Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)

Case No: 2161/2024

In the matter between: -

DESERT OIL (PTY) LTD **APPLICANT**

and

OP BATHLARO FILLING STATION (PTY) LTD **FIRST RESPONDENT**

ANDREW TEBOGO KESIAMANG **SECOND RESPONDENT**

TOTALENERGIES MARKETING SOUTH AFRICA (PTY) LTD **THIRD RESPONDENT**

Neutral citation: Desert Oil (Pty) Ltd v OP Bathlaro Filling Station (Pty) Ltd and two Others (Case number 2161/2024)

Heard: 13 September 2024

Delivered: 18 September 2024 electronically

Coram: Stanton J

ORDER

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1. Pending the final determination of an action to be instituted by the applicant against the first and second respondents claiming declaratory and consequential relief in terms of section 20(9) of the Companies Act 71 of 2008: -

1.1 The first and second respondents are interdicted and restrained from: -

1.1.1 entering into a fuel supply agreement with the third respondent and/or with any person other than the applicant;

1.1.2 implementing any fuel supply agreement which may have already been concluded with the third respondent or with any other party;

1.1.3 in any way interfering with, hindering or preventing the ongoing supply of fuel by the applicant to the business conducted in Bathlaros under the name "OP's Filling Station" or OP Filling Station, including but not limited to, ceasing the operations of the business;

1.2 The first and second respondents shall do all things necessary to finalise the application for, and the issue of, a valid fuel retail licence in the name of the first respondent for the operation of the business;

1.3 The first and the second respondents shall comply with all the provisions of the supply and operating agreement concluded between the applicant and OP's Filling Station (Pty) Ltd on 30 September 2016;

1.4 The first and second respondents shall not purchase, and/or permit the purchase, of fuel for sale in the business from any supplier other than the applicant;

2. Summons in the action shall be issued and served within 30 calendar days of the date of this order, or such longer period as the parties may agree to in writing or the Court may order on application, on good cause shown,

failing which, the orders as set out in paragraphs 1.1 to 1.4 shall lapse; and

3. The costs of this application shall stand over for determination in the action.

JUDGMENT

Stanton J

Introduction: -

[1] On 19 August 2024 the applicant, Desert Oil (Pty) Ltd *("Desert Oil")* issued an application for interlocutory interdictory relief on a truncated timeline. In its notice of motion, Desert Oil requests the following relief: -

1.1 That the applicant's failure to adhere to the forms and time periods provided for in the Uniform Rules of Court and the hearing of this matter as one of urgency in terms of Rule 6(12) be condoned;

1.2 Requesting a rule nisi, calling upon the respondents to show cause, on a return date to be set by the Court, as to why the Court should not make an order pendente lite that, pending the final determination of an action to be instituted by the applicant against the first and second respondents (jointly 'the respondents') (on or before a date to be determined by the Court) for various declaratory orders in terms of section 20(9) of the Companies Act 71 of 2008 ("the Companies Act") ("the action"), the respondents, together with the third respondent, TotalEnergies Marketing South Africa (Pty) Ltd ("Total"), where applicable, are interdicted and restrained from: -

1.2.1 entering into a fuel supply agreement with Total and/or with any person other than the applicant;

1.2.2 implementing any fuel supply agreement which may have already been concluded with Total or with any other party;

1.2.3 in any way interfering with, hindering or preventing the ongoing supply of fuel by the applicant to the business conducted in Bathlaros under the name OP's Filling Station ("the business"), including but not limited to, ceasing the operations of the business;

1.3 The respondents shall do all things necessary to finalise the application for, and the issue of, a valid fuel retail licence in the name of the first respondent for the operation of the business;

1.4 The respondents shall comply with all of the provisions of the supply and operating agreement concluded between the applicant and OP's Filling Station (Pty) Ltd on 30 September 2016 ("the agreement");

1.5 That prayers 1.2 to 1.4 shall operate as a temporary interdict, pending the final determination of the rule *nisi*; and

1.6 The costs of this application shall stand over for determination in the action, save for in the event of opposition to the relief sought, in which case the costs occasioned by such opposition are to be borne by the party opposing.

