

REPUBLIC OF SOUTH AFRICA



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

CASE NUMBER: 56719/2021

<u>DELETE WHICHEVER IS NOT APPLICABLE</u>	
1.REPORTABLE:	NO
2.OF INTEREST TO OTHER JUDGES:	NO
3.REVISED	
19 January 2022	
DATE	SIGNATURE

In the matter between:

SASOL OIL (PTY) LIMITED

APPLICANT

AND

EUROZAR (PTY) LIMITED

FIRST RESPONDENT

MICHAEL MOOSA

SECOND RESPONDENT

NAEEM MOOSA

THIRD RESPONDENT

SANDTONFUEL (PTY) LIMITED

FOURTH RESPONDENT

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on the 19th of January 2022.

DIPPENAAR J:

Introduction and background facts

[1] The applicant ("Sasol") by way of urgent application sought the eviction of the first respondent ("Eurozar") and three further respondents from commercial premises, together with punitive costs. In short, Sasol's case is that Eurozar has no right to occupy the premises as the franchise agreement terminated through effluxion of time, that its refusal to vacate the premises is unlawful and that it is entitled to an order ejecting Eurozar and all persons associated with it from the premises, including SasolFuel which is unlawfully conducting an Uber Eats business from the premises. Its case for urgency is based on potential brand damage, the siphoning of money to SasolFuel and the potential loss of its site licence. Its intention is to appoint an interim operator who will apply for a retail licence. Sasol contended that it is suffering significant brand damage as consumers are disappointed at the lack of service at the Sasol branded forecourt and convenience centre and have lodged complaints and that it is suffering substantial financial losses on an ongoing and increasing basis.

[2] Eurozar challenged the urgency of the application, contended for the importation of an implied or tacit term of good faith into the franchise agreement concluded between it and Sasol, which the latter breached and by way of counter application sought a stay of the eviction application. The second, third and fourth respondents contended that they were wrongly joined to the application and no costs order should be granted against them. They did not oppose the relief sought, nor contended for any right to occupy the premises.

The second and third respondents are the sole directors of both Eurozar and the fourth respondent (“SandtonFuel”).

[3] The application must be determined on the basis that the applicant sought final relief¹ and applying the so called Plascon Evans test². Where there is a genuine dispute of fact, the respondent’s version must be accepted. A dispute will not be genuine if it is so far-fetched or so clearly untenable that it can be safely rejected on the papers.³ A real dispute of fact arises, *inter alia*, where a court is satisfied that the party who purports to raise the dispute has in its affidavit seriously and unambiguously addressed the facts said to be disputed.⁴

[4] The background facts are not contentious and are common cause. Sasol holds the head lease over a Sasol branded forecourt and convenience store located at 375 Rivonia Road, Sandton (“the premises”). Eurozar occupied the premises in terms of a written franchise agreement concluded with Sasol during 2016. The five-year initial period of the lease commenced on 8 May 2016 and expired on 7 May 2021.

[5] The franchise agreement contained an extension clause, the relevant portion of which provides:

“...the Franchisee has the right subject to the prior approval of the Franchisor, but is not obliged to, extend its relationship with the Franchisor for an additional period of five (5) years, calculated with effect from the date immediately following the expiry of the Initial Period...Although the Franchisor is not obliged to extend this Franchise Agreement for an additional period after the Initial Period, the Franchisor may not refuse to agree to such an extension on unreasonable grounds”.

¹ In the alternative interim relief was sought, the effect of which may however be considered as final. To the benefit of the respondents, the application will be adjudicated on the basis that the relief sought is final.

² Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd, 1984 (3) SA 623 (A) at 634E to 635C; NDPP v Zuma 2009 (2) SA 277 (SCA) para [26]

³ J W Wightman (Pty) Ltd v Headfour (Pty) Ltd 2008 (3) SA 371(SCA) para 12

⁴ PMG Motors Kyalami (Pty) Ltd (in liquidation) v Firststrand Bank Ltd, esbank Division 2015 1 All SA 437 (SCA) ; 2015 (2) Sa 634 (SCA); Wightman supra para 13

[6] On 4 November 2019, Sasol notified Eurozar that it would not extend the Franchise agreement. The relevant portion of the letter provided:

“The franchise agreement between Sasol and the franchisee is due to expire on 08 May 2021 in the ordinary course by the effluxion of time (the initial period).

