

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

28/5/14

CASE NO: 42659/2012

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
28 May 2014	<i>EIM</i>
DATE	SIGNATURE

In the matter between:

AFRICAN OXYGEN LTD

APPLICANT

and

M & H COHEN CC

1ST RESPONDENT

MAXINE GERHARD COHEN

2ND RESPONDENT

BELL CRESCENT PROPERTIES CC

3RD RESPONDENT

AND

CASE NUMBER: 54341/2012

In the matter between:

M & H COHEN CC

APPLICANT

and

AFRICAN OXYGEN LTD

RESPONDENT

JUDGMENT

KUBUSHI, J

- [1] In these court proceedings there are two *ex parte* applications. Both applications were launched in chambers. I shall for purposes of convenience refer to the application under case number 42659/2012 (which was instituted first) as the main application and the application launched under case number 54541/2012 as the counter application. The main application was instituted by Afrox, who is also a respondent in the counter application. I shall therefore refer to the applicant in the main application and respondent in the counter application as Afrox. The counter application was instituted by M & H Cohen CC, who is also the 1st respondent in the main application. I shall refer in this judgment to the applicant in the counter application and the 1st respondent in the main application as M & H. I shall also refer to the 2nd respondent in the main application as Cohen and the third respondent in the main application as Bell Crescent. Where I refer to M & H and Cohen jointly, I shall refer to them as the respondents.
- [2] The main application was launched on 15 August 2012 by Afrox against M & H and Cohen. In that application the relief sought by Afrox was in two parts, namely, part A and part B. In terms of Part A Afrox sought an order permitting it to attach certain liquid petroleum gas (LPG) cylinders belonging to it which were in the possession of M & H and Cohen or either of them; and in part B it sought an order that the cylinders so attached be returned to Afrox, together with final interdicts, preventing M & H and Cohen from receiving, filling and distributing Afrox's LPG cylinders together with certain ancillary relief, aimed at ensuring compliance with the interdict. Afrox was granted an *interim* relief as a result of the *ex parte* application. Pursuant to that order 515 cylinders belonging to it were attached by the sheriff at the premises controlled by the M & H. Some of these cylinders were full some were empty. The said order was also served on M & H and Cohen.
- [3] In retaliation, on 20 September 2012, M & H also brought an *ex parte* application against Afrox for the attachment of its cylinders at Afrox's premises. The relief sought is along the same lines as that sought by Afrox in part B of the main application. M & H was granted the *interim* relief as a result of the *ex parte* application and pursuant to that order approximately 6 500 "Solgas" cylinders and 682 "Indigas" cylinders were attached from Afrox's premises by the sheriff.

- [4] Initially Afrox's application was against M & H and Cohen only. But later in the proceedings Bell Crescent was joined as the 3rd respondent in the main application. In its papers in the main application, Afrox cited M & H as a close corporation trading as 'The Gas Company'. In M & H's answering affidavit in the main application, Cohen, who is the deponent therein, contends that he is the sole member of M & H and denies that M & H trades as 'The Gas Company'. According to Cohen the entity trading as 'The Gas Company' is Bell Crescent Properties CC (Bell Crescent). Consequently Afrox launched an application to join Bell Crescent to the proceedings which was granted. Bell Crescent is now the 3rd respondent in the main application.
- [5] M & H and Cohen are opposing both Afrox's *interim* order and the substantive relief claimed in part B of the application. Afrox is also opposing M & H's *interim* order and the substantive relief sought therein. Bell Crescent as the third respondent in the main application is also opposing Afrox's *interim* order.

BACKGROUND

- [6] Afrox and M & H are wholesale sellers and distributors of LPG. Afrox cylinders carry the logos "Afox" and "Handigas" whilst M & H's cylinders carry the logos "Indigas" and "Solgas". Afrox is contesting that the cylinders carrying the logo "Solgas" belong to M & H. During argument, the respondents' counsel relented and conceded that the "Solgas" cylinders should for purposes of this judgment not be considered as M & H's cylinders. Both parties have a significant number of gas cylinders in the market place and are thus lawful competitors in the LPG market. Afrox however, is admittedly the bigger player of the two in the industry.
- [7] It is common cause that each party retains ownership of its cylinders which get distributed into the market on a deposit system. The end user purchases only the LPG in such cylinders. It is also not in dispute that the filling and distribution of the cylinders is regulated by various regulations and safety standards. In terms of these regulations and safety standards it is unlawful to fill LPG cylinders without the permission of the owner. Conversely it is also unlawful to distribute the cylinders

without authorisation from the owner. A trade practice has as a result developed where consumers can take their empty gas cylinders to any LPG distributor to swap it for a full one. The distributors come into possession of each other's cylinders, and exchange such cylinders from time to time. Afrox and M & H have an agreement in line with this exchange practice. They have each approached the court for relief on the ground that the other does not fully comply with the terms of the said agreement.

