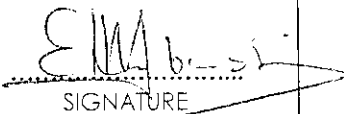


REPUBLIC OF SOUTH AFRICA

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

CASE NO: 48206/2012

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
12 June 2013	
DATE	SIGNATURE

12/6/2013

In the matter between:

EASIGAS (PTY) LTD**APPLICANT**

and

HONEYFIELDS**1ST RESPONDENT****GEORGE LYSANDROU GEORHIOU****2ND RESPONDENT**

J U D G M E N T

KUBUSHI, J

- [1] The applicant is requesting an order for final relief interdicting and preventing the use of its gas cylinders by the respondents. The respondents are resisting the application and deny filling the applicant's containers or selling such containers to the public. They further allege

that they have not received, never been in possession, filled or distributed any of the applicant's LPG cylinders.

- [2] The cylinders which the applicant seeks to protect are silver in colour and bear the name and/or embossing EASIGAS and/or "PROPERTY OF EASIGAS, NEVER SOLD". The applicant retains ownership in its cylinders which it distributes into the market on a deposit system. The end user purchases only the LPG in such cylinders.
- [3] For the respondents to be able to fill and distribute the applicant's cylinders they must get authorisation or permit from the applicant. This is a requirement because there are various regulations and safety standards which require written permission from the owner of the cylinder. The applicant has not authorised or permitted the respondents to fill and distribute its cylinders.
- [4] Whenever the applicant suspects that unauthorised third parties are filling and/or dealing with its cylinders it investigates such suspicion. The applicant employs the services of Royal Square Investments CC (RSI) to investigate the activities of suspected entities. In this instance, RSI sent two of its investigators, Peter Molohe (Molohe) and Joseph Mohlala (Mohlala) to investigate the respondents. Their investigation forms the basis of this application.

- [5] After the applicant had filed its replying affidavit the respondents' attorneys approached the applicant's attorneys with a request to allow them to file a further affidavit in reply to the applicant's answering affidavit. When there was no response from the applicant's attorneys, the respondents' attorneys proceeded to file the affidavit. They also filed an application for leave to file a further affidavit alternatively for leave to supplement their answering affidavit, for hearing at the trial. At the hearing of the application the applicant's counsel did not take issue with the filing of this affidavit. In the interest of justice I also allowed the affidavit.
- [6] The respondents' defence raises two disputes of fact. The respondents' counsel submitted that the factual disputes are genuine and *bona fide* warranting dismissal of the applicant's application. I disagree.
- [7] Courts have said that an applicant who seeks final relief on motion, in the event of conflict, accepts the version set up by his or her opponent unless the latter's allegations are, in the opinion of the court, not such to raise a real, genuine or *bona fide* dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers. See PLASCON-EVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD 1984 (3) SA 623 (A) at 634E – 635C and WIGHTMAN t/a JW CONSTRUCTION v HEADFOUR (PTY) LTD & ANOTHER 2008 (3) SA 371 (SCA) at para [12].

[8] A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his or her affidavit seriously and unambiguously addressed the fact said to be disputed. A bare denial may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. See WIGHTMAN t/a JW CONSTRUCTION v HEADFOUR (PTY) LTD & ANOTHER above at para [13].

[9] The first dispute is in respect of what transpired when Molohe and Mohlala went to purchase gas from the 1st respondent's premises. The applicant's version is that Molohe and Mohlala were informed by Elmarie Scholtz (Scholtz), an employee of the 1st respondent, that the 1st respondent does not sell LPG from its premises but that it does deliver on order. Scholtz's evidence, on the other hand is that she refused to assist Molohe and Mohlala upon noticing that they had gas cylinders which belong to the applicant. According to the 2nd respondent, the employees of the 1st respondent were specifically instructed not to fill gas cylinders belonging to the applicant.

[10] The respondents' defence to this alleged dispute is contradictory. I cannot determine from their version whether Molohe and Mohlala, when they went to the 1st respondent to purchase the LPG, met with Scholtz or with the 2nd respondent. In the answering affidavit the 2nd

respondent testified that the two gentlemen approached Scholtz. This fact is confirmed by Scholtz and it is also the evidence of Molohe and Mohlala. However, in the respondents' affidavit in reply to the applicant's replying affidavit, the 2nd respondent alleges that the two male persons approached him and he in no uncertain terms, informed them that he was not interested to fill the applicant's cylinders. I am therefore of the opinion that the applicant's version should in this respect stand.

[11] The second dispute emanates from the telephonic LPG order placed by Molohe with the respondents. The respondents admit receiving the order for delivery of the LPG, but deny that they fulfilled the order themselves and delivered the filled LPG cylinders. According to the 2nd respondent the order was passed on to Alva Gas Distributors (ALVA) which filled and delivered the LPG cylinders. On the contrary, the applicant alleges that the respondents delivered the order, and that gas cylinders belonging to the applicant were used and delivered to Molohe and Mohlala.

[12] The applicant's counsel contends that it cannot be said that the 1st respondent and ALVA are not the same entity. According to him, the respondents provided Molohe with a Standard Bank account number wherein to deposit the amount due for the ordered gas. The same account number appears on the invoice tendered by ALVA to Molohe.

Both entities, the 1st respondent and ALVA use the same bank account numbers and they also have the same VAT registration number.

