REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(MPUMALANGA DIVISION, MBOMBELA)

CASE NO: 1753/2023

(1)	Reportable: Yes/No
(2)	Of Interest to other Judges: Yes/No
(3)	Revised: Yes/No

20 November 2024 [redacted]

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Date Signature

In the matter between:-

MNAKA DIAMONDS (PTY) LTD **Plaintiff**

and

ENGEN PETROLEUM LIMITED **Defendant**

JUDGMENT

Mazibuko AJ

INTRODUCTION

[1] The plaintiff brought an application for default judgment alleging that the plaintiff

had suffered pecuniary loss due to the defendant's actions of taking possession of the site, refusing or failing to return same to the plaintiff, and refusing to compensate the plaintiff.

PARTIES

[2] The plaintiff is Mnaka Diamonds (Pty) Ltd (Mnaka), a proprietary company duly registered and incorporated in accordance with the laws of the Republic of South Africa pertaining to companies. Also, a franchisee or a dealer using Engen's trademarks and a holder of a retail licence duly issued by the Controller of Petroleum Products in accordance with the Petroleum Products Act[1] and the Regulations.[2]

[3] The defendant is Engen Petroleum Limited, a public company (Engen) duly registered and incorporated in accordance with the laws of the Republic of South Africa pertaining to companies, a holder of a wholesaler licence, and a franchisor.

BACKGROUND

[4] In April 2017, the parties, in their respective capacities as a licenced retailer and licenced wholesaler, entered into a written franchise agreement.

[5] In 2021, Mnaka sought to sell the business operations subject to Engen's approval of the buyer. Engen approved the terms of the sale of the business agreement between Mnaka and a buyer.

[6] Before signing the agreement between Mnaka and the buyer, Engen demanded that Mnaka hand over the site to it. The site's operations came to a halt. Mnaka received no payments for the selling price and the stock on hand. Engen had not compensated Mnaka for the loss of business and sale, nor was it for the value of the stock on the day of the handover.

[7] In April 2023, Mnaka instituted proceedings against Engen by serving combined

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[1] *Act 120 of 1977.*

[2] *The Regulations regarding Petroleum Products Site and Retail Licences, (GN R286 of 2006).*

summons claiming for payment of damages suffered by Mnaka in the amount of R6 800 000.00 and R500 000.00, interest at the legal rate calculated from the date of service of summons upon Engen until the date of final payment and costs of suit.

[8] Summons was served on Engen on 4 May 2023. Engen's failure to enter an appearance to defend the matter prompted Mnaka to seek leave from the court to apply for default judgment in terms of Rule 31 of the Uniform Rules[3]. The matter was enrolled for a hearing in August 2024 to proceed on merits and quantum.

THE EVIDENCE

[9] In order to succeed with its claim, Mnaka tendered the evidence of its sole director, Mr Shadrack France Mashele (Mashele) and called no other witnesses.

[10] Mashele testified and confirmed his sole directorship of Mnaka following the demise of the other director. He testified that in April 2017, in their respective capacities as a licenced retailer and licenced wholesaler, Mnaka and Engen entered into a written franchise agreement, being Engen's standard franchise agreement, to enable Engen to have its proprietary products offered and sold on the open market to consumers by way of Mnaka at Chris Hani Street, KaNyamazane, Mpumalanga province (the site).

[11] In 2021, Mnaka sought to sell its business as a going concern to the buyer, which Engen approved. Subsequent to Engen's recommendation of Thrive Retail (Pty) Ltd (Thrive) as a buyer, a written sale of the business agreement was proposed between Mnaka and Thrive, represented by their respective owners. The agreed final selling price was R6.8 million, which is made up of R6.5 million as contained in a principal agreement and R300. 000 included in an addendum, excluding stock on hand and dealer assets. Engen approved the

[3] *Act 59 of 1959.*

terms of the agreement between Mnaka and Thrive. Engen directed Mnaka to share the necessary documentation, including financials, with Thrive.

[12] Pursuant to the engagement between Mnaka and Thrive, and acceding to a request from Nokuthula Yembe of Engen, Mnaka handed over the site keys to Ntombi of Engen on 1 June 2022, even though the sale price and stock were not paid yet to Mnaka. On this date, Mnaka seized operations. Mnaka, through Mashele, contacted Thrive; however, Thrive informed him it was told by Engen not to engage with them further. The proposed agreement between Mnaka and Thrive was accordingly not signed per Engen's instructions.

[13] He further testified that he handed over the site to Engen in good faith. When the site was handed over, the stock valued at R500 000 was in the site's fuel tanks.

[14] In July 2022, Mnaka, in correspondence to the Controller of Petroleum Products, yielded to Engen's request by agreeing to surrender its petroleum retail licence for Thrive to succeed in its application for a new retail licence for the site previously operated by Mnaka.

[15] Engen continued with the proposed sale and finalised the agreement with Thrive after Mnaka handed the site to Engen. Thrive commenced to trade. However, despite demand, Engen had not compensated Mnaka for the ongoing retailing potential of the site, the value of fixtures, fittings and equipment in the amount of R6.8 million and R500 000 for stock at the time of handing over.