POINTS *IN LIMINE*

[8] In opposing the main application, the respondents as well as Bell Crescent have, respectively, raised points *in limine*. The respondents have raised the following points *in limine*:

- a. *Lis alibi pendens*;
- b. No case made out against Cohen; and
- c. Doctrine of unclean hands.

Bell Crescent raised the following points *in limine*:

- a. the supplementary founding affidavit of Andre du Preez is defective;
- b. No allegations made against Bell Crescent; and
- c. Dispute of fact.

I shall deal with the points *in seriatim* as they were argued in court.

Lis Alibi Pendens

- [9] It is common cause that Afrox instituted application proceedings against the respondents in the magistrate's court under case number 39918/09 (the 2009 application). The respondents opposed the 2009 application. Afrox's contention is that the facts in the main application demonstrate that the application is based on entirely different facts to those in the 2009 application. Afrox's counsel submitted in argument that the dispute in the 2009 application was finalised when the parties entered into a settlement agreement.
- [10] The respondents are however, not in agreement with Afrox's submissions. According to them the facts between the main application and the 2009 application are the same; and that the settlement agreement between the parties was not in respect of the 2009 application but in respect of the search and seizure warrant which Afrox issued against M & H.
- [11] The issue to be determined is whether Afrox is precluded from obtaining relief against the respondents on account of the defence of *lis alibi pendens*.
- [12] The general principle is that once a suit has been commenced before a tribunal that is competent to adjudicate upon it, the suit must generally be brought to its logical conclusion before that tribunal and should not be replicated (*lis alibi pendens*). The suit between the same parties should be brought once and finally. See *Socratous v Grindstone Investments*¹.
- [13] The party wishing to raise a defence of *lis alibi pendens* bears the *onus* of alleging and proving that there is pending litigation between the same parties or their privies, based on the same cause of action in respect of the same subject matter. See Harms: *Amler's Precedents of Pleadings*².

¹ (149/10) [2011] ZASCA 8 para [14] (10 March 2011)

² 7th ed p263 – 264

the LPG industry and/or against payment of a deposit for each cylinder and/or against payment of the value of LPG in each cylinder.

2.5 Failing compliance by African Oxygen Limited with the terms of paragraph 2.4 above the relevant sheriff, who may be accompanied by a representative of M & H Cohen CC and/or attorney of M & H Cohen CC of record, is directed to take possession of any of M & H Cohen CC's cylinders which are found by the sheriff in the possession of African Oxygen Limited at any premises where African Oxygen Limited may be trading, or which are found by the sheriff on any motor vehicle or motor vehicles which are identified as those of African Oxygen Limited or which are being used to convey any such cylinders for or on behalf of African Oxygen Limited either presently or in the future, and whether such cylinders contain LPG or not and that the sheriff is authorised forthwith to hand these over to M & H Cohen CC and/or M & H Cohen CC duly authorised representative in terms of the cylinder exchange practice which operates in the LPG industry and/or against payment of a deposit for each cylinder and/or against payment of the value of LPG in each cylinder.

2.6 African Oxygen Limited return to M & H Cohen CC all of M & H Cohen CC's cylinders in their possession in terms of the cylinder exchange practice which operates in the LPG industry and/or against payment of a deposit for each cylinder and/or against payment of the value of LPG in each cylinder.

