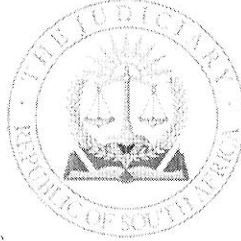


REPUBLIC OF SOUTH AFRICA



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

Case No: 2022/18287

<u>DELETE WHICHEVER IS NOT APPLICABLE</u>	
(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
30 May 2023 DATE	 SIGNATURE

In the matter between:

ENGEN PETROLEUM LIMITED

APPLICANT

and

KEBRASCAN (PTY) LTD

t/a ENGEN MARKET GATEWAY

FIRST RESPONDENT

TEBOHO THEOPHYLUS BEN SEEKO

SECOND RESPONDENT

CYNTHIA SEEKO

THIRD RESPONDENT

Neutral Citation: *Engen Petroleum Limited vs Kebrascan (Pty) Ltd T/A Engen Market Gateway & 2 Others* (Case No. 2022/18287) [2023] ZAGPJHC 603 (30 May 2023)

JUDGMENT

BERGER AJ:

- [1] This is an application for a money judgment against the three respondents, jointly and severally.
- [2] The claim against the first respondent is in respect of goods sold and delivered during the period 10 January 2022 to 26 April 2022. The applicant claims that it sold and delivered automotive fuel and lubricants to the first respondent, and that these (priced at R5 491 161.72) have not been paid for. Other costs, for turnover rental, rates, refuse, electricity, water, and sewerage, are included in the claim. In total, the claim is for an amount of R5 765 223.96, plus interest and costs.
- [3] The applicant's claims against the second and third respondents are based on deeds of suretyship signed by them to cover the first respondent's indebtedness to the applicant. The applicant seeks to hold the second and third respondents liable, as sureties and co-principal debtors, for the amount owed to it by the first respondent.
- [4] The first respondent denies that it is liable to the applicant in the amount claimed, and states that it has a counterclaim for damages, in the amount of R14 800 000, relating to the applicant's conduct which, the first respondent claims, prevented the first respondent from selling its business.

- [5] The second and third respondents deny being liable to the applicant and contend that the deeds of suretyship signed by them do not extend beyond 31 December 2013, being the termination of the lease first covered by the deeds of suretyship. To extend the suretyships beyond this date, so the respondents contend, “*would be contra bonos mores and invalid in law.*”

The relevant background circumstances

- [6] On or about 1 November 2009, the applicant and the first respondent concluded an agreement of lease and services in terms of which the first respondent was appointed as the applicant’s authorised and nominated dealer in respect of the Engen fuel service station in City Deep, Johannesburg (the service station). The agreement provided for the applicant to let to the first respondent the premises on which the service station was housed, and to supply to the first respondent *inter alia* the petrol and diesel required for the operation of the service station. In terms of the agreement, its expiry date was set at 31 December 2013.
- [7] On 3 November 2009, the second and third respondents each concluded deeds of suretyship in favour of the applicant, binding themselves as “*surety and co-principal debtor with [the first respondent] for the due and punctual payment to [the applicant] of all monies as are now due or may hereafter be owing by the [first respondent] to the [applicant] from any cause howsoever arising.”¹*

¹ My underlining.

[8] The deeds of suretyship also provide: *"This suretyship shall be a continuing and standing one, incapable of termination (even with respect to obligations of the [first respondent] which may not yet have arisen at any time at which I may desire to terminate the same) without the prior written consent of the [applicant], and shall be in addition and without prejudice to any other securities now or hereafter to be held by the [applicant] from or on behalf of the [first respondent]. Without limiting the generality of the foregoing, this suretyship shall remain in force, as a continuing security, notwithstanding any intermediate settlement of account, and notwithstanding my death or legal disability, and shall be binding on my estate and my executor and administrator. ..."*²

[9] From 1 January 2014 to 30 March 2015, there was no written agreement of lease and services between the applicant and the first respondent. However, the first respondent continued to trade at the service station during this period, with the applicant continuing to supply it with petrol, diesel and related products.