[2] The respondents filed their answering affidavit without taking issue with the request for condonation and Desert Oil filed its replying affidavit. Total filed a notice of intention to abide. I accordingly dealt with the matter without making a finding in respect of urgency and in view of the

fact that the matter was properly ventilated, I find it prudent to adjudicate this application without issuing a rule *nisi*.

Brief factual history: -

[3] The following are the undisputed salient facts: -

3.1 Desert Oil carries on business as a "branded marketer" of Astron Energy (Pty) Ltd, previously Caltex, for the Northern Cape Province and is a wholesale supplier of Astron or Caltex branded petroleum products;

3.2 Desert Oil supplied petroleum products to OP's Filling Station (Pty) Ltd ("the Old OP company") in terms of the agreement that was concluded during September 2016 for a period of 20 years, thus expiring on 31 August 2036;

3.3 The Old OP company, registered and incorporated during 2003, has a current CIPC status as "Annual Return Final Deregistration", with Mrs. AM Kesiamang as its sole director, the other four erstwhile directors, which include the second respondent, Mr AT Kesiamang ("Mr Kesiamang"); having resigned on a date not reflected in the CIPC document;

3.4 The first respondent, OP Bathlaro Filling Station (Pty) Ltd ("the New OP company") was incorporated and registered on 27 July 2022 with Mr Kesiamang as its sole director;

3.5 On 03 July 2007 the Department of Mineral Resources and Energy ("the DMRE") issued site and retail licences ("the licences") to Mr Kesiamang's father, Mr. OP Kesiamang, who passed away on 02 November 2009. On Mr. OP Kesiamang's death, Mrs. A Kesiamang, Mr. Kesiamang's mother was appointed as the executor of his deceased estate;

3.6 The licences have never been transferred to the Old OP company;

3.7 A caretaker operator, Mr J Leach, operated the business from 01 May 2017 to 30 April 2019, which caretaker agreement was renewed in 2019 for a further period of 01 June 2019 to 31 May 2021 ("the caretaking periods"). The agreement was amended twice to provide for the caretaking period. The amended agreement provided that: -

> '1.3 For a period of 24 months from 1 May 2017 (Caretaking Period), the Operator shall allow the Company, in its sole discretion, to appoint a third-party franchisee to operate the Filling Station Business in terms of a Caretaker Agreement ("Caretaker Franchisee"). During the caretaking period: -
>
> 1.3.1 all the rights and obligations of the Operator and the Company in terms of this Agreement shall be suspended;
>
> 1.3.2 the Company and the Operator will negotiate in good faith to agree the redevelopment that is required at the Premises comprising inter alia, the replacement of tanks. For the avoidance of doubt, this Agreement continues in full force and effect subsequent to the expiration of the Caretaking Period, including all the rights and obligations of the Operator and the Company in terms of this Agreement, regardless of whether any redevelopment of Premises is carried out;'

3.8 On 21 July 2024 Ms. T Khobane, on behalf of the New OP company, addressed an email to Desert Oil's director, Mr. F Johnson, and its general manager, Ms. K Mallick, to which email a document entitled "Request for Proposal" ("the RFP") was attached. In the RFP, the New OP company states that the executor of Mr OP Kesiamang's estate has obtained a new site and retail licence in the name of the New OP company; and it requested proposals from licenced wholesale petroleum companies with efficient distribution networks/depots; and wide distribution of branded service stations.

[4] The issuing of the RFP prompted this application to be issued on an urgent basis.

Applicable law: -

[5] The four requisites for the granting of an interim interdict are trite[1]: -

5.1 A *prima facie* right that might be open to doubt;

5.2 Apprehension of irreparable harm;

5.3 Balance of convenience; and

5.4 No alternative remedy.

Ad prima facie right: -

[6] A court must be satisfied that the applicant has a right established on a balance of probabilities and that the respondent has invaded it or threatened to do so.[2] Unterhalter J, as he then was, writing for the minority, succinctly summarised the law pertaining to this requirement in ***Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others***[3] as follows: -

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[1] Setlogelo v Setlogelo 1914 AD 221 at 227.
[2] Webster v Mitchell 1948 (1) SA 1186 (W) at 1188.
[3] 2023 (4) SA 325 (CC) at para [64] to [68].