3. Each party to pay own costs.

- [14] My view is that the 2009 application and the main application are virtually the same. The parties in both applications are Afrox and the respondents; the relief sought and the subject matter in both applications is the same.
- [15] I find Afrox's contention that the facts giving rise in the main application are new facts which occurred after the 2009 application and as such cannot be used to revive the 2009 application, to have no merit. Although the facts in the present application are new, they however relate, firstly, to the same subject matter, that is, the alleged unlawful filling and distribution of Afrox's LPG cylinders by the respondents. In the 2009 application what was in issue was Afrox's LPG cylinders bearing the following names or brand names: Handigas, Afrox, African Oxygen and Acetylene Company, AOL, BOC Gases, Mobil, Engen, Homegas, Sonap, Sonarep, Trek, Socony, Caltex and Calgas. In the main application the cylinders in issue are those bearing Afrox's brand names 'Afrox' and 'Handigas'. The cylinders with these brand names are also part of the subject matter of the 2009 application. The premises at which the cylinders are to be attached in the main application are the same premises as in the 2009 application, that is, the Bell Crescent property. It is on this basis that I would conclude that the subject matter in both applications is the same.
- [16] Secondly, the relief sought in both applications is the same as well. The relief sought in both applications is:
- a. to interdict and restrain the respondents or any other person representing the first respondent from receiving or being in possession of LPG cylinders with Afrox's brand name.
 - b. to interdict and restrain the respondents or any person acting on their behalf from filling and distributing LPG cylinders bearing Afrox's brand name.
 - c. that the representatives of Afrox be permitted to enter the premises of the first respondent and direct the respondents or persons representing them to surrender or handover to Afrox and/or any duly authorised person any

cylinders which bear it's brand name which may be in the respondents' possession.

- d. failing compliance by the respondents to direct the sheriff, who may be accompanied by a representative of Afrox and/or attorney to take possession of any cylinder bearing the brand name of Afrox, found in the possession of the respondents at any premises the first respondent is trading or which are found on the vehicle(s) of the respondents.
- e. ordering the respondents to jointly and severally, the one paying the other to be absolved, pay Afrox's costs of this application on an attorney and client scale.

[17] The *lis* in the 2009 application between the parties is still before court as it has not been finalised. A defence of *lis pendens* rests on the existence of a pending earlier action and is indeed dependent on the actual existence of such other action. An action at law is disposed of and the *lis* (dispute) between the parties is no longer before the court as soon as the court has delivered its judgment and order or perhaps the previous action upon which the defendant relies is withdrawn. See RSA Faktor Bpk v Bloemfontein Town Developers (Edms) Bpk En Andere³.

[18] Afrox's submission that the *lis* between the parties does no longer exist is factually incorrect. Its contention is that there was a settlement agreement between the parties by which the 2009 application was finalised. The respondents' objection to this contention is that the settlement agreement was as a result of the warrant of search and seizure which was issued by Afrox pursuant to a criminal case against the respondents and not pursuant to the 2009 application. Afrox in its founding affidavit, paragraphs 9.5 to 9.11 thereof, confirms that it sought and obtained a search and seizure warrant in terms of sections 20, 21 and 25 of the Criminal Procedure Act, 51 of 1977, which was executed on 26 October 2010. Subsequent to the execution of the order, an oral agreement in line with the exchange practice in the industry was concluded with Cohen.

[19] It is well established that *lis pendens* is not an absolute bar. The court has a discretion to allow a matter to proceed notwithstanding that the same issue may be pending in another court of competent jurisdiction. See Janse Van Rensburg NO v Steenkamp and Another; Janse Van Rensburg NO v Myburgh⁴.

[20] As it has been said *lis alibi pendens* is a discretionary remedy. Consequently, even where all the required elements of the defence are present, a court, if satisfied that the balance of convenience and equity are in favour of allowing the case to proceed, may rule that the case should proceed. On the basis of the circumstances of this application, I am persuaded to exercise my discretion in favour of Afrox. Afrox's submission that it had to institute new proceedings because it would have been impracticable to revive the 2009 application to include the facts arising out of the new investigations, which would lead to the necessity of further sets of affidavits has convinced me to exercise my discretion in its favour.

[21] It is common cause that the 2009 application was stalled at the behest of both parties when they entered into a settlement agreement pursuant to the search and seizure warrant obtained by Afrox. Consequently Afrox did not file its replying affidavit. For Afrox to have proceeded with the 2009 application, firstly, it would have to file the replying affidavit. Since the time within which it was supposed to have filed the replying affidavit has elapsed, Afrox would have to apply for condonation for the late filing of the said affidavit. Secondly, since the facts which prevailed at the time of the launch of that application have become irrelevant, Afrox's case is that it investigated the matter afresh and came up with new facts. In order to bring these new facts before the court, Afrox would have to apply for the filing of a further affidavit to supplement its founding affidavit. These are procedures which are allowable in terms of the uniform rules. However, my view is that it is much easier to proceed with the current application than to proceed with the cumbersome 2009 application which requires the filing of further affidavits. Afrox must still approach the court to be permitted to file the affidavits. In my opinion the only sensible thing to do is to proceed with the current application

before me. All parties in this case have delivered full papers and the matter is ripe to be heard.

