

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
.....	
DATE: 27/6/2018	SIGNATURE: <i>[Signature]</i>

CASE NO: 8142/2017

In the matter between:

SERALOR (PTY) LTD**1ST APPLICANT****EASTERN BLUE INVESTMENTS 178 CC****2ND APPLICANT**

And

COMPREDOX (PTY) LTD**1ST RESPONDENT****BOTTOM LINE TRADING 19 CC****2ND RESPONDENT**

NIKITA JOHANNES TSEBETSEBE

3RD RESPONDENT

ANNA-MARIE NOLAN N.O

4TH RESPONDENT

(ABSA TRUST LTD) (on behalf of estate late
(GONSO JULIUS NKOSI)

CAPENSIS INVESTMENT 267 (PTY) LTD

5TH RESPONDENT

JUDGMENT

SEMENYA J

1. Ebenerzer Marais) (Marais, the deponent to the applicants' founding affidavit, is the sole director and shareholder of the 1st applicant and the only member of the 2nd applicant. He launched this application and deposed to the affidavit on behalf of both applicants.
2. Marais alleges that on the 12 June 2012, the 2nd applicant entered into a 9 year written lease agreement with the late Gonso Julius Nkosi in terms of which the 2nd applicant let Shampeni Filling Station business premises (Shampeni) situated at 389 Ring Road, Daantjie Pienaar. The commencement date of the said agreement was the 11 June 2012. The parties agreed that the 2nd applicant would have the option to renew the lease of the premises for a further 10 year period by giving the landlord

notice of the exercise of the option at least 90 days before the termination date. The lease entitled the lessee to sublet the premises without the lessor's consent. It is common cause that the 4th respondent is the late Nkosi's successor in title.

3. In the second lease agreement, the 1st applicant and the 5th respondent entered into a written lease agreement in respect of the business premises known as TK Filling Station situated at Erf 177A & B, Zone 6, Extension 4, Sebe Street, Sebokeng (TK). It was a 3 year agreement with the 11 September 2015 as the commencement date. The parties further agreed that the 1st applicant, being the lessee would have an option to sublet without the lessor's consent and the option to renew the agreement for a further 3 years.
4. The 3rd agreement involves the lease of business premises known as Big Boy Filling Station (Big Boy) situated at Ga-Masemola. It was a 24 months lease, with an option to renew 90 days before the expiration of the initial term. The applicant avers that it exercised its option in a letter dated the 25 November 2015. As with the other two agreements, the applicant is to sublet the premises or part thereof.
5. The facts that led to the launching of this application, which are either common cause or undisputed, are that the 1st and/or 2nd applicants sublet the three business premises to the 1st respondent between November 2015 and March 2016 in three separate lease agreements. According to the applicants, these three lease agreements were all terminated on the 30 November 2017.

6. It came to Marais' attention that after the termination of the agreements, 1st and/or 2nd respondents concluded lease agreements with the 3rd and 5th respondents in respect of Big Boy and Shampeni. The agreement between the 1st and/or 2nd respondents in respect of TK was that the 1st and/or 2nd respondents would continue to operate the business on the said premises for the remaining 9 months of the lease agreement between the 5th respondent and the 1st applicant, but that the rent would not be paid to the applicant.
7. The applicants seek among others, an interdict prohibiting the 3rd, 4th and 5th respondents from breaching the lease agreements that they have entered into with the applicants. The applicants furthermore, seek specific performance in the negative form *i.e* non-performance of the agreement between the 1st and/or 2nd respondent and 3rd, 4th and 5th respondents.
8. Applicants allege that they have already entered into lease agreements with other entities and that they may be held in breach if the 1st, 2nd, 3rd, 4th and 5th respondents are not interdicted.
9. The deponent to the answering affidavit, Lazarus Selae Mphosi (Mphosi), avers that the late Nkosi's widow and the other respondents have given Venn and Muller the power of attorney to oppose the application. He further states that these persons were unable to file confirmatory affidavits due to the urgency of the matter. I however agree with counsel for the applicants' contention that Mphosi cannot depose to an affidavit on behalf of the 3rd, 4th and 5th respondents for want of proper mandate to

do so. Under these circumstances I will accept the applicants' argument that the 3rd, 4th and 5th respondents are in effect not opposing the application.