'A very long line of cases, stretching back to the authoritative pronouncement of our modern law in Setlogelo, has made it plain that a prima facie right, though open to some doubt, is the standard used to assess the applicant's prospects of success in obtaining final relief. The enquiry is of necessity provisional because the available evidence is usually incomplete, untested under cross-examination (where there are disputes of fact), and the case may yet be more fully developed.

What the standard requires has given rise to no small measure of difference. According to Webster v Mitchell, as qualified in Gool, the test is whether the applicant has furnished proof which, if uncontradicted at trial (here in the review), would entitle the applicant to final relief. The Court will then consider the case of the respondent to decide whether it casts serious doubt on the case of the applicant. If it does, the standard is not met. In Ferreira, a majority of a Full Court considered this test to be too exacting. It held that the prospects of success of the claim for the principal relief, albeit weak, may nevertheless suffice. This is so because other requirements for the grant of an interim interdict may be strongly grounded and hence compensate for the weakness as to prospects. This, it was thought better chimed with the holding in Eriksen Motors. More recently, this Court, in Economic Freedom Fighters held that—

> "before a court may grant an interim interdict, it must be satisfied that the applicant for an interdict has good prospects of success in the main review. The claim for review must be based on strong grounds which are likely to succeed. This requires the court adjudicating the interdict application to peek into the grounds of review raised in the main review application and assess their strength. It is only if a court is convinced that the review is likely to succeed that it may appropriately grant the interdict."

What all of these cases make clear is that to secure interim relief, an applicant must establish their prospects of success of obtaining final relief to the required standard. Without that showing, there is no basis upon which a respondent can be required to endure the strictures of an interim order, pending the final determination of the case for final relief. And even if the standard is satisfied and the applicant is granted an interim order, the order is generally subject to the following condition. If the applicant ultimately fails in the main action, they will be liable for the damages that the respondent may have suffered as a result of the imposition of the interim order. This is a further demonstration of the manifest connection between the grant of interim relief and the likely outcome of the proceedings that will finally determine the matter.

In sum, the following may be said of this account of our law. First, an application for interim relief is decided upon a consideration of the applicant's prospects of success in obtaining final relief. The prima facie right, though open to some doubt, that must be established to obtain interim relief is the right that is the subject of the main action (or proceedings)... Hence, an application for interim relief is never decided on some separate consideration of rights unrelated to the claim for final relief. ...

Second, it is axiomatic that if an applicant cannot prove that they have a clear right, the very nature of satisfying a court that they have a prima facie right, though open to some doubt, is a provisional judgment. The court that finally determines the matter will decide whether the right, that the applicant relied upon to secure interim relief, has been proven on a balance of probabilities so as to secure final relief...' (References omitted.)

[7] Desert Oil asserts that it has a *prima facie* right on the basis that the agreement with the Old OP company affords it the exclusive right to supply fuel at the OP Filling Station, for a period of 20 years, with the agreement expiring in 2036. It furthermore contends that the agreement was revived after the caretaking periods came to an end. In addition, Desert Oil alleges that Mr. Kesiamang is attempting to evade the obligations of the agreement by the deregistration of the Old OP company and the incorporation of the New OP company. The applicant, in the action, will request the court to declare Mr. Kesiamang's conduct as an unconscionable abuse of the separate juristic personality of the New OP Company; and to grant consequential relief in the form of an order that the New OP company is deemed to be the contracting party to the agreement; and that the New OP Company is bound by and obliged to comply with the provisions of the agreement.

[8] The respondents rely on section 2A(6) of the Petroleum Products Act 120 of 1977 ("the PPA") in support of its argument that Desert Oil has not established the requirement of a *prima facie* right. According to the respondents, Desert Oil knew that the Old OP company was not in possession of a licence, and as such, it transgressed the provisions of section 2A(6) of the PPA that states: -

'A licensed manufacturer shall only sell petroleum products to a licenced wholesaler or a licensed retailer, or both, except for export purposes.'

[9] It is common cause that the Old OP company does not have a site or retail licence.

[10] The respondents argue that Desert Oil must have been aware of the correct factual position, and as such knew that it was selling fuel to an unlicenced business, as: -

10.1 The retail licence, issued to Mr OP Kesiamang and not the Old OP company, was always at display at the site;

10.2 The internal email sent from Desert Oil's general manager to Desert Oil's operations manager on 6 March 2018 in which email Ms. K Mallick writes: -

'The current caretaker at OP Filling Station has applied for retail license and has been advised by the DOE that the site already has a retail licence that requires renewal fees and re-print fees.