Unclean Hands

- [22] It is common cause that in the two *ex parte* applications the parties are accusing each other of unlawfully stockpiling each other's LPG cylinders and also unlawfully filling and distributing each other's LPG cylinders. As a result each of the parties alleges in their respective applications that the other party conveniently failed to disclose several material facts to the court. This is indicated for example, by the numerous cylinders belonging to the other party attached by the sheriff.
- [23] My view is that both parties have approached this court with unclean hands. This point is therefore neutral.

Case not made out against Cohen

- [24] Afrox in making out a case against Cohen contends that Cohen should be personally regarded as a joint wrongdoer with M & H. Cohen's response to the said allegation is that there is no basis for him to be joined in his personal capacity in the application. My understanding of Afrox's complaint is that i should disregard the juristic personality of M & H and find Cohen, a member of M & H which is a close corporation, to be jointly liable with M & H.
- [25] It is a well-known principle of our law that a company has legal personality separate from that of its shareholders. That separate personality may however, in certain circumstances be disregarded by a court. The mere fact that a company has only one shareholder who is in full control of the company does not however constitute a basis for disregarding its separate legal personality. See Nel v Metequity Ltd⁵.

⁵ 2007 (3) SA 34 (SCA) para [11] at 38H – I

- [26] Judicial discretion to disregard or negate a juristic person's separate personality is a generally acceptable principle in our law. Courts are however traditionally reluctant to disregard separate juristic personality and are willing to do so only in limited circumstances. Such circumstances would generally have to include an element of fraud or other improper conduct in the use of the company or the conduct of its affairs. In case of a close corporation, s 65 of the Close Corporation Act 69 of 1984 endows the judiciary with the statutory power to negate separate juristic personality, where it is found that "the incorporation of, or any act by or on behalf of, or any use of, that corporation, constitutes a gross abuse of the juristic personality of the corporation as a separate entity". See *Nel v Metequity Ltd* above⁶.
- [27] Can it be said that in this instance the conduct of Cohen acting on behalf of M & H as alleged by Afrox, constitutes a gross abuse of the juristic personality of M & H as a separate entity?
- [28] The conduct of Cohen that Afrox is complaining of is that Cohen is directly involved in the unlawful storing, filling and distribution of Afrox's cylinders. According to Afrox, the evidence demonstrates that Cohen is aware of the activities of M & H's employees in the storing, filling and distribution of such cylinders. He (Cohen) personally gives instructions to M & H's employees that they (the employees) store or fill empty cylinders of Afrox that come into the possession of M & H. Cohen gives such instructions well knowing that Afrox and M & H do not have a distribution agreement between them. It is Afrox's submission that one of its sales manager, Andre Du Preez whilst doing some investigation, observed Cohen personally supervising the loading of Afrox's cylinders and took photographs of Cohen performing such supervision. Copies of the said photographs are attached to Afrox's founding affidavit as evidence.

- [29] These allegations against Cohen are not challenged by either M & H or Cohen. Besides submitting that there is no basis for Cohen to be joined in his personal capacity in this application, none of the allegations are specifically challenged. Cohen concedes that M & H is filling, although on a limited scale, Afrox's cylinders in order to survive because Afrox is also filling and distributing M & H's cylinders. My view is that the filling and distribution of Afrox's cylinders by M & H without an agreement between them is unlawful and the reason Cohen provides for M & H to fill and distribute Afrox's cylinders, does not take away the fact that M & H is performing those activities unlawfully. I have to conclude therefore that Cohen's involvement in such activities constitutes a gross abuse of the juristic personality of the corporation as a separate entity and Cohen should as a result be regarded as a joint wrongdoer with M & H.

Failure to Comply with Regulation 3.1

- [30] The first point *in limine* raised by Bell Crescent is that Afrox's supplementary founding affidavit does not comply with the provisions of regulation 3.1 of the Regulations Covering the Administration of Oaths or Affirmation GN R1258 dated 21 July 1972 (the Regulations), in that the affidavit was not signed by the deponent. I was in this regard referred to the judgments in *S v Msibi*⁷, *Swart v Swart*⁸ and *Engineering Requisites (Pty) Ltd v Adam*⁹.

