IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA

14/7/2015.

CASE NUMBER: 56178/2014

(1) REPORTABLE: YES / ~~NO~~

(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~

(3) REVISED.

7.7.2015

DATE SIGNATURE

In the matter between:

CWA SNYDERS N.O. as trustee of

LOUIS SNYDERS FAMILIE TRUST Applicant

and

LOUISTEF (PTY) LTD First Respondent

THE CONTROLLER OF PETROLEUM PRODUCTS Second Respondent

MACROBERT INCORPORATED Third Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

[1] The applicant claims the following relief:

"1. An order declaring that the agreement ***annexure "A"*** *to the Applicant's Founding Affidavit is null and void and of no force and effect.*

2. The First Respondent pays the costs of the Application."

[2] The first respondent opposes the relief claimed by the applicant and has launched a counter application in terms of which the following relief is claimed:

"1. An order declaring that the agreement, (annexures "A" and/or ***"RD"****) was legally and validly concluded and was not null and void;*

2. That the applicant be ordered to pay First Respondent the amount of R 1 000 000, 00 plus vat of R 140 000-00 against delivery of a valid tax invoice.

3. In the alternative to prayer 2 above:

3.1 that Applicant's repudiation of the agreement, First Respondent's acceptance thereof, First Respondent's resiling therefrom and its termination, be confirmed;

3.2 That That (sic) *Applicant be ordered to pay the amount of R 1 000 000 – 00 (One Million Rand) plus R 140 000, 00 to First Respondent as liquidated damages;"*

[3] The second and third respondents filed notices to abide by the decision of the court.

FACTS

[4] The applicant is the owner of a certain immovable property ("the premises") in Brits. The property has a filling station ("the site") from which the first

respondent has retailed petroleum products for a period of approximately 13 years. For the aforesaid purpose the parties have concluded consecutive lease agreements. In order to conduct the business of fuel retailing, the first respondent obtained the necessary retail and site licenses prescribed by the Petroleum Products Act, 120 of 1977 ("the Act").

[5] According to the parties, the lease agreement terminated at the end of April 2014.

[6] The applicant was eager to continue with the filling station business and the third respondent, the trust's attorney at the time, addressed a letter to the first respondent requesting the first respondent to transfer the site licence to the applicant *"in order to prevent the site license from lapsing"*.

[7] The first respondent was, however, of the view that the site licence was its asset and refused to relinquish or surrender the licence.

[8] In view of the first respondent's attitude, the parties entered into a written agreement in terms of which the applicant purchased the site licence from the first respondent for an amount of R 1 million.

[9] The Agreement contains the following relevant clauses:

"3. ***INTRODUCTION***:

3.1 The Seller conducts the business of a fueling station at the Premises.

3.2 The Seller leases the Premises from the Purchaser and the lease agreement terminates on 30 April 2014 and the Seller will cease the business on that date.

3.3 The Seller wishes to transfer the Site License to the Purchaser in order to enable the Purchaser to conduct a business of a fueling station from the premises."

and

"4. SALE OF SITE LICENCE

The Seller hereby sells the Site License to the Purchaser, who purchases same with effect from the Effective Date."

[10] In pursuance of the agreement, the applicant paid the purchase consideration of R 1 million into the bank account of the third respondent. The first respondent alleges that it complied with its obligations in terms of the agreement by *"signing all documents and delivering those documents, amongst others, Annexure **"RE"**, together with the original site- and retail licenses to the Applicant, who on the strength thereof represented to Second Respondent that this was an application for the transfer of a licence."*

[11] Annexure "**RE**" refers to the retail licence and contains a declaration to surrender the retail licence. The present operator of the filling station has applied for a corresponding retail licence in its name.

[12] It is common cause that the second respondent has issued a site licence to the applicant. It is, however, not clear from the facts whether the site licence would have been issued without the existence of the written agreement.

[13] Prior to the purchase price being paid to the first respondent, the applicant received legal advice to the effect that the written agreement is null and void and unenforceable. As a result, the applicant instructed the third respondent to withheld payment of the purchase price.

DISPUTE

[14] The applicant alleges that the agreement is invalid; null and void and unenforceable because a site licence is not a *res* capable of being sold.

[15] The first respondent contents that the site licence forms part of its property, has a value and is indeed capable of being sold.