Please could you kindly request from the previous operator.'

10.3 Despite the email dated 19 March 2018 from Desert Oil's operations manager to Mr Kesiamang in which a copy of the retail licence is requested, Desert Oil never pursued the matter further.

[11] Desert Oil, however, avers that they laboured under the impression, albeit incorrectly, that the business was operating with a valid licence in view of: -

11.1 The fact that Mr Kesiamang does not deny that when the Old OP company entered into the agreement with Desert Oil, he had represented to Desert Oil that the Old OP company had the necessary site and retail licences required to operate the business; and

11.2 The content of the two emails dated 06 and 19 March 2018.

[12] To my mind, the respondents' reliance on the two emails is misconceived because neither of the two emails confirms that Desert Oil was aware of the correct factual position. A request is merely made for a copy of the licence. The respondents' answer that Desert Oil knowingly supplied fuel to the Old OP company without a licence is disingenuous as the information about the status of the licence must have been within Mr Kesiamang's knowledge. I am equally unsatisfied with Desert Oil's conduct as it was not diligent in timeously obtaining the correct information.

[13] Mr JJF Hefer SC, on behalf of the respondents, referred me to the judgment in ***Schierhout v Minister of Justice ("Schierhout")*** [4] in support of his argument that if the interim relief is granted, the Court will protect an illegal right, which is impermissible. It was held in ***Schierhout*** that: -

> 'It is a fundamental principle of our law that a thing doen contrary to the direct prohibition of the law is void and of no effect.... So what was done contrary to the prohibition of law is not only of no effect, but must be regarded as never having been doen – and that whether the lawgiver has expressly so decreed or not, the mere prohibition operated to nullify the act.'

[13] Mr. Hefer SC also referred me to ***Walsun Motordienste CC v Combrink N.O. and Others*** [5] where the Full Bench held: -

> '[16] The plaintiff, based on the absence of such a license, decided to cancel the agreement, and rightly so in my view. Not only have the parties agreed that defendant would obtain the necessary license, but the Act compels the defendant to do so. At the time of the hearing of this appeal defendant was still in default in respect of this particular obligation and was still in occupancy of the premises, presumably retailing fuel in contravention of the provisions of the Act. In the absence of an obtained license, defendant may not conduct business on the premises. The court may not be a party to

[4] 1926 AD 109.

[5] (A63/2022) [2023] ZAFSHC 129 (14 April 2023).

transgressing the Act. This is exactly what the defendant asks from court, namely to keep the agreement in place. For the same reasons I cannot find that defendant had extended the lease agreement as per clause 11.2. The lease agreement in any event lapsed by effluxion of time on 31 August 2019.'

[14] The respondents' arguments are, however, not vindicated if regard is had to the following: -

14.1 Section 2A(2)(b) of the PPA grants the Controller of petroleum products the discretion to allow a person to continue with its activities, which may be in contravention of section 2A(1), pending an application and the issue of a licence if the cessation of such activity is likely to lead to a material interruption in the supply of petroleum products;

14.2 Section 2A(3) of the PPA provides that if a person engages in an activity in contravention of the licence, the Controller must give written notice to that person to comply with the licence, and if applicable, to rectify any state of affairs resulting from the contravention;

14.3 The caretaker applied for a retail licence and was informed in March 2018 that the site already had a retail licence; and

14.4 Mr. Kesiamang, on 15 July 2024, addressed an email to Desert Oil's director in which letter he confirms that that the DMRE agreed that the filling station may be opened in the interim and that it will be operated by him as a caretaker under the existing licence, pending the approval of the new licence. Furthermore, Mr. Kesiamang confirms that the site licence in favour of the first respondent had already been approved by the DMRE and he has applied for new licence.

[15] In view of the above, I accordingly find that the granting of an interim order will not countenance an illegal act or enforce an illegal agreement.

[16] The second issue that requires consideration is whether Desert Oil will be successful in proving that Mr Kesiamang's conduct is an unconscionable abuse for the purpose of section 20(9) of the Companies Act.