- [31] Uniform rule 6 (1) requires that every application to be brought on notice of motion should be supported by an affidavit as to the facts upon which the applicant relies for relief. An affidavit in application proceedings must set out all that would be necessary in a trial. See *Saunders Valve Co Ltd v Insamcor (Pty) Ltd*¹⁰.

⁷ 1974 (4) SA 821 (T)
⁸ 1950 (1) SA 263 (O) at 267
⁹ 1977 (2) SA 175 (O) at 178
¹⁰ 1985 (1) SA 144 (TPD) at 149C

- [32] In terms of regulation 3.1 the deponent should sign the declaration in the presence of the commissioner of oaths. A declaration includes an affidavit. In this instance, Bell Crescent's contention is that Afrox's case against it is exclusively based on the allegations contained in Afrox's unsigned supplementary founding affidavit. And according to the respondents' counsel since the affidavit is not signed it cannot be said that there is an affidavit before the court because the applicant did not comply with the requirements of regulation 3.1. He contends that as a result Afrox has not complied with uniform rule 6.1. To the contrary, the submission by Afrox's counsel is that based on the common cause facts on this point, the defect is a technical point which should not be entertained by this court.
- [33] Non-compliance with the provisions of regulation 3 does not *per se* render a purported affidavit void, for that provision is not peremptory, but directory. The court has a discretion to regard a declaration that does not comply with regulation 3 as worthless, or to recognise it as an affidavit. It also has a discretion, in a suitable case, to allow evidence to be produced on the question whether in reality the provisions were satisfied or not, before a decision is arrived at on the information so produced. See *S v Msibi* above and *Cape Sheet Metal Works (Pty) Ltd v J J Calitz Builder (Pty) Ltd*¹¹.
- [34] In deciding whether the non-compliance is of such a nature that the court should refuse to entertain the affidavit, it is clearly relevant to have regard to the nature and purpose of the requirement with which there has been failure to comply. In this instance, the complaint is that the deponent did not sign the affidavit whereas in terms of the regulation the deponent should have signed the declaration in the presence of the commissioner of oaths. Compliance with the regulations provides a guarantee of acceptance in evidence of affidavits attested in accordance therewith. Where an affidavit has not been so attested, it may still be valid provided there has been substantial compliance with the formalities in such a way as to give effect to the purpose of the legislator. The courts discretion to refuse to receive an affidavit attested to otherwise than in accordance with the regulations would depend upon

whether or not substantial compliance with the regulations has been proved. See S v Munn¹².

- [35] It is common cause that the proceedings in this instance are application proceedings which should be supported by an affidavit. It is common cause that Bell Crescent was joined to the proceedings at a later stage and a supplementary founding affidavit had to be filed by Afrox in that respect. It is not in dispute that the said supplementary founding affidavit on which Afrox relied in support of its case against Bell Crescent was not signed by the deponent. It is also not in dispute that the supplementary founding affidavit was initialled on all the pages including the last page but a full signature was not attached. Afrox has also subsequently filed a new supplementary founding affidavit which complies in all respects with regulation 3.1.
- [36] It is indeed so that the defect in the supplementary founding affidavit initially filed by Afrox does not render the purported affidavit void because the provisions of regulation 3.1 are merely directory. I therefore have a discretion to decide whether to accept the affidavit into evidence or not. In order for me to exercise this discretion, I must be provided with the grounds for the exercise of the discretion. Counsel for Bell Crescent is of the view that such grounds have not been made available to me. I am however of the opinion that the common cause facts as stated in paragraph [35] of this judgment are sufficient grounds to enable me to exercise the discretion.
- [37] Based on the said common cause facts my view is that I should exercise the discretion in favour of Afrox. It is so that the Regulations do not state the manner in which the affidavit ought to be signed. My view therefore is that the initials of the deponent attached to the supplementary founding affidavit should be accepted as an indication that the declaration was indeed signed. The submission by Bell Crescent's counsel that it cannot be determined from the said initials that it was the deponent who put the initials there is to me without merit. The deponent initialled

¹²

1973 (3) SA 734 (NC) at 737 and 738A – C

all the pages in the presence of the commissioner of oaths who attested same. A new affidavit was filed which was initialled and fully signed by the deponent. The initials on the old affidavit appear to be the same as those in the new affidavit and there being no evidence to the contrary should be accepted as having been attached by the deponent.