[10] On 12 March 2015, the applicant and the first respondent concluded a second agreement of lease and services (the second lease agreement) in respect of the premises housing the service station and the supply of products to the service station. The second lease agreement contained many of the clauses that appear in the original agreement, and others that do not. The second lease agreement was to run for a period of five years, commencing on 1 April 2015 and terminating on 31 March 2020.

² My underlining.

[11] In order for the applicant to prove the indebtedness of the first respondent at any time, the agreement provided that a “*certificate on the stationery of the Company signed by any director, the secretary, any legal advisor or any senior manager of the Company and stating the amount due and payable by the [first respondent] to the [applicant], shall be proof of the existence of such debt and of the amount of the [first respondent’s] indebtedness to the [applicant] at that time unless the [first respondent] proves the contrary.*”³

[12] The second lease agreement contained a clause (44.2) providing for the situation where the applicant intended or elected not to offer the first respondent a further lease agreement after 31 March 2020. The clause provided for a twelve month notice period which could result in the second lease agreement being continued, on the same terms, until the completion of the notice period. The clause further provided that: “*Should the [applicant] advise [the first respondent] that it does not intend renewing the lease between the parties, [the first respondent] shall be entitled to attempt to sell the Business during the remaining period of the lease, and the [applicant] shall not unreasonably withhold its consent to such sale. ...*”

[13] During 2019, and while the second lease agreement was still operative, a dispute arose between the applicant and the first respondent concerning the proposed sale of the first respondent’s business.

³ Clause 12 of Schedule 2 to the second lease agreement. The first agreement (concluded in 2009) contained a similar clause. In terms of that clause, the certificate would serve as *prima facie* proof of the first respondent’s indebtedness to the applicant. In my view, there is no material difference between the two versions of the clause.

- [14] On 30 October 2019, the Controller of Petroleum Products, in terms of section 12B of the Petroleum Products Act 120 of 1977, granted the request of the first respondent (a licensed retailer) to refer the dispute to arbitration. Section 12B(5) of the Act provides that any award made by the arbitrator, in such an arbitration, shall be final and binding upon the parties concerned.
- [15] On 4 March 2020, by order of the Western Cape High Court (*per* Gamble J), it was recorded that the applicant and the first respondent had agreed to appoint retired Judge Bertelsmann to act as arbitrator in the arbitration. It was *inter alia* ordered that, pending the finalisation and/or final determination of the arbitration, the first respondent's operations, tenure and entitlement to conduct its business at the service station would continue and/or remain extant.
- [16] It was further ordered by Gamble J that the terms of the second lease agreement would "*continue to operate as provided for and contemplated in clause 44.2 of the operating lease*", pending the final determination of the arbitration.
- [17] On 22 March 2021, shortly before the arbitration was to commence, the applicant and the first respondent concluded a settlement agreement, which was made an arbitration award by Judge Bertelsmann. In terms of the settlement agreement, the parties agreed on a procedure by which the first respondent could dispose of its interest in the service station by 30 September 2021, as long as the applicant identified and advised the first respondent of an approved purchaser by no later than 30 August 2021. The sale was subject to the approved purchaser obtaining a retail license as contemplated in the Petroleum Products Act.

[18] It was also recorded in the settlement agreement that *“the entrenched value of the business as contemplated by “A” [the second lease agreement], has been determined to be R10 000 000 (ten million rand), ex VAT. Subject to paragraph (8) below, the sale/disposal shall be concluded at this price, ex VAT.”*

[19] Paragraph (8) of the settlement agreement recorded that the *“entrenched value”* excluded the first respondent’s stock-in-trade, and fixed and movable assets. It was further provided that the first respondent was free to negotiate the terms of the acquisition of any stock and/or equipment, owned by it on the premises, with the approved purchaser, and/or to remove any such stock or equipment owned by it.