LEGAL PRINCIPLES

[16] In order for a contract to be valid and binding, the contract must comply with certain requirements. In *Norman's Law of Purchase and Sale in South Africa*, RH Zulman, G Kairos, 5th edition, p. 2, the elements of a contract of sale are stipulated as follows:

> " *(i)* *emptor et venditor* (buyer and seller – parties capable of entering into an agreement of sale)
>
> *(ii)* the *merx* or *res vendita* (the thing or things which form the subject matter of the agreement of sale)(see for example *Kriel and Another* [2000] 2 All SA 65 (SCA));
>
> *(iii)* the *pretium* (the price in money or which is readily ascertainable in terms of money). See the useful discussion by Lubbe in 2000 *Annual servey* pp. 213-221;
>
> *(iv)* *consensus ad idem* (the mutual consent of the contracting parties)."

[17] In view of the dispute between the parties, it is only the second requisite, to wit the *merx* or *res vendita* that requires further attention.

Merx or *res vindita*

[18] In *Norman's Law of Purchase and Sale in South Africa, supra* at p.21, a *merx* or *res vindita* is described as follows:

> *"3.1 the second requisite of the contract of sale is a thing which can be bought or sold, and which may form the subject matter of the contract. Paul (*Dig *18.1.34.1) says:*
>
> *"Whatever can be held as private property, or possessed, or sued for, may lawfully be sold; but things which are withdrawn form commerce, by the law of nature, or of nations, or by public policy, are incapable of being owned by any individual person, such as the air, public streams or the sea, cannot be bought or sold."*

[19] Things falling in the first category are referred to as *res in commercio* and things falling in the latter category as *res extra commercio*.

[20] In order to determine in which category a site licence falls, the legislative framework pertaining to the licence needs to be considered.

PETROLEUM PRODUCTS ACT, 120 OF 1977

[21] Prior to the commencement of the Petroleum Products Amendment Act, 58 of 2003 ("the Amendment Act") on 17 May 2006, the retail of petroleum products in South Africa was largely unregulated.

[22] The 2003 Amendment Act changed the landscape of the petroleum retail industry in South Africa drastically. The industry has, subsequent to the amendment, become highly regulated in the manufacturing, wholesaling and retailing of petroleum products prescribed by the Act.

[23] Section 2A(1) of the Act, stipulates, *inter alia*, that a person must have a site licence to hold or develop a site and must have a retail licence to retail prescribed petroleum products.

[21] Section 2A(4) specifies the type of person who may apply for a licence. In respect of a site licence, only the owner of the property may apply.

[24] Section 2B of the Act makes provision for the issuing of licenses and subsection (3) deals with the duration of the validity of a licence. The subsection reads as follows:

> *(3) Any license issued by the Controller of Petroleum Products remains valid for as long as-*
>
> *(a) the licensee complies with the conditions of the license;*
>
> *(b) The licensed activity remains a going concern, **excluding a site**; and*
>
> *(c) in the case of a site, there is a corresponding valid retail license."*

(Own emphasis)

[25] Due to the fact that fuel retailing businesses were in existence at the commencement of the Act, the Legislator made provision for transitional licenses in section 2D of the Act. The section reads as follows:

*"**2D Transitional licensing provisions.**-(1) For the purposes of this section –*

***'hold'** means to own or lease land, or to possess an option to purchase land or lease land, that has been zoned and approved by appropriate authorities for use as a site; and*

'process of developing' ....

(2) Any person who, at the time of the commencement of the Petroleum Products Amendment Act, 2003-

(a) holds and is in the process of developing a site; or

(b) manufactures or wholesale petroleum products, or retail prescribed petroleum products...........................

shall, subject to subsection (3), be deemed to be the holder of a license for that activity.

(3) (a) Any person referred to in subsection (2) shall, within a period of six months from the date of commencement of this section, apply for a manufacturing, wholesale, site or retail license, as the case may be.

(b) Subsection (2) shall cease to apply if the person fails to apply for A license within the period contemplated in paragraph (a).

(4) (a) An applicant contemplated in subsection (3) shall, on application, be entitled to be issued with a license for the operation of the activity concerned if the applicant is in compliance with all national, provincial and local government legal requirement, that are in force immediately prior to the commencement of this Act for the operation of the activity concerned.

(b) Such applicant shall be subject to the general conditions of a license

set out in this Act, but not to any financial security requirement prescribed by regulation."

[26] The Act and regulations promulgated in terms of the Act, differentiate between sites established after the commencement of the Amendment Act ("new sites") and sites that existed prior to the commencement of the Amendment Act ("existing sites"). Although only the owner of land may hold a site licence in terms of section 2A (4) of the Act, the transitional arrangements contained in section 2D provides that, subject to compliance with the relevant statutory requirements contained in section 2D, a lessee of land may also hold a site licence. The requirements contained in the regulations for the transfer of a "new site" licence and the transfer of an "existing site" licence also differ.