- [38] I conclude therefore that there has been substantial compliance by Afrox with the provisions of regulation 3.1. As a matter of convenience, the new affidavit, which complies in all respect with regulation 3.1 should substitute the old affidavit. Bell Crescent will not be prejudiced by the admission of the affidavit into evidence. The purpose of the initial affidavit was to inform Bell Crescent of the case it has to meet and the new affidavit serves the same purpose. Consequently there is compliance with uniform rule 6 (1).

No Case Against Bell Crescent

- [39] It is common cause that at the commencement of these proceedings Bell Crescent was not a party to the proceedings. It was joined as a party at a later stage when Cohen provided information in his answering affidavit that the party trading as 'The Gas Company' is Bell Crescent. As such in its founding affidavit Afrox did not make out a case against Bell Crescent. It therefore had to file a supplementary founding affidavit.
- [40] Bell Crescent contends that there is a dispute of fact as regards the allegations against it in Afrox's supplementary founding affidavit. The clearest instance in which a real dispute of fact arises is of course when the respondent denies all the material allegations made by the various deponents of the applicant on the applicant's behalf and produces positive evidence by the deponents to the contrary. See Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd¹³.

- [41] My view is that there is a dispute of fact in this instance. The allegation by Afrox in the supplementary founding affidavit which connects Bell Crescent to the unlawful allegations is that, Bell Crescent trades as 'The Gas Company'. And 'The Gas Company' in turn is actively involved or participates with M & H in the unlawful activities. This, according to Afrox, is because M & H uses a vehicle clearly marked with the signage of 'The Gas Company' as a delivery vehicle. Bell Crescent in its answering affidavit denies any involvement of whatever nature with the business affairs of M & H relating to the allegations by Afrox.
- [42] The approach that a court adopts when there is a dispute of fact in motion proceedings is set out in *Plascon-Evans Paints v Van Riebeeck Paints Ltd*¹⁴. In such an event the court will decide the matter on the version of the respondent and the common cause facts. The exception to this rule is a finding that the respondent's version set out in the answering affidavit, taken as a whole, is so palpably implausible, far-fetched and untenable that it must be rejected out of hand.
- [43] It is therefore my view that I having concluded that there is a dispute of fact in this instance, I have to decide the matter on the version of Bell Crescent. Consequently I have to find that there is no case made out by Afrox against Bell Crescent and Afrox's claim against Bell Crescent must as a result fail.

MERITS

- [44] It is common cause that both Afrox and M & H are lawful participants in the cylinders exchange practice. In terms of the said practice, lawfully operating suppliers of cylinders participate in the exchange practice to enable them to regain possession of their cylinders. The exchange practice operates as follows:

- a. When a supplier or distributor receives cylinders belonging to another supplier on exchange, it returns them to the supplier, receiving in exchange such cylinders as the latter may have which belong to the former.
- b. If the number of empty cylinders exchanged do not match, the recipient of the greater number of empty cylinders will pay the current deposit value of those empty cylinders received, which exceed in number the empty cylinders delivered.
- c. When a customer or end-user purchases LPG from any wholesale supplier or distributor for the first time, the customer pays the refundable deposit plus VAT in respect of the cylinder containing the LPG, in order to obtain possession of the cylinder.
- d. In practice, suppliers and distributors seldom service customers by refilling the empty cylinders as and when they are returned.
- e. Usually the customer is provided with a pre-filled cylinder whilst the empty cylinder returned by such customer is refilled later (But only by the entity authorised to re-fill such cylinder) and thereafter supplied to another customer.
- f. A customer may replace an empty cylinder from time to time by way of an "exchange", i.e. returning the empty cylinder and being provided with a "full" cylinder but only being charged for the contents thereof depending on the volume of actual LPG supplied.
- g. The distributors who provides and end user with a full cylinder on exchange is only permitted to provide a full cylinder belonging to a supplier who has authorised the distributor to supply its cylinder.

[45] The exchange system is designed to ensure that all cylinders, including their fittings, are returned to their owners and inspected and checked for damage or corrosion. Should the cylinder be found to be defective, they are either repaired (providing that they can be repaired and safely used thereafter) or they are discarded.

