REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: **80739/2016**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) ~~REVISED.~~

SIGNATURE .... DATE 16/02/2018

16/2/18

In the matter between:

ENGEN PETROLEUM LIMITED Applicant

versus

FASTRACK TRADING 276 CC t/a

MOTORCALL SERVICE STATION First Respondent

ERF 346 GEZINA CC Second Respondent

LEON FOURIE Third Respondent

PUMA ENERGY SOUTH AFRICA Fourth Respondent

JUDGMENT

MPHAHLELE J

[1] This is an application for an order declaring that the agreement that was concluded between the applicant and the first and second respondents dated 17 February 2016, for the redesign and upgrade of existing service station on erf 2108 Lyttleton Manor township, registration division JR, at Engen Motorcall, Botha Avenue, Lyttleton, Centurion is valid and binding on the parties.

[2] The applicant contends that it was compelled to institute this application after the first, second and third respondents reneged from the agreement and now alleging that the agreement is not binding or enforceable.

[3] The first, second and third respondents are opposing this application. The fourth respondent is not opposing the application and accordingly no relief is claimed against it.

THE PARTIES

[4] The applicant carries on business throughout the country and elsewhere as a manufacturer and marketer and bulk distributor of petroleum, diesel and chemical products and is a franchisor of *inter alia* the Quick Shop Convenience Store and Woolworths chains.

[5] The first respondent operates a duly approved and licenced Engen petrol service station, in the premises of the second respondent. The first respondent is also commonly known as Motorcall service station.

[6] The second respondent is a property owning entity which owns the immovable property in which the service station (the business of the first respondent) is situated.

[7] The third respondent is the sole member of the first respondent as well as member of the second respondent. He is the natural person that controls the first respondent and acts on behalf of both the first and the second respondents.

[8] The fourth respondent has made offers to the first, second and third respondents for the operation of a Puma service station

THE OPERATING AGREEMENTS

[9] The relationship between the applicant and the first and second respondents is regulated by various retail agreements concluded between these parties.

[10] By 31 January 2015 the retail agreements were due to lapse. The parties entered into negotiations with a view to concluding new retail agreements. The parties extended the period of operation of the retail agreements several times eventually ending in August 2016.

THE APPLICANT'S VERSION

[11] According to the applicant, early in 2016, well within the period of extensions of the retail agreements, the applicant and the first and second respondents (as duly represented by the third respondent) concluded a new agreement *in lieu* of the extended retail agreements, namely an agreement to redesign and upgrade the existing petrol service station at Motorcall service station.

[12] On 17 February 2016, the applicant made a written offer to the first and second respondents, for the re-development of the Motorcall service station site. The first and second respondents duly represented by the third respondent who signed the offer on their behalf, accepted the offer in writing. The signed agreement was dispatched by the third respondent to the applicant under a covering e-mail on 04 April 2016. In the covering e-mail it was specifically stated that *"attached please find the acceptance letter for the upgrade of Motorcall Engen"*.

[13] The applicant contends that in terms of the agreement the applicant bound itself in respect of the re-development of the existing service station to rebuild the Engen filling station on the existing property. Paragraph 4.3 provides that: *"Upon acceptance of this proposal it will become a binding agreement subject to the approval by the Engen's management and the suspensive condition referred to in paragraph 1"*.

[14] Paragraph 1 sets out the basis of the contractual relationship

between the applicant and the first, second and third respondents, including the material terms of the various retail dealer agreements to be concluded between the parties and the parties' financial obligations.

[15] Pursuant to the acceptance of the agreement, a series of further agreements had to be concluded to give effect to the agreement. The applicant duly instructed its attorneys to attend to the preparation and drafting of the transaction agreements necessary to give effect to the agreement as attached to the respondents' e-mail of 04 April 2016, including various exhibits thereto.

[16] The applicant provided the transaction agreements to the first to third respondents for evaluation and signatures. By virtue of the fact that these agreements are of a technical nature, the applicant accepted that the finalisation of the agreements might take some time as the first, second and third respondents would probably require an opportunity to evaluate the terms thereof in line with the signed agreement and perhaps obtain legal assistance, in regard thereto.

[17] The applicant maintains that it was an express term alternatively an implied term of the agreement that the first and second respondents would sign the transaction agreement and the exhibits thereto as well as any formal documents necessary for the execution of the agreement. Further, that the first and second respondents shall not unreasonably refuse to sign any of the mentioned documents.