[13] The respondents' defence in respect of this allegation is that the 2nd respondent took Molope's order well aware that the 1st respondent did not have LPG in stock and passed the order to ALVA. The reason for taking the order is because he did not want to lose Molope as a new customer. The 2nd respondent alleges also that he gave Molope the bank account number of the 1st respondent to deposit the amount due for the order. He requested ALVA to use those bank account details and the VAT registration number of the 1st respondent on their invoice because according to him, the VAT registration number that has to appear on an invoice is the VAT registration number of the person who received the payment.

[14] I find the 2nd respondent's explanation that he took Molope's order even though he knew that the 1st respondent had run out of LPG, implausible. He went out of his way to phone Molope and take his order 'with the intention to request another supplier of LPG', which happened to be ALVA, to carry out the order. The question is why would he go to all this trouble? Why did he not provide Molope with the contact details of ALVA and leave it at that? There are also discrepancies in his explanation. In paragraph 17 of the answering affidavit, he alleges that he was aware of the fact that the 1st respondent did not have stock when he took Molope's order, yet in

paragraph 32 of the respondents' affidavit in reply to the applicant's answering affidavit he states that he became aware that the 1st respondent was out of stock when he attempted to perform delivery.

[15] The explanation why ALVA had to use the bank account details and VAT registration number of the 1st respondent in its invoice is also not credible, in my view. It is unheard of that a business can use another business' bank account details and VAT registration number on its invoice. The 2nd respondent states that ALVA came the following day to collect the money paid by Molohe. In my judgment, it means that Molohe's money was paid to ALVA and not to the 1st respondent as they want us to believe. The transaction the 2nd respondent is referring to is an ordinary and normal business transaction that happens frequently in business and did not require the two businesses to falsify their records as it is alleged they did. Much as the 2nd respondent tried to explain why ALVA had to use the 1st respondent's VAT registration number, there is, however, no explanation forthcoming of why it was necessary for ALVA to use the 1st respondent's bank account number.

[16] There is no confirmatory affidavit from ALVA or its alleged owner, Mogaleamalla Masedi Goodwin (Goodwin), to confirm what is said by the 2nd respondent about the entity or its owner. This information remains hearsay in the mouth of the 2nd respondent. The 2nd respondent's explanation why Goodwin's affidavit could not be obtained is to me unacceptable. According to the 2nd respondent,

Goodwin hesitated to provide him with an affidavit because he said he sells gas only in winter. Why would Goodwin refuse to provide an affidavit on such a flimsy reason? Mainly, why would he refuse to state in writing that he sold LPG to Molohe if he in fact did so?

[17] The respondents were not able to provide proof that an entity by the name Alva Gas Distributors exists. The respondents provided an identity document which they allege belongs to Goodwin. This however, is to me, not proof enough that the entity does exist. Although the respondents' counsel argued that the business exists and was not thumb sucked, he conceded in argument that there is no legal entity in that name.

[18] It is common cause that the LPG ordered by Molohe from the 1st respondent was delivered by a motor vehicle which bore the cell phone number of the 2nd respondent and the land line telephone number of the 1st respondent. According to the respondents the said motor vehicle belonged to a close corporation known as HAZCHEM VEHICLE RENTAL which trades under the name 1009 Kruger Avenue Properties CC. It is also not in dispute that the 2nd respondent is the sole member of that close corporation. The 2nd respondent's testimony is that at the time of the delivery the motor vehicle had been hired out to ALVA. In support of this aversion he attached a copy of a lease agreement. According to him, ALVA fulfilled the order and delivered it to Molohe and Mohlala.

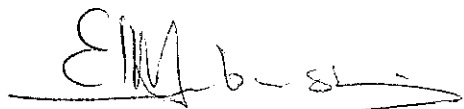
[19] I, however, find it a coincidence that the business that hired the 2nd respondent's motor vehicle would be the same that delivered the gas cylinders to Molope. As I have already stated in paragraph [17] of this judgment the respondents have not convinced me that either an entity or a business under the name and style ALVA does exist. The lease agreement provided does not persuade me otherwise.

[20] On the basis of the proven facts before me the only objective inference I could make is that the two entities, Alva Gas Distributors and the 1st respondent are either both owned by the 2nd respondent or are one and the same business.

[21] Consequently I have to find that the respondents' allegations do not raise a genuine and *bona fide* factual dispute. The application can, therefore, be decided on the papers as they are before me. The respondents' allegations on the disputed facts are unambiguous and called for an explanation which was not forthcoming and they thus stand to be rejected. I have to defer to the applicant's version and the application should therefore succeed.

[22] The applicant's 6th prayer is for an order for costs on the scale as between attorney and client. The respondents' counsel left the matter in the discretion of the court. I am inclined to award costs as requested by the applicant. It is the unlawful conduct of the respondents that has occasioned this action and they must therefore bear punitive costs.

[19] In the premises the application is granted. Prayer 1, 2, 3, 4, 5 and 6 of the notice of motion are made an order of this court.

A handwritten signature in black ink, appearing to read 'E M Kubushi', with a horizontal line drawn underneath it.

E. M. KUBUSHI
JUDGE OF THE HIGH COURT

Appearance:

HEARD ON THE	: 28 MAY 2013
DATE OF JUDGMENT	: 12 JUNE 2013
APPLICANT'S COUNSEL	: ADV P STRATHERN
APPLICANT'S ATTORNEY	: YAMMIN HAMMOND INC c/o PETZER DU TOIT & RAMULIFHO
RESPONDENTS' COUNSEL	: ADV J J W HAYES
RESPONDENTS' ATTORNEY	: PHILLIP DE BEER ATTORNEYS c/o KEMP ATTORNEYS