[20] Paragraph (12) of the settlement agreement provided: *“Subject to paragraph (13) below, [the first respondent] together with all those claiming a right or title to occupy the premises by or through it will vacate the premises by no later than 30 September 2021.”* Paragraph (13) provided for the first respondent to remain in occupation of the premises beyond 30 September 2021, if the first respondent had by then concluded an agreement of sale with the approved purchaser, and the approved purchaser had by then lodged an application for a retail license. In that event, the first respondent could remain in occupation until 14 days after the date on which the Controller of Petroleum Products announced its decision on the purchaser’s application for a retail license.

[21] If the first respondent remained in occupation of the premises beyond the period allowed in terms of paragraph (13), the settlement agreement provided that the first respondent would have to pay the applicant a holding over penalty in the

amount of R250 000 per month, payable on the first day of each month that the first respondent remained in occupation.

[22] The arbitrator's award, including the settlement agreement, was made an order of this Court on 11 August 2021.

[23] On 24 August 2021, the applicant advised the first respondent of its approved purchaser (the approved purchaser). The applicant reminded the first respondent that it had until 30 September 2021 to dispose of its interest in the service station.

[24] Nine days before the deadline, on 21 September 2021, the first respondent and the approved purchaser concluded a sale of business agreement in terms of which the first respondent sold its business at the service station to the approved purchaser. On the following day, 22 September 2021, the approved purchaser made application for a retail license.

[25] The first respondent continued to remain in occupation of the premises, as it was entitled to do. About four months later, on 11 January 2022, the Controller of Petroleum Products announced that the approved purchaser's application "*for a Retail New (Change-of-Hands) License*" had been approved.

[26] In terms of the settlement agreement, the first respondent had until 25 January 2022, to vacate the premises. On 7 February 2022, the applicant demanded that the first respondent pay to it an amount of R3 045 861.09, which the applicant said was outstanding in respect of fuel and lubricants sold and delivered. On 9 February 2022, the first respondent vacated the premises.

[27] On 14 February 2022, the applicant terminated the second lease agreement with the first respondent. The applicant recorded its reason for termination as follows:

"In breach of your obligations under the operational lease agreement, ... you have inter alia, without the knowledge of [the applicant], ceased trading from the site and abandoned the premises."

[28] The first respondent states that it vacated the premises *"in order to avoid paying the holding-over penalty of R250 000.00 to the applicant."*

The claim against the first respondent

[29] The applicant alleges that during the period 10 January 2022 to 9 February 2022 (although the applicant also alleges the period to have lasted until 26 April 2022), the first respondent placed orders for fuel and lubricants *"in accordance with the terms of the operating lease with Engen."* The orders were accepted, and the applicant sold and delivered the fuel and lubricants to the first respondent.

[30] In addition, the applicant alleges that it levied charges for rates, refuse, electricity, water and sewerage consumed by the first respondent at the premises during the period. The applicant also levied turnover related rental charges against the first respondent which it alleges the first respondent was obliged to pay *"in terms of the operating lease"*.

[31] The *"certificate of balance"* relied on by the applicant, dated 10 May 2022 and signed by the applicant's credit risk manager, records that the first respondent is indebted to the applicant in the capital amount of R5 765 223.96.

[32] The first respondent denies *“that it is indebted to the applicant in the sum of R5 765 223.96 and accordingly the applicant is put to the hereof”*. Similarly, the first respondent denies its liability to the applicant in respect of the charges for *“rental, rates, refuse, electricity, water and sewerage as this is set-off by the first respondent’s counter-claim”*. The basis of the first respondent’s denial that it is liable for the cost of the automotive fuel and lubricants, delivered over the period 10 January 2022 to 26 April 2022, is that no order would have been released by the applicant without payment by the first respondent of the previous delivery.