[18] At all material times relevant to the transactions on the agreements and the conclusion of the agreement, the applicant acted in good faith and also accepted the first, second and third respondents' *bona fides* actions. However, it later transpired that the first, second and third respondents lacked *bona fides* and were intent on frustrating the execution of the transaction agreement and the exhibits thereto.

[19] The first and second respondents have failed and/or neglected and/or refused to sign the transaction agreements, notwithstanding that they are contractually obliged to do so. Therefore, the first and second respondents, through their duly authorised representative, the third respondent have reneged on their contractual obligations in terms of the agreement concluded with the applicant.

[20] The present dispute is rooted at the first, second and the third respondents' demands for the applicant to act contrary to the terms of the agreement, in particular that the applicant must bind itself that it would *"meet the offer of Puma in all respects"* on or before 16 October 2016 and 19 October 2016. Puma, the fourth respondent, is the applicant's business competitor.

[21] The applicant submits that, having regard to the first and second respondents' ultimatums, the applicant finds itself in a quandary regarding the exercise of its rights to operate the Engen service station, in the premises of the second respondent in terms of the existing agreement. The applicant maintains that the first and second respondents are not entitled to make these demands.

THE RESPONDENTS' VERSION

[22] The applicant submitted to the first and second respondents the letter of offer, dated 17 February 2016. This offer contains two clauses stipulating the following suspensive conditions:

22.1 The second unnumbered introductory paragraph reads as follows:

> *"Once accepted by you this proposal shall be subject to the approval of our management as set out in clause 11 below and shall be furthermore subject to the execution of formal documentation incorporating our standard documentation for the implementation of the Transaction"*; and

22.2 Clause 8 with the heading ***"APPROVAL BY ENGEN'S MANAGEMENT"*** which reads as follows:

> *"the above proposal and the agreement arising from the acceptance thereof, is subject to the written approval of Engen's board, within 90 days after execution on your behalf of formal contracts under paragraph 5 above. Every effort will be made to minimise this approval period. In order to finalise the proposal to the board for approval, the full details of the entity which will contract as outlined in this proposal, as well as the intended date of transfer of the said property if transfer has not already taken place, should be furnished to Engen".*

[23] No evidence or allegations are contained in the founding affidavit to the effect that the suspensive conditions were fulfilled, or waived. The respondents submit that there can be no valid, binding and enforceable agreement until the formal contracts have been agreed upon and duly signed; and Engen's board approve those formal

contracts within 90 days after its execution.

[24] The respondents submit that no further agreement was concluded between the parties and the contract period in terms of the Retail Dealer Agreement previously concluded between the parties expired on 31 July 2016. Therefore, the respondents maintain that there is consequently no binding and/or enforceable written retail dealer agreement between the parties.

[25] The respondent submit that the applicant's own representative doubted whether any binding agreement was concluded and, in this regard made reference to the letter dated 19 August 2016 by the applicant's Mr Dirk Goldschmidt, paragraph 2 thereof states that:" *To what extent is the signed letter offer from the dealer enforceable?...*"

[26] The respondents maintain that the applicant retracted and varied the offer of 17 April 2016 prior to its purported acceptance on 04 April 2016. Prior to 4 April 2016 the applicant submitted two further revised offers. The applicant revoked, replaced and/or varied its own offer of 17 February 2016, the 19th and 24th of February 2016. Therefore, the respondents could no longer have accepted the offer of 17 February 2016. The respondent contend that, at best for the applicant (which is not admitted) the purported acceptance of the letter of offer, by the third respondent, on 4 April 2016 constitute a counter-offer.

[27] I deal in turn with the various stipulations as contained in the agreement:

27.1 The second unnumbered introductory paragraph reads as follows: "*Once accepted by you this proposal shall be subject to the approval of our management as set out in clause 11 below and shall be furthermore subject to the execution of formal documentation incorporating our standard documentation for the implementation of the Transaction*".

27.2 Paragraph 1 with the heading RETAIL DEALER AGREEMENT provides as follows: 1.2 "*You will execute our standard Retail Dealer Agreement as in effect at the time of execution of the formal documentation to which we have referred above.....*"

27.3 In terms of clause 4.3 of the agreement "*Upon acceptance of this proposal it will become a binding agreement subject to the approval by Engen's management and the suspensive conditions referred to in paragraph 1*".