Therefore, this serves to notify the franchisee that the relationship between Sasol and the franchisee will summarily terminate 08 May 2021 and Sasol is unable to offer any additional period for the franchisee to operate the Sasol Rivonia convenience store”.

[7] Eurozar asked Sasol to elaborate on why it was unable to offer an additional period, pursuant to which Sasol on 2 December 2019 responded stating:

“This is to reiterate that Sasol’s Franchise Agreement with Eurozar (Pty) Ltd will expire by effluxion of time on 8 May 2021. The property on which the premises are situated is not owned by Sasol and same reverts to the owner on expiration of this Franchise Agreement.”

[8] On 27 February 2020, Eurozar notified Sasol that it wished to extend the franchise agreement for the additional period of five years, being the contractually agreed period in terms of clause 5.4 of the franchise agreement.

[9] Eurozar disputed the validity of Sasol’s refusal to extend the franchise agreement and sought to assert its rights under s 12B of the Petroleum Products Act⁵ (“the PPA”) by lodging its request for a referral to arbitration with the controller. Its case was that Sasol’s decision not to extend its relationship with Eurozar for an additional period of five years constituted an unfair or unreasonable contractual practice as contemplated in s 12B⁶. It further sought compensation. On 26 March 2020, the matter was referred to arbitration and an arbitrator appointed. A full hearing with evidence and argument was conducted during June 2021. During the arbitration it transpired that Sasol had rights to occupy the property upon which the site is situated until March 2024.

⁵ 120 of 1977

⁶ The grounds advanced by Eurozar are recorded in paragraph 5 of the arbitrator’s award.

[10] The franchise agreement in its terms expired on 7 May 2021. As the arbitration was not completed at that time, the parties agreed to an interim arrangement from May 2021 that: *“pending the resolution of the arbitration, Eurozar would carry on the business at the premises in accordance with the defined standards of operation and procedures set out in the franchise agreement”*.

[11] The arbitrator handed down his award in Sasol’s favour on 22 November 2021, putting an end to the interim arrangement. The arbitrator dismissed Eurozar’s claim with costs and held, *inter alia*, that: (i) Sasol’s refusal to extend the lease was not a breach of clause 5.3 of the franchise agreement; and (ii) Sasol’s refusal to agree to an extension was not unreasonable or unfair and was not an unfair or unreasonable contractual practice as envisaged by s 12B of the PPA. In terms of s12B(5), the arbitrator’s award is final and binding. The effect of the award is that the franchise agreement expired by effluxion of time on 8 May 2021.

[12] Sasol called on Eurozar to vacate the premises on 26 November 2021, giving it until 29 November 2021 to do. Eurozar’s directors, the second and third respondents (“Messrs Moosa”) refused to vacate the premises resulting in the present application being launched on 6 December 2021.

[13] It was undisputed that Eurozar is not conducting business from the convenience store, has not bought or sold fuel since July 2021 and has not paid any rental to Sasol for some six months. There is a dispute on the papers regarding SandtonFuel conducting business from the premises, an issue to which I later return.

[14] Subsequent to the service of this application, Eurozar on 17 December 2021 instituted review proceedings in the High Court under s33 of the Arbitration Act⁷, which proceedings are still pending.

⁷ 42 of 1965

[15] The issues requiring determination are: (i) whether the application is urgent; (ii) Eurozar's counter application for a stay of the eviction application pending finalisation of the pending review proceedings; (ii) the merits of Eurozar's defence to the eviction, being the importation of a tacit term into the franchise agreement and Sasol's alleged breach thereof; (iv), whether the joinder of the second to fourth respondents is appropriate and (v) an appropriate order as to costs.

Urgency

[16] Eurozar challenged urgency on the basis that Sasol did not establish that it could not obtain substantial redress at a hearing in due course⁸. It further contended that any urgency was self-created as Sasol knew of the facts relied on months before the application was launched and since at least March 2021 alternatively August 2021 when Eurozar ceased to purchase fuel from it. I do not agree.

[17] The prejudice and ongoing and increasing reputational and financial harm relied on by Sasol was not factually disputed. Sasol intends installing an interim operator for the remainder of its head lease which terminates in March 2024 so that it can earn revenue from the fuel filling station and convenience store. It was not disputed that Sasol is liable to its landlord for monthly rental of some R75 000 plus VAT, could earn revenue from the sale of fuel of some R1.5 million per month and generate a 10% of turnover income from the operation of the convenience store. This income is not presently earned as Eurozar is not purchasing fuel products and is not operating the convenience store since about August 2021. It was further uncontested that Eurozar has been left as an empty shell with the result that Sasol would be unable to recover damages for holding over any additional period of Eurozar's occupation of the premises. It was similarly not challenged that the

⁸ East Rock Trading 7(Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others (2012) JOL 28244 (GSJ) paras [6]-[7]

continued conduct of Eurozar places Sasol in jeopardy in relation to its head lease agreement.