[33] However, the first respondent does not state positively that it has paid any of the amounts claimed by the applicant.

[34] It is clear that the applicant could not have been delivering its product to the first respondent after 9 February 2022, and certainly not until 26 April 2022. The first respondent had vacated the premises on 9 February 2022, and the applicant had terminated the second lease agreement on 14 February 2022. There would have been no reason for the applicant to have delivered product after it had cancelled its agreement with the first respondent.

[35] As at 7 February 2022, the applicant claimed that the amount outstanding from the first respondent in respect of fuel and lubricants sold and delivered to it was the sum of R3 045 861.09.

[36] In its replying affidavit to the first respondent’s answering affidavit, the applicant sought to rebut the first respondent’s denial that *“... the applicant could have sold and delivered goods to the first respondent in the amount of R5 491 161.72 for*

four (4) months without payment” by annexing “... copies of the delivery notes confirming delivery of the product sold and delivered to the first respondent.”

[37] The delivery notes annexed to the replying affidavit reflect deliveries of petrol and diesel by the applicant to the first respondent. Some of the delivery notes have delivery dates before 10 January 2022; others have been duplicated. Excluding duplications, and delivery notes outside the relevant period, the total amount sold and delivered during the period 10 January 2022 to 9 February 2022 is reflected as R3 884 008.86.

[38] The first respondent does not dispute the applicant’s charges for turnover rental, rates, refuse, electricity, water, and sewerage, totaling R274 062,24. Instead, the first respondent claims that these charges be “... *set-off by the first respondent’s counter claim*”. For the reasons set out below, set off cannot be done.

[39] In my view, the applicant has proved that the first respondent is indebted to it in the amount of R4 158 071.10, being the sum of the relevant delivery notes and the other undisputed charges. The certificate of balance states that the amount owing to the applicant is R5 765 223.96, but this is only *prima facie* proof of the extent of the indebtedness, and must give way to the evidence submitted by the applicant in response to the first respondent’s denial of liability.

[40] I therefore find that the first respondent is liable to make payment to the applicant in the sum of R4 158 071.10, together with interest and costs as claimed by the applicant. As far as interest is concerned, the second lease agreement set the rate at 4% above Standard Bank’s Prime Bank Overdraft Rate, as published.

The claim against the second and third respondents

[41] The applicant's claim against the second and third respondents is based on the deeds of suretyship concluded by them on 3 November 2009. In this regard, the applicant relies primarily on the provision in the deeds that: "*This suretyship shall be a continuing and standing one, incapable of termination (even with respect to obligations of the [first respondent] which may not yet have arisen at any time at which I may desire to terminate the same) without the prior written consent of the [applicant] ...*"

[42] There are other provisions in the deeds (as quoted above) that repeat the point that the deeds are intended to be continuous. It is clear that, when the second and third respondents signed the deeds of suretyship, they agreed that the deeds would remain in force "*as a continuing security*" until the applicant consented in writing to terminate them.

[43] It is common cause that the applicant has not consented to the termination of the deeds of suretyship, in writing or otherwise. There is therefore no basis for the contention that the deeds of suretyship terminated on 31 December 2013 when the first lease agreement came to an end.

[44] The fact that the second lease agreement contained terms of insurance not found in the original lease agreement matters not. The deeds of suretyship constitute independent undertakings by the second and third respondents in favour of the applicant. They do not depend on one or both of the lease agreements, either for their validity or for their continued existence.

[45] The second and third respondents further contend that it “*would be contra bonos mores and invalid in law*” for the deeds of suretyship to extend beyond the life of the first lease agreement. No authority was cited for this proposition, and I am not aware of any. Since the deeds of suretyship are independent undertakings, not linked to either or both of the lease agreements, they cannot be rendered *contra bonos mores*, or invalid in law, by virtue of the fact that they continue to exist beyond the life of the first lease agreement.