10. In his affidavit, Mphosi alleges that he is the managing member of the 1st respondent and is deposing to the answering affidavit on its behalf. He further states that the 2nd respondents is a firm owned and run by his brother, Theophilus, who is also in possession/occupation of Big Boy, Shampeni and TK.

11. It would appear from Mphosi's affidavit that the basis for the opposition is three-fold. Firstly, it is alleged that the three lease agreements entered into between the applicants and the 1st respondents were invalid *ab initio* and/or have already been terminated. Secondly, that the said agreements are invalid in that they were entered into in contravention of the **Petroleum Products Amendment Act 58 of 2003** (the PP A) and lastly, that the 1st respondent or Mphosi do not believe that the applicants have sublet the properties to third parties already, in view of the amounts the applicants have charged these third parties as rent.

12. The sections of the PPA which according to counsel for the 1st and 2nd respondents are relevant to the issues in this application are 2A (1), 2A (7) and 2B (2), (3) and (4) of the Act which provides as follows:

"Prohibition of certain activities.-

2A (1) A person may not-

- (a) Manufacture petroleum products without a manufacturing license;
- (b) wholesale prescribed petroleum products without an applicable wholesale license;
- (c) Hold or develop site without there being a site license for that site;
- (d) Retail prescribed petroleum products without an applicable retail license, issued by the Controller of Petroleum Products.

(7) A license retailer shall only purchase petroleum products from a licensed wholesaler or a license manufacturer, or both.

2B

(2) In considering the issuing of any license in terms of this Act, the Controller of Petroleum Products shall give effect to the provisions of section 2C and the following objectives:

- (a) Promoting an efficient manufacturing, wholesaling and retailing petroleum industry;
- (b) facilitating an environment conducive to efficient and commercially justifiable investment;
- (c) the creation of employment opportunities and the development of small businesses in the petroleum sector;
- (d) ensuring country wide availability of petroleum products at competitive prices; and
- (e) promoting access to affordable petroleum products by low-income consumers for household use.

(3) Any license issued by the Controller of Petroleum Products remains valid from as long as-

(c) in the case of a site, there is a corresponding valid retail license.

(4) The Controller of Petroleum Products must issue only one retail license per site."

13. Mphosi's interpretation of the PPA is that, it is the owner of the land only, who can hold a license (site licence) to erect a petrol filling station on the premises. It was further stated that it is the owner of the land only who can hold or issue a petroleum retail licence. It was argued on behalf of the 1st and 2nd respondents that since the applicants are not the owners of the land on which Big Boy, Shampeni and TK are situated; they therefore cannot hold a site or retail licence. It is on this basis that 1st and 2nd respondents submitted that the lease agreements between the applicants and them were invalid from the beginning.

14. It was submitted on behalf of the 1st and 2nd respondents that the land and/or the site licences and/or retail licences on which Big Boy, Shampeni and TK are owned alternatively held by Mpakeni Traditional Authority, the widow of the deceased Nkosi and the 5th respondent/ Magaqa respectively, and not by the applicants. It is on this basis that the respondents submit that section 2A (1) (c) of the PPA prohibits the applicants, who are not the owners of the land and/or entities which are not the holders of a site licence from retailing in petroleum and can therefore not legally lease or sublease the premises.

15. Mphosi does not dispute the allegations that he had entered into lease agreements with the applicants on behalf of the 1st respondent in respect of the three filling stations. He however avers that he remained on the property after the termination of the lease agreement in order to safeguard the premises. It was submitted on behalf of the 1st respondent that the evacuation of the properties by the 1st respondent would have endangered the 4th and 5th respondents' license rights. Mphosi alleges that he remained in occupation at the behest of the land and business owners of the premises.

16. Mphosi stated that the lease agreement between the applicants and the 4th respondent was terminated by the death of Nkosi. On the other hand, it was contended on behalf of the applicants that it is settled law that Nkosi's heir or successor in title is bound by the terms of the agreement.

17. In PRINCIPLES OF THE LAW Sale and Lease, page 86, the authors states the following:

“Termination by death

A lease is terminated by the death of the lessor or the lessee if the contract so provide. Furthermore, it will be terminated by the death of the lessor if the lease is at the will of the lessor, and by the death of the lessee if the lease is at the will of the lessee. Apart from these instances, however, the death of a lessor or lessee has no effect on the continued existence of a lease – the

rights and duties of a deceased lessor or lessee pass to his or her heirs on his or her death."—**Grobler en Ander v Jacobs NO 1965 (4) SA 724 (O).**

18. In the absence of any facts to the contrary, I am inclined to accept counsel for the applicants' contention that the agreement between the applicants and Nkosi, in respect of Shampeni, was not terminated by Nkosi's death. It is for this reason that the 4th respondent, as a representative of Nkosi's estate, was cited as a party. The respondents do not dispute the applicants' contention that the winding up of Nkosi's estate is still in progress. The 1st respondent's averment that the agreement between the applicants and Nkosi has been terminated by Nkosi's death is therefore rejected.