[17] Section 20(9) of the Companies Act, in part, reads: -

'If, on application by an interested person…., a court finds that the incorporation of the company, any use of the company, or any act by or on behalf of the company, constitutes an unconscionable abuse of the juristic personality of the company as a separate entity, the court may –

(a) declare the company to be deemed not to be a juristic person in respect of any right, obligation or liability of the company… or of another person specified in the declaration; and

(b) make any further order that the court considers appropriate to give effect to a declaration contemplated in paragraph (a)'

[18] The Supreme Court of Appeal in ***Butcher Shop and Grill CC v Trustees for the Time Being of the Bymyam Trust***[6] confirmed that section 20(9) of the Companies Act has not abolished or replaced the common law in relation to the piercing of the corporate veil, but that it supplements the common law and broadens its reach. In ***City Capital SA Property Holdings Ltd v Chavonnes Badenhorst St Clair Coopers and Others***[7] the Supreme Court held as follows with regard to the application of section 20(9) of the Companies Act: -

'Section 20(9) of the 2008 Act provides a statutory basis for piercing the corporate veil. On its plain wording, s 20(9) permits a court to disregard the separate juristic personality of the company where its incorporation, use or an act performed by or on its behalf 'constitutes an unconscionable abuse of the juristic personality of the

[6] 2023 (5) SA 68 (SCA) paras 38 – 40 and 60.
[7] 2018 (4) SA 71 (SCA) at paras 26 -27.

company as a separate entity'. The term 'unconscionable abuse' is not defined in the 2008 Act and must therefore be given its ordinary meaning.

The meaning of 'unconscionable' in the Oxford English Dictionary includes, 'Showing no regard for conscience . . . . Unreasonably excessive . . . . egregious, blatant . . . . unscrupulous.' It is in my view undesirable to attempt to lay down any definition of "unconscionable abuse". It suffices to say that the unconscionable abuse of the juristic personality of a company within the meaning of s 20(9) of the 2008 Act includes the use of, or an act by, a company to commit fraud; or for a dishonest or improper purpose; or where company is used as a device or facade to conceal the true facts.'

[19] Desert Oil's grounds for invoking section 20(9) of the Companies Act are the following:-

19.1 The registration of the New OP company on 27 July 2022, with Mr Kesiamang as its sole director;

19.2 The resignation of all the directors of the Old OP company, save for one;

19.3 Allowing or orchestrating the deregistration of the Old OP company by deliberately failing to pay the annual return amounts required to maintain its registration;

19.4 Submitting applications for site and retail licences for business in the name of the New OP Company; and

19.5 Sending out the RFP on 21 July 2024 soliciting offers from petroleum wholesales to enter into an agreement with the New OP Company in respect of the business, which would thwart Desert Oil's rights under the agreement.

[20] According to Ms DM Davis SC, on behalf of Desert Oil, a dishonest motivation may be inferred from the above grounds, which is indicative of a

stratagem by Mr. Kesiamang aimed at evading the contractual obligations of the Old OP company.

[21] I deal with the grounds stipulated above in succession.

<u>The registration the New OP company on 27 July 2022, with Mr Kesiamang as its sole director: -</u>

[22] Ms. Davis SC submitted that a dishonest motivation may be inferred if the timing of the incorporation of the New OP company is viewed against the fact that the two successive amendments to the agreement providing for a caretaker franchisee which temporarily suspended the rights and obligations of Desert Oil and the Old OP Company. These rights and obligations were revived on the expiration of the caretaking periods. Desert Oil and the Old OP Company entered into negotiations with regard to the possibility of entering into a head lease agreement in respect of the site when the caretaking periods ended. On 20 July 2022 STBB, Desert Oil's erstwhile attorney addressed a letter to the Old OP Company's attorney, placing on record the terms and conditions on which Desert Oil would be prepared to enter into a head lease in respect of the business; and in which it also reminded the Old OP Company that it was bound to acquire fuel exclusively from Desert Oil until 31 August 2036. No response to the letter was received; and these allegations are not denied by the respondents. The respondents, however, admit that as at July 2022, the Old OP Company was desirous of entering into a head lease; and that it was engaging in discussions with other wholesalers.

[23] The respondents' vague response that the New OP Company was suddenly established on 27 July 2022, within a matter of days after receipt of the STBB letter, namely that it was done for *"commercial purposes"* is simply not adequate and tips the scale in favour of Desert Oil.

