. Even though those conditions may not have been strictly met, applicant argues that there was in fact an extension of the said one month period and that

the Total agreement only became effective between the applicant and the respondent on the 1 August 2022.

62. As has already been stated, it is common cause that applicant exercised its option on the 15 June 2022.

63. On the 17 June 2022 Korber wrote to Addinall requesting an extension of the period of one month within which a supply agreement was to be negotiated between the parties.

64. On the 17 June 2022 Addinall responded by email that he had referred Korber's letter requesting an extension to his client for instructions and that he should be in a position to engage on this issue in the week that followed.

65. On the 29 June 2022 Addinall sent an email to Korber wherein he stated that:

> "My instructions are as follows:
>
> 1. Our client is willing to agree to extension of maximum of 10 (ten) days in order to receive your written proposal.
> 2. The above mentioned will be on condition that the proposal also contains a compromise on the legal cost (sic) that still needs to be taxed."

66. Correspondence again ensued between Korber and Addinall wherein Korber requested a further month in which to negotiate the supply

agreement. This correspondence culminated in a letter from Addinall on the 29 July 2022, the material part of this letter reads:

"…our client is not willing to consent to a further extension in order to receive a proposed draft supply agreement with terms than that of the 2019 TOTAL contract.

We are of the opinion that the court order dated 22nd April 2022 specifically determines the relationship between our clients as from the 15th July 2022.

Our client will implement the (TOTAL) agreement as from the 1st August 2022.

In light of the abovementioned kindly confirm the following:

a) The price of the petroleum products with regard to the discount as per the 2019 Total contract;

b) The collection point for collecting of the petroleum products at the coast.

We confirm that payment will be 30 days after statement as from the 15th July 2022.

Kindly request your client to confirm the dates of upgrading of the station."

67. Respondent argues that the agreement to grant an extension was conditional on a compromise on legal costs. They further argue that Korber rejected this offer on the 14 July 2022 and that therefore there was no agreement on an extension as at 14 July 2022. On respondent's argument the Total agreement came into operation on the 15 July 2022.

68. Applicant argues that: Applicant was waiting for a response to the request for a further month within which to negotiate the alternative

supply agreement; and Respondent had in fact granted a 10-day extension from the 15 July 2022 without any condition attached thereto, and what was sought to be conveyed in Addinall's email of the 29 June 2022 was that any proposal for an alternative supply agreement would need to contain a compromise in regard to previous cost order granted in favour of the applicant in order for such alternative supply agreement to be acceptable to the respondent.

69. The facts and circumstances as they emerge from the papers currently before this court do not support the respondent's position that the proposed 10-day extension was merely a suspensive condition that was not in fact fulfilled. That consequently there had been no extension of the period contemplated in Order 9 of the Court Order of the 22 April 2022. I reach this conclusion after having considered:

69.1. The wording of the email from Mr Addinall dated 29 June 2022, the relevant portion of such email reads: "The above mentioned (the 10-day extension) will be on condition that the proposal also contains a compromise on the legal cost that still needs to be taxed." (emphasis added);

69.2. The wording of the letter from Mr Addinall dated the 29 July 2022, the relevant portions of such letter read: "Our instruction is that our client is not willing to consent to a further extension in order to receive a proposed draft supply agreement..." and "Our

client will implement the (TOTAL) agreement as from the 1st August 2022" (emphasis added);

69.3. The wording of the two documents referred to immediately above clearly shows that the Total agreement was not implemented from the 15 July 2022 as the respondent now contends;

69.4. That respondent continued with its usual payment patterns in July 2022 and did not inform applicant that it would now only be paying in 30 days as contemplated in the Total contract;

69.5. That until the 29 July 2022 the respondent did not inform the applicant that it wished to collect its own fuel at the coast, as is required by the Total contract;

69.6. That respondent only on the 29 July 2022 enquired about the applicable price in terms of the Total contract and the collection point for fuel collection at the coast; and

69.7. That respondent, on the probabilities, would have reacted differently to the applicant's request for an extension if it had intended the Total agreement to be put into effect on the 15 July 2022 as it now contends.

70. Applicant argues, in the alternative, if it is found that the respondent did not in fact grant a 10-day extension, then applicant submits that by virtue of Mr Addinall's correspondence and the conduct of the

respondent, that respondent is estopped from denying that it granted the applicant an extension.

71. Although I do not need to make a finding on the estoppel issue in order for this court to grant an interim interdict, in all of the circumstances as found in the affidavits filed in this matter as outlined above, I do not think that the respondent is now entitled to rely on the one month period set out in the order of the 22 April 2022 for the purpose of negotiating an alternative supply agreement.