[18] Sasol's explanation why the application was not launched prior to the arbitrator's award becoming available on 22 November 2021, is reasonable and acceptable. It is well established that commercial urgency can justify the invocation of urgent proceedings⁹. This principle has found approval in the context of commercial evictions by our courts in similar circumstances to the present where tenants are not paying rental or offering to do so¹⁰.

[19] I conclude that Sasol has established that it will not obtain substantial redress at a hearing in due course and that it has appropriately considered the degree of urgency in the time limits set in the application¹¹. It cannot be concluded that there was any delay in the launching of the application. It follows that this challenge must fail.

The stay application

[20] It is apposite to first deal with Eurozar's application for a stay of the eviction application wherein it raises the imposition of a tacit or implied term of good faith, and an alleged breach thereof by Sasol, which underpins its argument both in support of the stay application and its defence to the eviction application.

[21] In *Crompton Street Motors CC v Bright Idea Projects 66 (Pty) Ltd*¹² ("*Crompton*"), the Constitutional Court confirmed that a High Court's jurisdiction to hear a dispute on the subject matter of an arbitration under s12B of the PPA is not ousted or deferred. In *Former*

⁹ 20th Century Fox Film Corporation v Anthony Blackfilms (Pty) Ltd 1982 (3) SA 582 (W) at 587G

¹⁰ Blue Crest Holdings (Pty) Ltd v Body Action Health Clubs (Pty) Ltd [2020] ZAGPJHC 407 at paras [9], [11] and [14]; CEZ Investments (Pty) Ltd v Wynberg Auto Body (Pty) Ltd 2021 JDR 2487 (GJ) para [19]-[21]

¹¹ Luna Meubelvervaardigers (Edms) Bpk v Makin and Another, t/a Makin Furniture Manufacturers 1977 (4) SA 135 (W) at 137F

¹² [2021] ZACC 24 para [26];

*Way Trade and Invest (Pty) Ltd v Bright Idea Projects 66 (Pty) Ltd*¹³ the Constitutional Court confirmed this principle and reiterated that the discretion is to be judicially exercised. The same principles would apply after the arbitration proceedings have been concluded. One of the benefits of arbitration is that the arbitrators award is final and binding which avoids the ordinary appellate processes applicable to litigation and thus saves time and resources as one of benefits. These benefits require that there should be legitimately compelling reasons to refuse a stay of proceedings¹⁴. In *Crompton*, the Constitutional Court explained¹⁵ that:

“[t]his principle of appellate restraint preserves judicial comity. It fosters certainty in the application of the law and favours finality in judicial decision making”.

[22] Eurozar argued that a stay of the application pending the finalization of the pending review proceedings would be in the interests of justice and just and equitable, considering the overlap of issues in the pending review proceedings and the eviction application. It contended for an overlap between the fairness and lawfulness dispensation, with a finding in the fairness dispensation having a material bearing on the lawfulness dispensation, that is that Eurozar stands to have the unfair or unreasonable practice corrected through an extension of the franchise agreement for the envisaged three year period. It was anticipated that the unfair or unreasonable referral in terms of s12B would be referred back to the arbitrator for a fresh consideration. Eurozar argued that if it is evicted, its retail licence would terminate and render it impossible for the arbitrator to direct reinstatement.

[23] In the review proceedings, Eurozar contends that the arbitrator committed a gross irregularity and misconceived the nature of the enquiry. It further contends that the arbitrator's finding that he did not have jurisdiction to grant compensation is a gross irregularity.

¹³ Former *Way Trade and Invest (Pty) Ltd v Bright Idea Projects 66 (Pty) Ltd* [2021] ZACC 33 (“Former Way”) paras [39]-[40]

¹⁴ *Crompton* para [45]

¹⁵ Para [47]

[24] Sasol on the other hand argued that the interests of justice did not favour a stay and contended that the review proceedings have no prospects of success and constitutes an abuse and has been launched for purposes of delaying the eviction.

[25] It was common cause that s 6 of the Arbitration Act¹⁶ does not apply, given that the s12B arbitration has already been held and an award made by the arbitrator. In terms of s12(5) the arbitrator's decision is final and binding.