19. As already stated, the 3rd, 4th and 5th respondents are not opposing the application. The fact that the lease agreements are still of force and effect, in as far as it relates to these respondents, is therefore not disputed. In addition, the applicants have attached correspondence from these respondents' attorneys which confirm the fact the agreements are still in existence.

20. Having found that the three agreements are still valid and running, it remains to be determined whether they are null and void for non-compliance with the provisions of the PPA as contended on behalf of the 1st and 2nd respondents.

21. Counsel for the respondents argued that the agreements are invalid on the basis that the applicants, not being the owners of the premises on which the filling stations

are situated, are prohibited, in terms of section 2A (1) (c) of the Act from holding a site licence in respect of Big Boy, Shampeni and TK. Counsel contended further that the applicants are further prohibited from acquiring a site licence to retail in petroleum on the sites as they are not the owners of the land.

22. It is common cause that the lease agreements between the applicants and the 1st respondent embodied a clause to the effect that the premises shall at all times be used for the purposes of operating a business of a filling station in terms of the site licence and retail licence only. Although not specifically stated, it seems to me that it is not the 1st and 2nd respondents' contention that during the existence of the lease agreements, the applicants used the premises contrary to this clause. In any event, the applicants stated that it was never their intention to retail in petroleum on the premises. They were only interested in the lease of the properties.

23. The 1st respondent alleges that he entered into a 'head lease' on behalf of a company he owns viz Rheiland Investment CC with the owners of Big Boy. Rheiland sublet the retailing to the 2nd respondent. The 2nd respondent is in the process of applying for the transfer of a retail licence. The 2nd respondent further entered into a lease agreement with Nkosi's widow in respect of Shampeni and with MAgaga in respect of TK.

24. It is evident that there are similarities between the contracts entered into between the 1st respondent and 2nd respondent and the ones entered into by the applicants

and the other respondents in this application. This is so in that the second respondent is similarly neither the owner of the land on which the filling stations are situated nor the holder of a site and retail licences. If the 1st respondent or Mphosi's interpretation of the PPA is anything to go by, neither the 1st nor the 2nd respondents can lease or sublet the premises on which these three filling stations are. It will also follow that the agreement it has entered into with the so-called owners will be null and void.

25. I am in agreement with counsel for the applicants that the allegations made by the 1st respondent with regard to the agreements entered into by the 1st respondent, the 2nd respondent and the owners and/or holders of the land or premises are by themselves confirmation that the contracts between the applicants and the respondents are indeed valid.

26. In **Louistof v Snyders NO [2016] ZASCA 182 [29 November 2016]** the court held that the site licence confers a personal right upon the holder thereof which entitles the holder to enter the site and to prepare it for the purpose of retailing petroleum products at the site, upon the granting of a retail licence. It was further held that there is no room to conclude that such rights are conferred on the land owner only and not the holder of the licence. In the present matter, nothing precludes the third parties with whom the applicants have entered into a lease agreement from applying for a retail licence if they intend to retail in petroleum. The applicants have in any event stated that they are not interested in retailing in petroleum.

27. In my view the fact that the applicants have rented the land from the holders and not from the owners of the land is irrelevant for the determination of the issues in this matter which are whether the lease agreements are valid or not. I agree with the applicants in this regard. It is not the applicants' case that they are in the business of retailing in petroleum. Nothing precludes the applicants from subletting the premises to the third parties in the manner in which they have done in this matter. It is upon the lessees to acquire the necessary licences in compliance with the Act if ever they intend to retail in petroleum.
28. I further agree with the applicants that the 1st and 2nd respondents have no *locus standi* to challenge the validity of the lease agreements between the applicants and third parties simply due to the amount charged as rent. The amount charged as rent is the issue between the parties to the contract only.
29. I agree with the applicants that they have proved that they have a clear right to the premises on which the three filling stations are situated by virtue of the valid lease agreements. I am further satisfied that the conduct of the respondents injured the applicants in that it interfered with their right to sublet the property to whomsoever they wish in terms of the lease agreements. Launching this application is regarded as the only satisfactory remedy at the applicants' disposal-**Setlogelo v Setlogelo 1914 AD 221.**
30. The conduct of the 3rd, 4th and 5th respondents amount to an unlawful interference with the applicants' use and enjoyment of the properties on which Big Boy, TK and