72. In the alternative to the argument that the Total agreement was only put into effect on the 1 August 2022, applicant argues that in any event there had not been a material breach of the said agreement on its part in July 2022. In this context, applicant contends that:

72.1. It did not commit a breach in July 2022 by failing to afford respondent 30-day payment terms because respondent did not inform applicant that it now wished to get the benefit of the 30-day terms and simply continued to pay in accordance with its usual practice;

72.2. Given the provisions of clause 2.3 of the terms and conditions of the credit application form, a document that formed part of the Total contract, applicant could refuse to supply fuel products to the respondent except on a cash on delivery basis without giving

respondent any notice whatsoever. Consequently, even if the failure to provide 30 days credit is established, in circumstances where credit facilities were cancelled in terms of the Total contract, it would not constitute a breach which respondent would be entitled to invoke;

72.3. It did not commit a breach in July 2022 by failing to afford the respondent the option to collect its own fuel. This argument is based on the following contentions: Respondent failed to exercise its option collect its own fuel in July 2022; The first indication respondent gave that it wished to collect its own fuel was in the letter of the 29 July 2022; In the orders for fuel placed by the respondent in July 2022 with the applicant it never specified that it wished to collect its own fuel as required in the Total agreement.

72.4. Applicant further argued that in regard to its failure to give respondent discounts in July 2022, it cannot be argued that this was a material breach on its part because of the impression created by the respondent that the Total contract had not yet come into operation.

73. In my view, respondent cannot hold applicant in breach of the Total agreement in July 2022 insofar as the 30-day credit terms are concerned for the reasons advanced by the applicant, namely: that respondent did not give applicant notice that it wanted to benefit from the 30-day credit provisions; that it was in terms of the Total agreement

relating to credit within the discretion of the applicant and that the respondent was in terms of that agreement not entitled to notice; and that the credit facilities were in fact cancelled in terms of the agreement. The factual basis upon which these arguments are based were not seriously challenged by the respondent.

74. Similarly, applicant did not commit a breach of the own collection provision of the Total agreement in July 2022, because the first mention of own collection by the respondent is in Addinall's letter of 29 July 2022. Also, own collection was not specified by respondent in any of the fuel orders it placed with the applicant in July 2022 as required in the Total agreement.

75. In regard to the discounts for July 2022, respondent certainly at the very least created the impression that the contract would be implemented from 1 August 2022. This clearly emerges from the timeline and correspondence set out above. In these circumstances, respondent cannot rely on the provisions of the Total contract without first putting applicant on notice that it would be implementing the Total agreement in July 2022. This was not done by the respondent.

76. Turning now to the period between the 1 August 2022 and the 5 August 2022. In order for respondent to have validly terminated the Total agreement, respondent would have to show that the applicant

was indeed in breach of at least one of the grounds set out in the notice to remedy of the 5 August 2022.

77. In respect of paragraph 5.1 of the letter of 5 August 2022 which relates to the discounts due to respondent. At this point one needs to specifically look at the discounts due for the period from the 1 August 2022 to the 5 August 2022. Applicant contends that it granted the said discounts in the following manner: The discounts for petrol was built into the invoice price; and the discounts for diesel for the August 2022 purchases were paid to the respondent on the 15 September 2022. Indeed, applicant contends that it gave respondent higher discounts than it was obliged to in terms of the Total contract in view of the fact that the respondent's service station on the Vaal River has not yet been refurbished.

78. The facts placed before this court in the affidavits filed by the parties, do not persuade me that applicant was in fact in breach of its obligations under the Total contract for the relevant period on the grounds relied upon in paragraph 5.1 of the letter of the 5 August 2022.

79. Paragraph 5.2 of the letter of the 5 August 2022 relates to the alleged failure of the applicant to grant the respondent 30-days credit terms on their fuel orders. It must be remembered that applicant

revoked the respondent's credit facilities in terms of the Total agreement and respondent was notified of this on the 2 August 2022.

80. Respondent placed an order for fuel on the 1 August 2022. However, this order was not delivered until the 4 August 2022 after the respondent's credit facilities had been revoked.

81. Accordingly, there is no factual basis for the respondent to aver that as at the 5 August 2022, it was entitled to 30-day credit terms. In these circumstances, it cannot be said that the applicant was in breach of the Total agreement on the grounds set out in paragraph 5.2 of the letter of the 5 August 2022.