[46] I am of the view that the cylinder exchange practice which operates in the LPG industry can be used to resolve the dispute between the parties. In terms of this practice the parties will be able to collect their cylinders from each other's premises against payment of deposits. Both parties are lawful participants in the LPG industry and are bound to, on a regular basis, come in possession of each other's cylinders. This cannot be avoided. The only way they can collect their cylinders from the other's premises is through the cylinder exchange practise. The parties are agreed that this practice is acceptable within the LPG industry. They are agreed that they have respectively taken part in this practice. They have also in the past exchanged cylinders between each other in terms of this practice. This evident from the following:

- a. At the time the parties terminated the distribution agreement between them, they entered into an agreement to exchange cylinders. In paragraph d) of termination agreement dated 10 December 2007, the parties agreed as follows:
 - i. Return and Exchange of Cylinders
 - ii. Both parties agree to exchange cylinders:
 - on a like for like basis
 - any for any basis
 - in accordance with the ruling deposit rates and in accordance with conventional accounting practices
 - as per the dictates and norms of the LPG industry and LPG Association.
- b. Pursuant to the execution of the search and seizure warrant of October 2010 the parties entered into an oral agreement which was in line with the exchange practice relied on by Afrox in its founding affidavit and was confirmed in a letter dated 9 November 2010. The terms of which were as follows:
 - i. the first respondent would release the applicant's cylinders to it against payment of the applicable deposit;

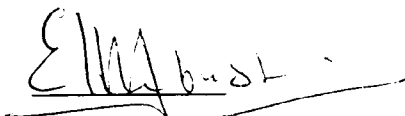
- ii. the applicant would return to the first respondent any of the first respondent's cylinders that had come into the applicant's possession against payment of a deposits;
- iii. the applicant would be entitled to attend at the first respondent's premises on a fortnightly basis to collect its cylinders.

In terms of the said agreement both parties collected a number of cylinders from each other's premises against payment of deposits. This agreement has until the launch of these applications been in place and apparently operating.

[47] What is however in issue is that both parties allege that the other is unlawfully stockpiling the other's cylinders and as such refuses to hand them over when the other party comes in to collect them. This challenge can be resolved by an order that allows similar to the one sought by Afrox in part B of its notice of motion which is also similar to the order sought by the respondents in its notice of motion. I am as such inclined to grant such an order.

[48] I therefore grant the following order:

The order marked with an "X" is made the order of this court.



E. M. KUBUSHI

JUDGE OF THE HIGH COURT

Appearance:**HEARD ON THE****: 25 FEBRUARY 2014****DATE OF JUDGMENT****: 28 MAY 2014****APPLICANT'S COUNSEL****: ADV P STRATHERN****APPLICANT'S ATTORNEY****: BOWMAN GILFILLAN****c/o GILDENHUY & LESSING MALATJI****1ST & 2ND RESPONDENTS' COUNSEL****: ADV B. NEUKIRCHER & C****ADV S. MENTZ****1ST & 2ND RESPONDENTS' ATTORNEY****: COENRAAD KUKKUK ATTORNEYS****3RD RESPONDENT'S COUNSEL****: ADV A. THOMPSON****3RD RESPONDENT'S ATTORNEY****: JACOBS ATTORNEYS**

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REPUBLIC OF SOUTH AFRICA



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RESPONDENT

ORDER

1. Re: Main Application - Case Number: 42659/2012

- 1.1 The cylinders inventoried and attached at the Bell Crescent property as belonging to the African Oxygen Limited be returned to it in terms of the cylinder exchange practice which operates in the LPG industry and/or against payment of a deposit for each cylinder and/or against payment of the value of the LPG in each cylinder.
- 1.2 M & H Cohen CC and/or any of its servant or employee or other person purporting to act on its behalf is interdicted and restrained from receiving or being in possession of any cylinders, which are the property of African Oxygen Limited and/or to which African Oxygen Limited has a lawful claim and which bear the African Oxygen Limited's brand names "Afrox" or "Handigas".
- 1.3 M & H Cohen CC and/or its servant or employee or person purporting to act on its behalf is interdicted or restrained from filling or distributing any of African Oxygen Limited's cylinders which carry African Oxygen Limited's brand names "Afrox" or "Handigas".
- 1.4 Representatives of African Oxygen Limited be permitted to attend at and to enter upon the Bell Crescent property or any other premises within the jurisdiction of this court from which M & H Cohen CC conducts business, on a weekly basis during normal business hours, and M & H Cohen CC should surrender and hand over to African Oxygen Limited and/or any other person duly authorised thereto by African Oxygen Limited's, any of African Oxygen Limited's cylinders which can be identified as such and/or which carry African Oxygen Limited's branding which are in the possession of M & H Cohen CC in terms of the cylinder exchange practice which operates in the

LPG industry and/or against payment of a deposit for each cylinder and/or against payment of the value of the LPG in each cylinder.