[27] Regulations to the Act were promulgate by the Minister of Minerals and Energy in Government Gazette, No 28665 on 27 March 2006 [Government Notice, No R 286]

[28] Regulation 12 applies to the transfer of a site license. Regulation 12(1) applies to the transfer of "new site" licenses and regulation 12(2) and (3) to the transfer of "existing site" licenses.

[29] Subregulations (2) and (3) reads as follows:

"(2) In the case of a licence issued to a person in respect of whom section 2D of the Act is applicable, the site license issued to-

*(a) a land owner, **must** be transferred to the new owner of that land; or*

*(b) a lessee, **must** be transferred to the new lessee or to the new owner of that land.*

(c) the provision of a certified copy of the title deed or of the deed or of deed transfer or of the lease agreement, to the Controller.

(Own emphasis)

[30] Subregulation (4) applies to both new and existing site licenses and provides that the application for the transfer of a licence must be made within six months of taking ownership or possession of the site.

APPLICANT'S CONTENTIONS

[31] In view of the provisions of regulation 12, the applicant contends that the first respondent was obliged to transfer the site licence to the applicant. The applicant further contends, that the site licence is attached to the site and the first respondent's entitlement thereto seized when it vacated the site.

[32] In the premises, the site licence has no commercial value and is not a *merx* or *res vendita* for the purpose of a valid sale agreement.

FIRST RESPONDENT'S CONTENTIONS

Ownership of rights flowing from site licence

[33] The first respondent avers that the rights flowing from the site licence belonged to it and was its property.

[34] Regulation 38 deals with the ownership of a licence and reads as follows:

"38. Any licence issued in terms of these Regulations-

(a) Remains the property of the Department of Minerals and Energy;

(b) may be cancelled or suspended at any time subject to Regulation 29;

(c) May not be tempered with or defaced in any manner; and

(d) May not be altered in any manner."

[35] The site licence therefore remains the physical property of the Department of Minerals and Energy (" the Department"). Although the Department is the owner of the physical licence, the question arises whether the first respondent *"owned"* any rights flowing from the licence.

[36] If regard is had to regulation 12 (2), such licence **must** be transferred to a new owner or new lessee, when ownership or possession of the site terminates. The licence is therefore a statutory requirement granted to the owner or lessee of a site in order to enable the person / entity to retail petroleum products from the site.

[37] If one have regard to the statutory framework regulating the granting of a site licence, the status of a site licence can be equated to that of a liquor licence. In *Aquatur (Pty) Ltd v Sacks and Others* 1989 (1) SA 56 AD, Vivier JA at 64 H-I, described the status of a liquor licence as follows:

"A liquor licence, it has been stated in decisions in this Court, is a purely personal statutory privilege granted to a particular person under the liquor laws to sell liquor at particular premises. Its grant involves the exercise by the licensing authorities of a delectus personae *so that the licensee cannot transfer or* ***otherwise deal*** *with the licence unless authorised thereto in terms of the Act, which provides for the strict supervision of the grant, transfer and removal of licences."*

[38] In the premises, the first respondent did not possess any rights flowing from the site licence that was capable of being sold. The act does not authorise the selling of the site licence, but provides that the site licence must be transferred to the new owner or possessor of the site, once possession of the site is relinquished.

Commercial value of site licence

[39] Apart from contending that it was the owner of the rights flowing from the site licence, the first respondent avers that the licence has, in any event, commercial value attached to it. According to the first respondent, the commercial value emanates from the fact that the site licence would have terminated when it vacated the premises. In this regard the first respondent relies on regulation 30, which reads as follows:

"30. (1) A licence ceases to be valid if-

(a) the licence is surrendered to the Controller;

(b) the licence is cancelled by the Controller in accordance with regulation 29(2); or

(c) the licensed activity is no longer a going concern."

[40] The first respondent contends that the fact that the site licence would have terminated, would have entailed that the applicant had to apply for a licence *de novo*.

[41] This would have been a cumbersome and costly exercise. According to the first respondent, the applicant would have had to:

"9.2.2 submit an environmental management plan and provide proof of financial position for the purposes of rehabilitation as envisaged by regulation 14(b)(i) and (ii)"

9.2.3 obtain a Record of Decision ("ROD") from the relevant authority on the basis of an environmental impact study in accordance with the Environmental conversation Act, No 73 of 1989 as envisaged by regulation 13(1)(d)(ii);

9.2.4 prove to Second Respondent that proper notice was given in terms of regulation 4 of the Regulations.