82. Paragraph 5.3 of the letter of the 5 August 2022 deals with the failure to allow respondent to collect the fuel at its own expense from the coast. The respondent does have the right to elect to collect the fuel it orders from the applicant at its own expense from the coast.

83. It is clear from the facts and circumstances originally asserted by the respondent on the issue of 'self-collection' that respondent was concerned it was paying too much for the delivery of fuel products to its Vaal River service station. Its concern was clearly with its profitability and not primarily with any right to enforce the contract *per se.* Its subsequent change of stance is clearly opportunistic and designed to bolster its case for cancellation.

84. Applicant contends that this is a case where performance *per aequipollens* is appropriate. Applicant contends that there can be no other prejudice to the respondent other than potential financial disadvantage. Applicant contends that in the circumstances of the case it could not negotiate an alternative supply agreement with the respondent. The Total agreement came into operation between the parties by virtue of the settlement agreement in April 2022. Applicant has no control over the fact that its own supplier Astron does not permit own collection from its depot on the coast. Applicant has tendered to make good any potential financial disadvantage that respondent may suffer from this. Applicant relies on the authority of Van Diggelen v De Bruin and Another[9] and contends that the facts of the present case warrant a substitute performance on the basis of the test set out by Claasen J in the Van Diggelen judgment as referred to above.

85. In these circumstances, compensation for any potential financial prejudice would be proper and adequate performance in respect of the obligation to allow self-collection. However, despite first raising the issue in the context of it potentially suffering financial prejudice as a result of not being allowed to self-collect, respondent has refused to co-operate and provide the applicant with the details of its costs in relation to self-collection. Applicant can only establish the amount it

[9] 1954 (1) SA 188 (SWA) at 192H to 193F

needs to compensate the respondent in respect of it not being allowed to self-collect if it can determine what the costs associated with self-collection are. Here the cooperation of the respondent is clearly required. Respondent has steadfastly refused such cooperation.

86. Despite originally claiming financial prejudice, respondent changed its tune and seeks to rely on a right to performance *in forma specifica*. Respondent does not explain its change of attitude. Respondent for the period prior to the alleged termination does not explain why it fails to cooperate with the applicant to quantify the financial prejudice it suffers from not being able to self-collect. After the alleged termination, respondent simply cites the termination of the agreement as grounds to justify its non-cooperation with the applicant. Respondent continues to insist on performance of the self-collect right *in forma specifica*.

87. There can be no prejudice other than potential financial disadvantage. Applicant cannot be blamed for not being able to give the respondent the opportunity to self-collect in these circumstances. Financial compensation would clearly be suitable, adequate and proper performance in these circumstances.

88. Respondent’s change of stance and failure to cooperate with the applicant to establish the extent of its financial disadvantage in this context does it no credit. It is clearly opportunistic. In these

circumstances, I cannot find that applicant is in breach of the obligation to allow self-collection.

89. In respect of applicant's contention that paragraph 5.3 of the notice to remedy dated 5 August 2022 does not correspond with the reason for cancellation enunciated in paragraph 2.2.1 of the cancellation notice dated 24 August 2022, it is clear that in paragraph 5.3 of the notice to remedy, respondent relies upon the ground that failure to allow respondent to self-collect in all probability resulted in the respondent paying an increased price for the delivery of the petroleum products. Whereas paragraph 2.2.1 as read with paragraph 3 of the notice of cancellation dated 24 August 2022 respondent states as its reason for cancelling that applicant states *inter alia* that applicant failed to honour its undertaking to deliver the petroleum products to respondent at the discounted rate for own collection.

90. This is essentially a new ground for cancellation and if respondent wants to rely on it as a basis to cancel the Total agreement, it ought to have delivered a new notice to remedy under clause 19 of the Total agreement.

91. A further problem for the respondent by raising and relying on this alleged failure by applicant to honour its undertaking to deliver petroleum products to the respondent at a reduced price to compensate for the fact that respondent cannot self-collect, is that it

fatally undermines the position respondent takes on its right to claim performance *in forma specifica* of its right to self-collection. The two positions are mutually destructive and the change from the one to the other has not been suitably explained on the papers.

92. Having regard to all of these facts and circumstances I believe that respondent has not established a valid basis to cancel the Total contract. Applicant has established facts that *prima facie* establish it's right, though at this stage open to some doubt. The doubt that presently exists is not of such a nature that negate applicant's right to interim relief, subject of course to establishing the other grounds required for an interim interdict. If applicant establishes these facts in the contemplated trial, it would be entitled to the relief it seeks.