[26] A court will favourably consider a stay when real and substantial justice requires such a stay or where injustice would otherwise result. Our courts have held that the requirements for an interim interdict could be taken into account as guidance in determining whether or not to grant a stay¹⁷ and that a similar test is to be applied, save insofar as an applicant may not be exerting a right. Underpinning Eurozar's contentions pertaining to the importation of an implied term of good faith and Sasol's breach thereof, is that it is pursuing a right to the extension of the franchise agreement for a period of three years.

[27] The interests of justice require that final arbitration awards are recognised and enforced. Eurozar's dispute over the reasonableness and fairness of Sasol's refusal to extend the franchise agreement has been referred to arbitration and has been determined. The grounds of review under s33 of the Arbitration Act are confined to considerations of the correctness of the procedure adopted at arriving at the award and do not extend to grounds of material errors of law¹⁸. It is further not for a court or an arbitrator to amend the terms of the franchise agreement where there was no attack on the reasonableness of the terms themselves. In the present context it is apposite to bear in mind that the issues surrounding the importation of a good faith clause was not pleaded in the arbitration proceedings as forming part of the franchise agreement, nor did it form

¹⁶ 42 of 1965

¹⁷ *Gois t/a Shakespeare's Pub v Van Zyl and Others* 2011 (1) SA 148 (LC) paras 32-33 and the authority referred to therein

¹⁸ *Telcordia Technologies Inc v Telkom SA Limited* 2007 (3) SA 266 SCA para [86]

part of the issues which the arbitrator was called upon to determine¹⁹. The sole basis on which Eurozar sought relief was for an extension of an additional period of five years in accordance with the provisions of the franchise agreement. There has further been no attempt to amend the agreement to provide for a three year period. It is further relevant that the s 12B arbitration proceedings have already been concluded and that the grounds for review under s33 of the Arbitration Act are limited. Review proceedings were also only threatened once Sasol took steps to demand Eurozar's vacation of the premises and launched after the launching of the eviction proceedings.

[28] It is not for this court to predetermine the merits of the pending review proceedings or whether the review is competent²⁰ and I shall express no view thereon. For present purposes, I accept that there is a possibility that the review may be successful and that Eurozar need not establish good prospects of success as it is not a weighty factor to take into consideration in exercising the discretion afforded²¹.

[29] I am not persuaded that Eurozar has, considering its own conduct, met the remaining criteria, or established a favourable balance of convenience. Eurozar's conduct has since about August 2021 been in direct contrast to compliance with the franchise agreement or the interim arrangement reached between the parties and destructive of any contention that it has acted in good faith.

[30] It was undisputed that Eurozar has not purchased fuel from Sasol from 28 July 2021 and has not been operating the forecourt as a fuel retailer or the convenience store as a Sasol convenience store. It has not accounted to Sasol for any sales from the convenience store, despite sales taking place and has not paid any rental or other payments. In its answering papers, Eurozar gave no cogent explanation for its conduct nor was any indication given that it intended to comply with a franchisee's obligations,

¹⁹ Hos+Med Medical Aid Scheme v thebe Ya Bophelo Healthcare Marketing & Consulting (Pty) Ltd and Others 2008 (2) SA 608 (SCA) paras [28] and [30]; s 12B(4)(a) of the PPA

²⁰ Gois supra paras 34-37

²¹ Crompton para [52]

make any payments to Sasol or that it intended to properly conduct the operations on the premises in accordance with the requirements set in the franchise agreement, pending the determination of the proposed review application. Rather, the undisputed facts further established that an Uber Eats business was being conducted from the premises earning substantial revenue from about March 2020 without any income being accounted for to Sasol. Insofar as Eurozar contended that the business was an independent one operated by SandtonFuel, no consent was ever sought or obtained from Sasol to do so. It was further not disputed that Eurozar has been left as an empty shell which would afford to recourse to Sasol if it were to seek to recover damages.

[31] Eurozar did not meaningfully dispute the prejudice and financial harm contended for by Sasol. It was further undisputed that Eurozar's conduct would have breached the franchise agreement entitling Sasol to cancel it. As one of the relevant factors, a court is further entitled to consider that the franchise agreement has lapsed²², despite Eurozar's contention that the breach by Sasol must be considered as at November 2019, which occurred before the termination of the said agreement. In this instance the franchise agreement terminated by effluxion of time on 7 May 2021.