- 1.5 Failing compliance by M & H Cohen CC with the terms of paragraph 4 above the relevant sheriff, who may be accompanied by a representative of African Oxygen Limited and/or attorney of African Oxygen Limited of record, is directed to take possession of any of African Oxygen Limited's cylinders which are found by the sheriff in the possession of M & H Cohen CC at any premises where M & H Cohen CC may be trading, or which are found by the sheriff on any motor vehicle or motor vehicles which are identified as those of M & H Cohen CC or which are being used to convey any such cylinders for or on behalf of M & H Cohen CC either presently or in the future, and whether such cylinders contain LPG or not and that the sheriff is authorised forthwith to hand these over to African Oxygen Limited and/or African Oxygen Limited duly authorised representative in terms of the cylinder exchange practice which operates in the LPG industry and/or against payment of a deposit for each cylinder and/or against payment of the value of the LPG in each cylinder.
- 1.6 M & H Cohen CC to return to African Oxygen Limited all of African Oxygen Limited's cylinders in their possession in terms of the cylinder exchange practice which operates in the LPG industry and/or against payment of a deposit for each cylinder and/or against payment of the value of the LPG in each cylinder.

2. Re: Counter Application

- 2.1 The cylinders inventoried and attached at Emmanuel Street, Roodekop, Germiston, (the premises) as belonging to M & H Cohen CC be returned to it in terms of the cylinder exchange practice which operates in the LPG industry and/or against payment of a deposit for each cylinder and/or against payment of the value of the LPG in each cylinder.
- 2.2 African Oxygen Limited and/or any of its employees or other person purporting to act on its behalf is interdicted and restrained from receiving or being in possession of any cylinders, which are the property of M & H Cohen CC and/or to which M & H Cohen CC has a lawful claim and which bear the M & H Cohen CC's brand name of "Indigas".
- 2.3 African Oxygen Limited and/or its employees or person purporting to act on its behalf is interdicted or restrained from filling or distributing any of M & H Cohen CC's cylinders which carry M & H Cohen CC's brand name of "Indigas".
- 2.4 Representatives of M & H Cohen CC be permitted to attend at and to enter at Emmanuel Street, Roodekop, Germiston or any other premises within the jurisdiction of this court from which African Oxygen Limited conducts business, on a fortnightly basis during normal business hours, and African Oxygen Limited should surrender and hand over to M & H Cohen Limited and/or any other person duly authorised thereto by M & H Cohen CC's, any of M & H Cohen CC's cylinders which can be identified as such and/or which carry M & H Cohen CC's branding which are in the possession of African Oxygen Limited in terms of the cylinder exchange practice which operates in

the LPG industry and/or against payment of a deposit for each cylinder and/or against payment of the value of LPG in each cylinder.

2.5 Failing compliance by African Oxygen Limited with the terms of paragraph 2.4 above the relevant sheriff, who may be accompanied by a representative of M & H Cohen CC and/or attorney of M & H Cohen CC of record, is directed to take possession of any of M & H Cohen CC's cylinders which are found by the sheriff in the possession of African Oxygen Limited at any premises where African Oxygen Limited may be trading, or which are found by the sheriff on any motor vehicle or motor vehicles which are identified as those of African Oxygen Limited or which are being used to convey any such cylinders for or on behalf of African Oxygen Limited either presently or in the future, and whether such cylinders contain LPG or not and that the sheriff is authorised forthwith to hand these over to M & H Cohen CC and/or M & H Cohen CC duly authorised representative in terms of the cylinder exchange practice which operates in the LPG industry and/or against payment of a deposit for each cylinder and/or against payment of the value of LPG in each cylinder.

2.6 African Oxygen Limited return to M & H Cohen CC all of M & H Cohen CC's cylinders in their possession in terms of the cylinder exchange practice which operates in the LPG industry and/or against payment of a deposit for each cylinder and/or against payment of the value of LPG in each cylinder.

3. Each party to pay own costs.