93. The requirement of irreparable and imminent harm is demonstrated by the history of the litigation between the parties. If the interdict is not granted, the contemplated action would be rendered moot because respondent would implement the cancellation by ceasing to order petroleum products from the applicant, removing the applicant's infrastructure at the Vaal River service station and entering into a long-term agreement with Total.

94. The harm to the applicant will be irreparable because if it were to succeed at the trial to show that the purported cancellation is invalid, without an interim interdict the respondent would have concluded a

long-term agreement with Total. Total would have installed its infrastructure at the Vaal River service station and the clock could never be turned back.

95. In respect of the balance of convenience, the respondent argues that if applicant is successful in the main action, it can claim damages.

96. Respondent's argument on damages does not consider that applicant may be at risk of losing its branded marketing agreement with its supplier, Astron.

97. Respondent further contends that it is embarrassed due to the outdated appearance of the Vaal River service station.

98. The prejudice the applicant stands to suffer if the interim interdict is not granted, and it ultimately succeeds in the main action far outweighs the inconvenience the respondent might suffer if the interim interdict is granted, and it ultimately succeeds in the main action. In these circumstances, the balance of convenience favours the applicant.

99. On considering the question of any alternative remedy which is reasonable and adequate in the circumstances, the respondent argues that the applicant has a claim for damages.

100. A claim for damages is not a suitable alternative remedy as it does not account for the risk that the applicant stands to lose its branded marketer agreement with Astron as a result of losing the contract with the respondent. The respondent has not put up any evidence to rebut this.

101. In these circumstances a claim for damages is not a suitable or adequate remedy for the applicant.

102. In my view there is no reason why I should exercise my discretion not to award an interim interdict in this matter.

103. Due to the approaching holiday season, I have decided to grant the applicant more time to institute the contemplated action.

104. On the question of costs in the circumstances where an interim interdict is granted pending the outcome of a trial to be instituted at a future date, it is prudent to reserve the question of costs for the trial court as the ultimate picture that may emerge after the evidence is tested at trial might be very different than that relied upon in this application.

In the circumstances, the following order is made:

1. Pending the final determination of the action to be instituted by the applicant, within 60 (sixty) days of date of this order, seeking declaratory and ancillary relief against the respondent ('**the action**"), the following order is granted:

1.1. The implementation of the respondent's purported cancellation of the agreement referred to in paragraph 4 of the order of the court dated 22 April 2022, as read with paragraph 9 thereof (which order, without annexures, constitutes annexure NOM1 to the notice of motion), is suspended;

1.2. The respondent shall continue to purchase all petroleum products for sale at the Vaal River Service Station ("**Vaal River**") from the applicant.

1.3. The respondent is interdicted and restrained from:-

1.3.1. Taking any further steps pursuant to its letter styled *"Notice of Cancellation/ Termination of Agreement: Griekwalandwes Korporatief Beperk/ Desert Oil (Pty) Limited dated 24 August 2022"* ("**the cancellation letter**") and from attempting to implement such purported cancellation in any way whatsoever;

1.3.2. Purchasing fuel products for sale at Vaal River from any supplier other than the applicant, save for the prior written consent of the applicant;

1.3.3. Handling, moving, interfering with and/or removing the applicant's Caltex signage and branding articles and equipment at Vaal River;

1.3.4. Handling, moving, interfering with and/or removing all or any of the applicant's underground storage tanks (USTs), pipelines and other equipment belonging to the applicant and installed by or on behalf of Caltex Oil SA (Pty) Ltd at Vaal River;

1.3.5. Demanding or continuing to demand from the applicant the removal of the said signage, branding articles, USTs, pipelines or other equipment;

1.3.6. Utilizing the applicant's USTs, pipelines and fuel dispensing pumps installed at Vaal River for the storage, dispensing and sale of any fuel products other than those supplied by the applicant, save with the prior written consent of the applicant;

1.3.7. Concluding any agreement with Total Energies Marketing South Africa Proprietary Limited (**"Total"**) or any other supplier of petroleum products in respect of Vaal River.

2. The costs of the above application are reserved for the court hearing the contemplated trial.

_____
Lawrence Lever
Judge
Northern Cape Division, Kimberley

REPRESENTATION:

Applicant:	*ADV DM DAVIS (SC)*
Instructed by:	*HAARHOFFS INC.*
Respondent:	*ADV N SNELLENBURG (SC) and ADV JG GILLILAND*
Instructed by:	*VAN DE WALL INC.*
Date of Hearing:	*06 October 2022*
Date of Judgment:	*17 November 2023*