[32] Whilst Eurozar's complaints pertaining to the demise of its business and loss of its retail licence may constitute the risk of irreparable harm, this must be measured against its own brazen and unlawful conduct. Having elected to effectively repudiate all its obligations towards Sasol and not to act towards it in a bona fide manner, it cannot be concluded that Eurozar has established any balance of convenience in its favour. Eurozar's conduct smacks of mala fides and abuse and strongly militates against the balance of convenience favouring the granting of a stay of the eviction application. Had it complied with its own obligations and illustrated good faith towards Sasol, Eurozar's position would have been entirely different. As matters stand, it would not be in interests of justice for the present arrangement to be endorsed²³.

²² Crompton para [53]

²³ Medicross para 11 and 12

[33] For these reasons, I conclude that even if there is an unfortunate demise of Eurozar's business as a result, this is not a case where equities and fairness could warrant the applicant being denied the relief to which it is entitled.²⁴ It follows that Eurozar's counter application must fail.

The importation of a tacit or implied term of good faith

[34] Eurozar's defence is predicated on a breach by Sasol during late 2019 of the implied term to be imported into the franchise agreement. Its case was that Sasol was untruthful in its correspondence of November and December 2019 advising that it could not extend the franchise agreement for a further five years as its head lease would come to an end. The failure to advise Eurozar thereof was not only untruthful, but intended by Sasol to preclude Eurozar from calling upon Sasol to agree to an extension, albeit for a period of 3 years. This contention persists in the face of the 5 year extension being the term determined in the franchise agreement for which the franchise agreement should be extended.

[35] It is undisputed that the equitable standards of fairness and reasonableness prevails in all petroleum contracts regardless of whether they are subject to statutory arbitration or ordinary court litigation²⁵. Clause 5.3 of the franchise agreement, which forms the centre of the debate between the parties, expressly includes a reference to reasonableness. In its answering affidavit²⁶, Eurozar pleaded:

"It is implied, alternatively a tacit term, of the franchise agreement that Sasol would act in good faith and would cooperate with Eurozar in such a manner as to ensure that Eurozar continued its operation as a going concern. Sasol, as aforementioned advised Eurozar on 2 December 2019 that it would have no further right to occupy the site post the termination of the franchise agreement. This was untrue and admitted by Sasol during the arbitration hearing. Sasol stated that it had a period of three years remaining in terms of its lease with McCullough. The failure to advise Eurozar of the 3 year period and the intimation that it did not have any further period on its lease, was not only untrue, but was a

²⁴ Engen Petroleum Ltd v Mfosa Service Station (Pty) Ltd Unreported judgment of Keightley J under case numbers 2019 8398/19 and 12156/19 (17 December 2019) para [55]

²⁵ The Business Zone 1010CC t/a Emmarentia Convenience Centre v Engen Petroleum Limited and Others [2017] ZACC 2 (9 February 2017) at para [52]

²⁶ Para 70-75

machination intended to preclude Eurozar from calling upon Sasol to agree to an extension for a period that it less and five years and is three years. This is not only a breach of Sasol's implied alternatively tacit obligation but also constitutes an unfair or unreasonable contractual practice...it is submitted on behalf of Eurozar that a party who breaches an agreement cannot itself rely on that self-same agreement. To allow this, is to allow Sasol the benefit of its own wrong. As a consequence, the court will be asked not to enforce the term requiring Eurozar to vacate the site, and thereby to dismiss the eviction".

[36] No facts were pleaded justifying the importation of a tacit term. During argument Eurozar, correctly in my view²⁷, jettisoned any reliance on an obligation on Sasol "to cooperate with Eurozar to ensure it continues its operation as a going concern" and argued for the importation of a broad implied term incorporating the concepts of good faith and cooperation.

[37] The breach of the duty of good faith is an issue raised in the pending review proceedings²⁸. It was undisputed that Eurozar did not plead the implied term in the arbitration proceedings and the issue did not form part of the issues the arbitrator was called upon to determine. Much of Eurozar's heads of argument was devoted to this issue, despite Eurozar contending that it was not for this court to determine whether the review is competent or not.

[38] It is not in my view necessary or appropriate to make a definitive finding on the implied term issue in this application for various reasons.