The resignation of all the directors of the Old OP company, save for one: -

[24] It is common cause that only Mrs. AM Kesiamang is an active director of the Old OP company. The CIPC printout does not reflect the resignation dates of Messrs Kesiamang and MJ Kesiamang. Ms. Davis SC contended that the inference must be drawn that the resignation dates were conveniently left blank to conceal the fact that the resignations had occurred at the same time as the registration of the New OP company. In response, Mr Kesiamang only states that 'The reason why the directors resigned from the old OP Filling Station (Pty) Ltd, was merely because each of them was no longer involved in the business and had other business obligations.'

[25] I agree with Ms Davis SC that Mr. Kesiamang's response does not withstand scrutiny because: -

25.1 It is not disputed that Mr. Kesiamang attended an online meeting with Desert Oil on 24 August 2022, without Desert Oil being informed of the registration of the New OP company; and

25.2 Mr Kesiamang's response does not explain why he resigned merely to be appointed as the only director of the New OP company.

Allowing or orchestrating the deregistration of the Old OP company: -

[26] The respondents do not dispute that the Old OP company was deregistered for annual return non-compliance; and that it could have been reinstated by simply paying the outstanding annual returns. In response to the statement that the Old OP company was deliberately allowed to be deregistered in order to evade its obligations in terms of the agreement, Mr Kesiamang baldly states that 'OP Filling Station (Pty) Ltd was deregistered because of financial constraints.' This response is terse and non-sensical as it does not explain how the incorporation of the New OP company would resolve the Old OP company's financial concerns.

Submitting applications for site and retail licences for business in the name of the New OP Company: -

[27] According to Desert Oil, this Court should draw an adverse inference from the fact that Mr. Kesiamang applied for site and retail licences in the name of the New OP company. As no explanation is proffered why it was necessary to apply for licences in the New OP company's name instead of in the name of the Old OP company, I am swayed to reach the conclusion that the respondents may be desirous of evading the obligations of the agreement.

The sending out of the RFP on 21 July 2024: -

[28] I am inclined to regard the sending out of the RFP on 21 July 2024 as indicative of conduct that may be proven to be unconscionable abuse as no other inference can be drawn as that the respondents are intent to secure a benefit by entering into an agreement with another wholesaler. That much is clear from the wording of the RFP.

[29] I am thus persuaded that Desert Oil has furnished proof which, if uncontradicted at trial, would entitle it to the final relief that the respondents' conduct could amount to an unconscionable abuse of the juristic personality of the first respondent as a separate entity, as contemplated in section 20(9) of the Companies Act. The respondents' version does not cast serious doubt on Desert Oil's case.

[30] As a result, Desert Oil has satisfied the requirement that it has a clear right to the relief it seeks.

Irreparable harm: -

[31] The second requirement is proof that Desert Oil has a reasonable apprehension of harm if the relief is not granted. In the matter of ***Minister of Law and Order Bophuthatswana v Committee of the Church Summit*** [8]

[8] 1994 (3) SA 89(B) at 98H-I and 99A-B.

the Court held that the word 'injury' must be understood in the wide sense to include any prejudice suffered by an applicant as a result of the infringement of his rights and that the injury does not have to be capable of pecuniary evaluation. It is accordingly not necessary for an applicant to establish on a balance of probabilities that the injury will occur, he must simply establish on the balance of probabilities that there are good grounds for a reasonable apprehension that his rights will be detrimentally affected.

[32] According to Desert Oil, it would suffer irreparable harm if the relief is not granted as a new agreement between the New OP company and Total (or any other oil major) will defeat Desert Oil's rights under the agreement. Furthermore, if the status quo is not preserved, it would be too late to turn back the clock as a new wholesaler would immediately commence to establish itself on the site, which Desert Oil would not be able to de-establish, even if it is successful in the action; and that Desert Oil would have to be content with a claim for damages. Desert Oil also avers that the continued operation of the agreement is important for reasons other than the profit it generates. In amplification, Desert Oil explains that it requires the regular and ongoing sale of fuel to the respondents to enable it to comply with its volume targets as laid down by Astron, failing which, Astron would be entitled to cancel the branded marketer agreement, which would ultimately eliminate the entire substructure of Desert Oil's business.