9.2.5 prove that a corresponding valid retail application has been lodged for that site in terms of regulation 5 of the Regulations and in case of an application where a site licence made by a person in respect of section 2D of the Act is not applicable, that there is a need for the site and that the site will promote the licencing objectives stipulated for in section (B) (2) of the Act;"

[42] In *"selling"* the site licence to the first respondent, the licensed activity (retailing of petroleum products), however, remained a going concern and the applicant did not have to apply for a licence *de novo*.

[43] Regulation 30 should, however, be read in conjunction with regulation 12 which provides for the transfer of a site licence in circumstances where the owner or possessor of the licence seizes to occupy the site.

[44] The two scenarios are distinct. If a licensed activity seizes all together, it follows that the site licence will no longer be valid. If a new owner or lessee, however, takes over the site, the licence must be transferred in terms of the provisions of regulation 12.

[45] The aforesaid conclusion corresponds with the contents of section 2B (3) of the Act, that only requires a corresponding retail licence in order for a site licence to be valid. As stated, *supra*, it is common cause between the parties that an application for a corresponding site licence has been lodged in respect of the site.

[46] In the present circumstances, the mere fact that the first respondent seized retailing operations when it vacated the site, does not mean that the site licence terminated and has as a result a corresponding commercial value.

Regulation 12(2) not applicable to applicant

[47] According to the first respondent, regulation 12(2) does not apply in the present circumstances, because the applicant is an existing and not a <u>new</u> owner.

[48] I pause to mention that the Controller of Petroleum Products deemed the transfer of the site licence to be in accordance with regulation 12(2)and (3). In a letter dated 14 May 2014, addressed to Mr Snyders, the trustee of the applicant, the Controller remarked as follows:

"The Office of the Petroleum Controller acknowledges your request for Site Licence Transfer (S/2008/1777), from LOUISTEF (PTY) LTD to LOUS (sic) *SNYDERS FAMILIE TRUST.*

In accordance with regulation 12 of the Site and Retail Licence Regulations, please make a payment of R 500, 00 ....."

[49] Payment of the R 500, 00 presumably represents the site licence fee referred to in regulation 12(3)(b).

[50] Insofar as regulation 12(2) does not refer to an existing owner, a *casus omissus* exist.

[51] When legislation contains a *casus omissus*, a court must decide whether it should *"fill the gap"* or whether *"filling the gap"* would amount to exceeding its powers in terms of the interpretation of the separation of powers doctrine. [See, *inter alia*: *Sleutelfontein (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk* 1994 (3) SA 407 (A)]

[52] When it is possible to cure the *casus omissus* by interpreting the Act to give it a meaning which is in accordance with the rest of the Act, a court should not hesitate to do so.

[53] In *Vryenhoek and Others v Powell NO and Others* 1995 (2) SA 813, the court discussed the interpretation rule applicable to a *casus omissus* at 847 A-B:

> "Devenish (op cit *at 84) under the heading 'Interpretation by implication' points out that provisions which are 'not enacted in express words may, under certain circumstances, be deemed to be implied by means of the process of curial interpretation.' The implication must, of course, from other parts of the statute (*Steyn (op cit *at 49) and must be 'a reasonable and necessary one."*

[54] In distinguishing between "new site" licenses and "existing site" licenses, the legislator created two distinct scenarios to which different criteria apply. "New sites" have more cumbersome requirements than "existing sites".

[55] No reason appears from the Act and regulations to distinguish between a new owner and an existing owner of an "existing site". Having regard to the structure of the Act and the regulations, it follows logically that the owner of an existing site should by implication fall within the provisions of regulation 12(2) and (3). The fact that an existing owner of an "existing site" is not expressly referred to in regulation 12, renders this interpretation reasonable and necessary.

[56] In view of the aforesaid interpretation, the first respondent had a statutory obligation to transfer the site licence to the applicant.

CONCLUSION

[57] In the premises, I am of the view that a site licence does not have commercial value and is not a *merx* or *res vendita*. Consequently, the sale agreement between the parties does not comply with the essential elements of a valid sale agreement and is *null* and void.

ORDER

I grant the following order:

1. The sale agreement between the applicant and the first respondent in respect of the site licence for Erf 2835, Brits JQ, North West Province, is declared to be *null* and void.

2. The first respondent is ordered to pay the costs of the application.

3. The counter application is dismissed with costs.

Nieuwenhuizen

JANSE VAN NIEUWENHUIZEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Counsel for Applicant: Advocate B G Savvas

ATTORNEYS FOR THE APPLICANT:

VENN & MULLER ATTORNEYS

Counsel for the First Respondent: Advocate JH Dreyer SC

ATTORNEYS FOR THE FIRST RESPONDENT:

LANGENHOVEN PISTORIUS & PARTNERS