[39] First, Eurozar cannot in argument stray beyond the case Sasol was called upon to meet²⁹ in its papers. I agree with Sasol in Eurozar's heads of argument and during oral argument, its case differed from the pleaded case which Sasol was called upon to meet in that the term contended for was substantially different that the one expressly pleaded and in argument, Eurozar's case extended beyond the importation of a specified term. It is trite that in motion proceedings, the affidavits constitute both the pleadings and the

²⁷ The express terms of the franchise agreement contemplate the franchisee being completely responsible for its own business.

²⁸ Para 55

²⁹ Administrator, Transvaal and Others v Theletsane and Others 1991 92) SA 192 (A) at 196

evidence³⁰. If I were to adjudicate the application on the basis advanced in oral argument and in Eurozar's heads, Sasol would be prejudiced as that was not the case it was called upon to meet in Eurozar's answering affidavit.

[40] Second, it is apposite to refer to *South African Forestry Company Ltd v York Timbers Ltd*,³¹ wherein the Supreme Court of Appeal held:

"...unlike tacit terms, which are based on the inferred intention of the parties, implied terms are imported into contract by law from without....Once an implied term has been recognised however, it is incorporated into all contracts, if it is of general application, or into contracts of a specific class, unless it is specifically excluded by the parties....It follows, in my view, that a term cannot be implied merely because it is reasonable or to promote fairness and justice between the parties in a particular case. It can be implied only if it is considered to be good law in general. The particular parties and set of facts can serve only as catalyst in the process of legal development".

[41] Considering the particular facts of this case and the circumstances under which the issue was raised and argued by Eurozar, this is not the appropriate case to determine whether good faith is to be imported into franchise agreements of this nature, an issue expressly left open by the Constitutional Court in *Beadica 231CC and Others v Trustees for the time being of the Oregon Trust*³², as it would have substantial implications for franchise agreements in the petroleum industry in general. It would be inimical to the interests of justice to determine such an important issue, absent it being fully and comprehensively addressed in the papers and in argument by both the parties.

[42] Third, in the present circumstances, Eurozar has already referred its "unfair or unreasonable contractual practice" to arbitration under the equitable standard introduced in the framework of the statutory arbitration mechanism under s12B of the PPA³³. The arbitrator has already made an award, determining the reasonableness of the practice contended for. After a full hearing, including cross examination of all the witnesses and consideration of the correspondence which Eurozar now contends constitutes Sasol's

³⁰ Hart v Pinetown Drive-In Cinema (Pty) Ltd 1972 (1) SA 464(D) at 469D-E

³¹ 2005 (3) SA 323 SCA at para [28]

³² 2020 (5) SA 247 (CC)

³³ Discussed by the Constitutional Court in *The Business Zone 1010 CC t/a Emmarentia Convenience Centre v Engen Petroleum Limited and Others* [2017] ZACC 2 at paras [45]-[68]

breach of the franchise agreement, the arbitrator concluded in his award that Sasol was not unreasonable in refusing to extend the franchise agreement. In his award, the arbitrator assessed the relevant communications by Sasol. He found that they were “*unsatisfactory and confusing*” but did not find these communications to be dishonest or untrue. These are findings of fact. Under s12B(5) the arbitration is final and binding. The grounds upon which Eurozar launched the review proceedings, will be determined in due course and it remains to be seen whether the arbitrator’s award will be set aside or not. I have already stated that it is not appropriate to voice an opinion on the ultimate prospects of success of those proceedings.

[43] Eurozar did not raise the issues surrounding the implied term of good faith in the proceedings before the arbitrator and it did not form part of the issues he was called upon to adjudicate. In the present application, Eurozar for the first time, sought to raise this issue but did not advance other grounds substantiating Sasol’s alleged breach of the franchise agreement. Factual findings have already been made on the issue by the arbitrator. Eurozar has not raised the implied term issue in the review proceedings. Eurozar cannot raise this issue in an attempt to obtain a different outcome.

[44] Lastly, insofar as the issue is raised by Eurozar to bolster its prospects of success in the pending review proceedings and it is contended that the arbitrator could after a successful review direct that the cancellation of the franchise agreement be set aside and the agreement be reinstated as corrective relief³⁴, it is not appropriate to make a finding on that issue in the present proceedings, which will be adjudicated upon in due course.

[45] It is in any event unclear how the importation of the implied term would assist Eurozar in resisting the eviction application. Even if the term contended for formed part of the franchise agreement, it would not apply to extend the express five year initial period, nor amend the express basis on which Sasol was entitled to refuse an extension as envisaged in clause 5.3 of the franchise agreement. In its terms, the franchise agreement

³⁴ Business Zone Technologies Inc v Telkom SA Ltd [2017] ZACC 2 (9 February 2017) para [76]

expired on 7 May 2021. The clause does not afford Eurozar the right to remain in the premises, nor does it serve to extend the franchise agreement for the period contended for by Eurozar.