[33] The respondents do not contest Desert Oil's assertions, save to insinuate that a damages claim would be adequate redress.

[34] The Constitutional Court in ***City of Tshwane v Afriforum*** [9] confirmed that: -

> "Irreparable" implies that the effects or consequences cannot be reversed or undone. Irreparable therefore highlights the irreversibility or permanency of the injury or harm. That would mean that a favourable outcome by the court reviewing allegedly objectionable conduct cannot make an order that would effectively undo the harm that would ensue should the interim order not be granted.'

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[9] 2016 (6) SA 279 (CC) para 59.

[35] Desert Oil convincingly satisfies the second requirement that it would suffer irreparable harm if the relief is not granted as an order in the action would not undo Desert Oil's harm.

Balance of convenience: -

[36] Desert Oil relies on the same arguments raised in respect of irreparable harm to prove that the balance of convenience favours the granting of relief. The respondents merely counter that Desert Oil will not be successful in the action. This statement does not assist the respondents in disturbing the probabilities in Desert Oil's favour.

No alternative remedy: -

[37] In the final instance, Desert Oil must show that it is has no other adequate ordinary remedy. This requirement is closely linked with "irreparable harm" for if the injury envisaged would be irreparable if allowed to continue, an interdict would be the only remedy. On the other hand, if there is some satisfactory alternative remedy, the injury cannot be described as irreparable.[10]

[38] Desert Oil contends that it has no other remedy for the preservation and protection of its contractual rights under the agreement in terms of section 20(9) of the Companies Act; and in particular, that the remedy of damages would result in Desert Oil to part with its contractual rights, including the ability to perform in terms of its branded marketer agreement with Astron.

[39] The respondents suggest that Desert Oil should negotiate 'a better deal with the First Respondent', alternatively that it should submit a proposal in response to the RFP. These arguments are flawed as commercial negotiations does not equate to a legal remedy. I am also not persuaded that damages would be an appropriate remedy.

[10] Erasmus: Superior Court Practice Vol 2 at D6-21.

[40] Desert Oil therefore meets the requirements for the granting of an interim interdict.

Costs: -

[42] The convention is that costs are awarded against the unsuccessful party. Despite requesting a cost order against opposing parties in its notice of motion, Ms. Davis SC proposed that the costs of this application should be determined in the action. I agree that such an order would be just and fair in the circumstances.

Wherefore the following order is made: -

1. Pending the final determination of an action to be instituted by the applicant against the first and second respondents claiming declaratory and consequential relief in terms of section 20(9) of the Companies Act 71 of 2008 ("the action"): -

    1.1 The first and second respondents are interdicted and restrained from: -

        1.1.1 entering into a fuel supply agreement with the third respondent and/or with any person other than the applicant;

        1.1.2 implementing any fuel supply agreement which may have already been concluded with the third respondent or with any other party;

        1.1.3 in any way interfering with, hindering or preventing the ongoing supply of fuel by the applicant to the business conducted in Bathlaros under the name "OP's Filling Station" or OP Filling Station ("the business"), including but not limited to, ceasing the operations of the business;

1.2 The first and second respondents shall do all things necessary to finalise the application for, and the issue of, a valid fuel retail licence in the name of the first respondent for the operation of the business;

1.3 The first and the second respondents shall comply with all the provisions of the supply and operating agreement concluded between the applicant and OP's Filling Station (Pty) Ltd on 30 September 2016;

1.4 The first and second respondents shall not purchase, and/or permit the purchase, of fuel for sale in the business from any supplier other than the applicant;

2. Summons in the main action shall be issued and served within 30 calendar days from the date of this order, or such longer period as the parties may agree to in writing or the Court may order on application, on good cause shown, failing which, the orders as set out in paragraphs 1.1 to 1.4 shall lapse; and

3. The costs of this application shall stand over for determination in the main action.

[redacted]

STANTON, A
JUDGE, HIGH COURT,
NORTHERN CAPE DIVISION

On behalf of the applicant:
Adv. DM Davis SC
On instruction of Korbers Inc.
Care of Haarhoffs Inc.

On behalf of the first and second respondents:
Adv JJF Hefer SC
On instruction of PGMO Atorneys