27.4 Clause 8 with the heading "***APPROVAL BY ENGEN'S MANAGEMENT***" as appears in paragraph 22.2 above.

[28] The applicant contends that the allegations that the suspensive conditions contained in the document have not been fulfilled lacks any merit. The applicant submit that it appears *ex facie* the agreement that the alleged suspensive conditions were for the benefit of the applicant, relating to the approval of the proposal by the applicant's management and/or board as well as the execution of the standard formal documentation.

[29] The applicant contends further that it is apparent from the relevant terms of the agreement that the first to third respondents are not at liberty to cancel or withdraw from the contract at all. Instead, the only remaining condition after acceptance as aforesaid, was for the applicant's management to approve or disapprove the accepted proposal.

[30] The agreement provides that: "*All formal documents necessary to give effect to this agreement shall be prepared by Engen as per its standard documents and shall contain such further provisions and shall be in such form as we may determine. We warrant that the further provisions and form so determined by ourselves, will be consistent with the provisions and form of similar documents used by us, or otherwise will be reasonable having regard to our legitimate concerns which we consider require protection*".

[31] The applicant maintains that it was an express term alternatively an implied term that the first and second respondents would sign the transaction agreement and the exhibits thereto as well as any formal documents necessary for the execution of the agreement. The applicant alleges that the first and second respondents unreasonably refused to sign any of the aforesaid. This is denied by the respondents who submit that the signing of those agreements was not an express or implied term, but a suspensive condition.

[32] The applicant provided the documents to the first to third respondents for evaluation and signatures. By virtue of the fact that these agreements are of a technical nature, the applicant accepted that the finalisation of the agreements might take some time as the first, second and third respondents would probably require an opportunity to evaluate the terms thereof in line with the signed agreement and perhaps obtain legal assistance in regard thereto.

[33] The respondents contend that the terms of the letter of 17 February 2016 by themselves are too narrow and too vague to constitute a firm and binding agreement. The letter in effect attempts to achieve a binding agreement whereby the parties thereto agreed to conclude future agreements. The letter seems to be a means to achieving a final agreement, it does not contain all the material terms relating to the final contract in order to render the contents of the letter to be a binding and enforceable contract.

[34] The applicant conceded that the finalisation of the agreements might take some time due to the technical nature of the documents, this reinforces the proposition by the respondents that there could not have been consensus about the terms of the final agreements, when the letter of 17 February 2016 was drafted by the applicant and subsequently accepted by the respondents.

[35] It has been held that an agreement that confers an unfettered discretion upon a party to determine the nature or extent of his obligations is void for vagueness [Benlou Properties (Pty)Ltd v Vector Graphics (Pty)Ltd 1993(1) SA 179 (AD)]. The agreement of 17 April 2016 seeks to confer an unfettered discretion on the part of the applicant to determine and enforce the standard terms and conditions contained in the so-called formal agreements upon the respondents, without negotiations or consensus. These formal agreements include, among others, the notarial deed of lease, restraint of transfer, development agreement, dealer agreements, and memorandum of agreement of sub-lease. Absence of agreement on these crucial documents renders the agreement void for vagueness.

[36] A party wishing to claim specific performance in terms of a contract must:

36.1 allege and prove the terms of the contract;

36.2 allege and prove compliance with any antecedent or reciprocal obligations, or tender to perform them;

36.3 allege non-performance by the defaulting party; or claim specific performance.

[37] The applicant presented the letters of 17 February 2016, 19 February 2016 and 20 February 2016 to the respondents. These letters contained different proposals from which the respondents had to make a choice. On 4 April 2016 the respondents made the election and chose to be bound by the letter of 17 February 2016. This is the agreement which the applicant contends is binding and forms the basis of the relief sought by the applicant.

[38] Apart from the fact that the applicant did not tender any evidence establishing that the suspensive conditions were fulfilled, or waived the agreement is vague to such an extent that it is not possible to ascertain the true intention of the contracting parties. The parties cannot be said to have reached consensus on all material terms of the agreement. Consequently, the application must fail.

[39] In the result, the application is dismissed with costs.

S S MPHAHLELE

JUDGE OF THE HIGH COURT,

PRETORIA

FOR THE APPLICANT: Adv L Sigogo

INSTRUCTED BY: DM5 Inc.

FOR THE RESPONDENTS: Adv MP van der Merwe, SC

INSTRUCTED BY: Couzyn Hertzog & Horak Attorneys