[46] Eurozar did not attack the validity of the franchise agreement or its terms, nor was it contended that the enforcement of the franchise agreement would be contrary to public policy. Fairness and reasonableness are not freestanding grounds which can be used to impugn the terms of a contract³⁵. Moreover, on Eurozar's own version, the arbitration, which deals with the fairness dispensation, did not deprive Sasol of any right to enforce its contractual rights and to approach this court under the lawfulness dispensation³⁶. Eurozar in this application sought the court not to enforce the term requiring Eurozar to vacate the premises.

[47] I agree with Sasol that a breach on its part of the franchise agreement would not result in the retention of the franchise agreement for a three year period. A breach would either result in its cancellation, if the breach was not accepted or specific performance, if it was not. Clause 5.3 of the franchise agreement envisages an extension of 5 years, not the lesser three year period contended for by Eurozar, which it is common cause is not a term of the franchise agreement. The franchise agreement was not amended and contains a non-variation clause, requiring any amendments to be in writing. On the papers in this application, it cannot be concluded that Eurozar has established any entitlement to remain in occupation of the premises. On the facts set out in this application, it can further not be concluded that Sasol breached the franchise agreement as alleged.

[48] The franchise agreement in its terms contemplates and requires Eurozar to vacate at the end of the agreement. It is common cause that the franchise agreement terminated

³⁵ Atlantis Property Holdings Cc v Atlantis Excel Service Station CC 2019 (5) SA 443 (GP) at para [31], per Opperman & Windell J, Vally J dissenting

³⁶ Answering affidavit, para 40

by effluxion of time on 7 May 2021. Eurozar has no other basis to claim an entitlement to remain in occupation of the premises.

[49] On a conspectus of the facts, I conclude that Eurozar has not established a valid defense to the eviction application. On the undisputed facts, Eurozar had only been entitled to occupation of the premises by virtue of the he franchise agreement and the interim arrangement in place pending the arbitrator's award. The franchise agreement terminated by effluxion of time on 7 May 2021 and the interim arrangement on 22 November 2021 when the arbitrator's award was delivered. After that date, Eurozar has no right to remain in occupation of the premises. Despite a demand to vacate the premises, Eurozar has refused to do so.

[50] It follows that the application must succeed.

Joinder of second, third and fourth respondents

[51] Before considering costs, it is apposite to consider the respondents' objection against the joinder of the second to fourth respondents in the proceedings. This issue was raised to support the argument that those respondents should not form part of the eviction order or be held liable for costs. Objection was taken against Sasol's attempt to "pierce the corporate veil" to obtain an order against the second and third respondents, absent a formal application. The second to fourth respondents did not claim any entitlement to occupy the premises and denied that they occupied it. In my view, Eurozar's arguments do not pass muster, considering the undisputed facts.

[52] It was undisputed that the second and third respondents are the sole guiding minds and in control of both Eurozar and SandtonFuel. They are the individuals who embarked on the course of conduct set out in the application papers and in this judgment. They are also the individuals who expressly refused to vacate the premises at the proposed site hand over on 29 November 2021.

[53] SandtonFuel was registered on 31 July 2020, according to the respondents, to operate an independent Uber Eats business from business premises situated at Melrose Arch. The Uber Eats website however advertises the premises as “a SandtonFuel delivery centre”. It was undisputed that in the period between the delivery of the founding papers and the replying affidavits, the premises’ address at “374 Rivonia Rd³⁷” was removed from the Uber Eats website, although “Rivonia Sandton”, remained listed as a collection point. I agree with Sasol that this conduct does not bear scrutiny and smacks of dishonesty. It was further not disputed on the papers that an Uber Eats business was conducted from the premises from as early as March 2020 and that substantial income has been generated thereby which has not been accounted for to Sasol. It is not necessary for present purposes to determine whether at that time and prior to December 2021, such business was conducted by Eurozar or SandtonFuel.

[54] The respondents’ version on this issue is replete with bald denials, evasive responses and does not meaningfully grapple with the detailed factual averments and matters of substance raised by Sasol, which evidences the premises being used as a collection point for Uber Eats. It is baldly denied that SandtonFuel occupies the site but no clarity is provided as to who is operating the Uber Eats business. The bald allegation that SandtonFuel has premises in Melrose and thus did not exercise any requisites for possession is insufficient and does not meaningfully grapple with Sasol’s detailed version.