[46] I am therefore of the view that the second and third respondents are liable, jointly and severally with the first respondent, to make payment to the applicant in the sum of R4 158 071.10, together with interest and costs as claimed.

The counter claim

[47] The first respondent bases its counter claim on the allegation that the applicant breached the settlement agreement concluded between the parties on 22 March 2021, and subsequently made an order of court. The first respondent claims that “*the applicant’s failure to comply with the order has caused the first respondent to suffer damages in the sum of R14 800 000.00 (R14.8 million)*”, made up as follows: R10 million “*for the sale of the business*”, R3 million “*for stock*”, and R1.8 million “*for the assets*”.

[48] In its answering affidavit in the main application, the first respondent sets out the basis of its counter claim. At its core, the claim is that the first respondent was made aware on 9 December 2021 that the Controller of Petroleum Products had declined the approved purchaser’s application for a retail licence “*because, inter*

alia, it failed to provide proof of availability of funds.” That, according to the first respondent, meant that the applicant had “failed to provide a financially suitable candidate as per the settlement agreement” and that, as a result, the agreement of sale between the first respondent and the approved purchaser “fell through, resulting in the first respondent suffering damages.”

[49] There are further allegations in the answering affidavit concerning a prospective purchaser who allegedly did not secure the applicant’s approval. That gave rise to the arbitration that was ultimately settled. Since the counter claim is based on an alleged breach of the settlement agreement, there is no basis for relying on facts that preceded the settlement.

[50] In its answer, the applicant points out that the Controller of Petroleum Products granted the approved purchaser’s application for a retail license on 11 January 2022. This in light of the sale of business agreement concluded on 21 September 2021 between the first respondent and the approved purchaser. The applicant notes that it was not a party to the sale of business agreement. Furthermore, the applicant contends that the first respondent breached the settlement agreement by deliberately frustrating and hindering the sale of the business.

[51] The first respondent, in its replying affidavit, appears to accept that the approved purchaser was granted a retail license on 11 January 2022. However, it persists in the allegation that the applicant breached the settlement agreement by failing to identify and approve a purchaser who was ready, willing and able to purchase the first respondent’s business. The basis for this allegation is a telephone call in which the approved purchaser informed the first respondent that it was unable to

pay the purchase price to it in terms of the agreement of sale. No further evidence has been adduced to establish the financial position of the approved purchaser and the true reason for the failure (or breach) of the agreement of sale.

[52] A further difficulty with the counter claim is that it is a claim for damages, at least part of which is unliquidated.

[53] It nevertheless appears that there may yet be a basis for the counter claim, if it is brought by way of action. Further evidence may be adduced to make out a proper case for the damages claimed by the first respondent, both in regard to the merits of the claim and in regard to the extent of damages.

[54] In my view, it would not be just for me to dismiss the counter claim outright. It is appropriate, in the circumstances, that I grant the first respondent absolution from the instance in relation to the counter claim (counter application, properly called), and make no order as to costs.

Orders

[55] In the result, I make the following order in relation to the main application:

55.1. The first, second and third respondents, jointly and severally, the one paying, the other to be absolved, are directed to make payment to the applicant of:

55.1.1. the sum of R4 158 071.10;

55.1.2. interest on the sum of R4 158 071.10 at the rate of 4% above the ruling Prime Bank Overdraft Rate of the Standard Bank of South Africa, calculated from date of service of summons (23 May 2022) to date of payment; and

55.1.3. costs of suit.

[56] In relation to the counter application, I make the following order:

56.1. Absolution from the instance is granted; and

56.2. There shall be no order as to costs.



D I Berger

**ACTING JUDGE
OF THE HIGH COURT
GAUTENG LOCAL DIVISION
JOHANNESBURG**

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 30 May 2023.

Heard on: 19 April 2023

Delivered: 30 May 2023

Appearances:

For the Applicant: Mr S Aucamp

For the Respondents: Mr M Mavodze