Shampeni are situated. In their prayers, the applicants applies that the court should order that they are entitled to possession of these properties. I am satisfied that on the basis of the decision in **Soffantini v Mould 1956 (4) SA 150 E**, the applicants are entitled to enforce the contract entered into with the 3rd, 4th and 5th respondents or to interdict them from interfering with this use and enjoyment.

31. With regard to costs, I do not agree with counsel for the applicants that the 1st and 2nd respondents acted mala fide in opposing the application. The agreements between the applicants and the 1st respondents had already expired and they were free to negotiate with the owners of the properties for new lease agreements. I am of the view that it is the 3rd, 4th and 5th respondents who had a duty to act in good faith and to refrain from entering into lease agreements with other parties in the face of existing and valid agreements with the applicants. A punitive cost order would not be appropriate in the circumstances.

32. I am unable to find the relevance of the statutory provisions to which I have been referred by counsel for the 1st respondent to the issues before me. The respondents were not allowed in law to enter into lease agreements with each other in respect of the premises in view of the fact that the lease agreement between the applicants and the 3rd, 4th and the applicants were still of force and effect. I find that the applicants are entitled to the relief sought.

33. It is ordered:

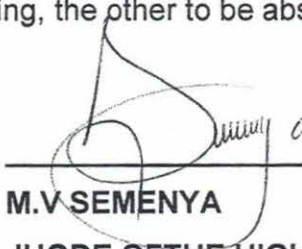
- 33.1. The lease agreements between the 1st alternatively 2nd applicants and the 3rd, 4th and 5th respondents are declared to be *in esse* and valid and the applicants are entitled to rely on them;
- 33.2. The lease agreements between the 2nd applicant, alternatively the 1st applicant and 3rd, 4th and 5th respondents are declared not to have been validly cancelled and therefor subsist and are enforceable in terms of the said agreements;
- 33.3. The 1st, alternatively 2nd applicants, alternatively both applicants are entitled to possession of the properties as set out in the lease agreements by virtue of the terms of the said lease agreements;
- 33.4. It is confirmed that the lease agreements of the properties relevant hereto between the applicants and the 1st respondent were validly terminated on the 31 October 2017 with effect to 30 November 2017, alternatively that the 1st respondent has repudiated such agreements, the repudiation having being accepted by the applicants;
- 33.5. The 1st respondent, alternatively the 2nd respondent or anybody or entity occupying the premises on behalf of the 1st, alternatively the 2nd, alternatively the 1st and the 2nd respondents are ordered to vacate or are ejected from the

premises of Big Boy Filling Station at Ga- Masemola, Shampeni Filling Station at 389 Ring Road, Daantjie Pienaar and TK Filling Station at Erf 177A & B, Zone 6, Extention 4, Sebe Street, Sebokeng;

33.6. The 3rd, 4th and 5th respondents are ordered to pay the amounts of R14 520.00, R30 000.00 and R35 000.00 (excluding VAT), which are the amounts the applicants were supposed to receive as rent had their use or enjoyment of the property not been interfered with, for the duration of the lease agreements term;

33.7. The 1st and 2nd respondents are interdicted from negotiating with and entering into lease agreements with the 3rd, 4th and 5th respondents for the lease of the properties known as Big Boy Filling Station, Shampeni Filling Station and TK Filling Station;

33.8. The 1st and 2nd respondents are ordered to pay the costs of the suit jointly and severally, the one paying, the other to be absolved.



M.V. SEMENYA

JUDGE OF THE HIGH COURT; LIMPOPO DIVISION

APPEARANCES

FOR THE APPLICANT : ADV. JR MINNAAR

INSTRUCTED BY : RIAAN BOSCH ATTORNEYS

FOR THE RESPONDENTS : ADV: BORRIS SAVVAS

INSTRUCTED BY : VENN & MULLER ATTORNEYS

DATE OF HEARING : 18 APRIL 2018

DATE OF JUDGEMENT : 27 JUNE 2018