[55] Applying the relevant principles³⁸, the respondent’s version can in my view be rejected on the papers as palpably false or untenable and no bona fide disputes of fact exist on this issue³⁹.

[56] The respondents’ argument that Sasol has not established possession of the premises by SandtonFuel, either in terms of the *animus* or *detentio* elements of

³⁷ Although the address is Rivonia Boulevard

³⁸ J W Wightman (Pty) Ltd v Headfour (Pty) Ltd 2008 (3) SA 371(SCA) para [12]

³⁹ Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd and Another 2011 (1) SA 8 (SCA) at paras [19] and [20]

possession, also does not pass muster. The underlying premise of the respondents' own assertions is that some business is carried out by SandtonFuel from the premises. It is undisputed that SandtonFuel has no entitlement to do so. On the respondents' own version, SandtonFuel was registered as a separate business to commence with an Uber Eats business, which was not obliged to account to Sasol. In my view, Sasol has established on undisputed facts that the premises were used as an Uber Eats collection point and that SandtonFuel conducted business activities from the premises. Moreover, the respondents' conduct in relation to this issue can be characterised as dishonest.

[57] From the undisputed facts it can be concluded that these respondents intended to retain occupation of the premises and, at least to derive some benefit from possession⁴⁰ and exercised sufficient control and exploitation of the premises to constitute the physical detention element of possession.

[58] Sasol's contention that the intention of the second and third respondents, the controlling minds of both Eurozar and SandtonFuel was to use Eurozar's personality to remain in occupation of the premises for as long as possible using SandtonFuel's personality to run the Uber Eats business and exact profits without having to pay any expenses or account for any profits, was not cogently disputed on the facts.

[59] For purposes of this application it is not in my view necessary to formally "pierce the corporate veil" as contended by the respondents. On the established facts and the undisputed conduct and dishonesty on the part of the second and third respondents, their joinder and an adverse order against them is justified. Moreover, eviction orders are regularly granted in our courts expressly evicting persons who hold occupation under another person or entity.

⁴⁰ *Animus sibi habendi* or *animus ex re commodum acquirendi*; *Scholtz v Faifer* 1910 TPD 243 at 246

[60] I conclude that in the circumstances, the joinder and granting of an order against SandtonFuel and against the second and third fourth respondents is justified.

[61] The normal principle is that costs follow the result. There is no basis to deviate from this principle. Considering the issues, I am persuaded that the employment of two counsel was justified. The applicant sought a punitive costs order based on the conduct of the respondents. For reasons already advanced, I am persuaded that such an order should be granted.

[62] I grant the following order:

[1] The forms and service provided for in the rules of court are dispensed with and the matter is treated as urgent in terms of rule 6(12)(a);

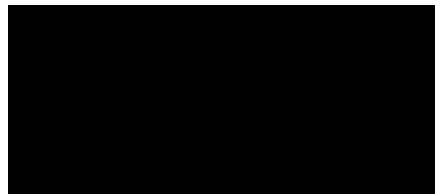
[2] The first, second, third and fourth respondents (“the respondents”) and all other persons who hold occupation with or under them, are hereby evicted from the property being Erf 154 Edenberg Township, Gauteng Province, known as Sasol Rivonia Convenience Centre, 375 Rivonia Boulevard, Sandton (“the premises”);

[3] The respondents and all those who hold occupation with or under them must vacate the premises within 48 hours of service of this order;

[4] In the event of the respondents or any other person failing to comply with the terms in [2] and [3] above, the Sheriff is authorized to compel compliance by evicting the respondents and all other occupants from the premises;

[5] The first respondent’s counter application for a stay of the eviction application is dismissed;

[6] The respondents are directed to pay the costs on the scale as between attorney and client, jointly and severally, including the costs of two counsel where so employed.



**EF DIPPENAAR
JUDGE OF THE HIGH COURT
JOHANNESBURG**

APPEARANCES

DATE OF HEARING	: 11 January 2022
DATE OF JUDGMENT	: 19 January 2022
APPLICANT'S COUNSEL	: Adv. D Turner Adv K Naidoo
APPLICANT'S ATTORNEYS	: Poswa Inc T Van der Merwe
RESPONDENTS' COUNSEL	: Adv M Desai
RESPONDENTS' ATTORNEYS	: Des Naidoo & Associates Mr Naidoo