[16] Concluding his testimony, Mashele stated that Mnaka would have ordinarily handed over the site to Thrive, the buyer. The stock price would have been determined on the day of the takeover by two stocktake teams from Mnaka and Thrive by sharing stock sheets and agreeing on the value thereof. However, at the insistence of Engen, that was not done as the handover was done to Engen, not the buyer.

ISSUES

[17] The issues for determination are whether Mnaka made out a case for default judgment against Engen, particularly establishing the wrongfulness element for a delictual claim arising out of Engen's actions causing pure economic loss.

LEGAL PRINCIPLES

[18] Rule 31(2)(a) reads: 'Whenever in an action the claim or, if there is more than one claim, any of the claims is not for a debt or liquidated demand, and a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down as provided in subrule (4) for default judgment and the court may, after hearing evidence, grant judgment against the defendant or make such order as it deems fit.'

[19] Rule 31(4) provides that the proceedings referred to in subrules (2) and (3) shall be set down for hearing upon not less than five days' notice to the party in default, Provided that no notice of set down shall be given to any party in default of delivery of notice of intention to defend.

[20] The South African law of delict is based on three pillars: the actio legis Aquiliae, the action iniuriarum and the action for pain and suffering. The primary object of an award for damages is to compensate the person who has suffered harm.

[21] Regarding the action legis Aquiliae, the following elements are essential to prove liability:

a) harm must take the form of patrimonial loss.

b) the conduct must take a form of a positive act or an omission or statement.

c) the conduct must be objectively unreasonable and without lawful justification.

d) one must be at fault, and the blameworthiness must be in a form of intention or negligence.

e) there must be causation both factual and legal.

[22] Patrimonial loss … has been defined as the dimunition in the utility of a patrimonial interest in satisfying the recognised needs of the person entitled to such interest. It has also been defined as the loss or reduction in value of a positive asset in someone's patrimony or the creation, increase or acceleration of a negative element of a person's patrimony (a patrimonial loss).'[4]

[23] The purpose of awarding damages for patrimonial loss is to place the plaintiff in the financial position, to the extent that money can do so, that the plaintiff would have been in had the delict or breach of contract not been committed, thereby redressing the dimunition (or probable dimunition) in his or patrimony caused by the defendant.[5]

[24] Damages for patrimonial loss are of the same nature as the impaired patrimonial interest and can thus be a true equivalent for such damage. In non-patrimonial loss, there is no real relationship between money and loss.[6]

[25] The Supreme Court of Appeal has dealt with a delictual action in the context of a contract in Standard Bank of South Africa Ltd v Coetsee[7] and stated the following: 'In my view, it is not necessary, generally, in a delictual action based on a fraudulent misrepresentation that it should be alleged and proved that the representor intended to occasion the loss which the representee suffered. All that is necessary to allege and prove is that the representor made a false representation which he intended, whatever his motive might have been, the representee to act upon. The loss or damages which the representee suffered need not have been intended by the representor, it must simply have followed as a result of the representee acting upon the false representation.'

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[4] *HJ Erasmus and JJ Gauntlett (updated by PJ Visser), "Damages" in The Law of South Africa, Volume 7, 2nd edition (2005) at page 11, paragraph 11; PJ Visser et al "Visser and Potgieter's Law of Damages" (2nd edition) (2003) at page 4.*

[5] *D Hutchison, "Back to Basics: Reliance Damages for Breach of Contract Revisited" in SALJ, Vol. 121 (2004) 51 at page 52; HJ Erasmus and JJ Gauntlett (updated by PJ Visser), "Damages" in The Law of South Africa, Volume 7, 2nd edition (2005) at page 27, paragraph 25.*

6 PJ Visser et al "Visser and Potgieter's Law of Damages" (2nd edition) (2003) at page 33.

7 Standard Bank of South Africa Ltd v Coetsee 1981 (1) SA 1131 (A) at 1145A-B.

[26] In Country Cloud Trading v MEC, Department of Infrastructure Development,[8] the Constitutional Court summarised the approach our law takes to wrongfulness by pointing out that the wrongfulness enquiry focuses on 'the [harm causing] conduct and goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable. It is based on the duty not to cause harm – indeed to respect rights – and questions the reasonableness of imposing liability'.

DISCUSSION

[27] The evidence established that summons was properly served upon Engen by the sheriff. Engen did not file a notice of its intention to defend. To that extent, Mnaka was entitled to approach the court for a default judgment without serving upon Engen a notice of setdown of the default judgment application.

[28] Regarding a claim in terms of the Aquilian action, it has been settled law that the purpose is to restore the plaintiff's patrimony and, as far as possible, to place him in the position he would have been had the delict not been committed. The plaintiff bears the onus to place sufficient evidence before the court with regard to the merits and the quantum. For quantum, the evidence must show a reasonable assessment of damages. Where the damages cannot be worked out precisely, the court may exercise its own judgment based on the relevant facts and evidence.

[29] The evidence presented by Mashele on behalf of Mnaka was persuasive, and I have no hesitation in accepting its truthfulness. He also referred to documentation, agreements and email correspondences, which I heard no reason not to admit.

[30] I find that the premature handing over of the site to Engen was not due to Mnaka's negligence. Mnaka believed it was necessary to expedite the process of concluding the sale of the business agreement. When it learned that Thrive

8 Country Cloud Trading v MEC, Department of Infrastructure Development [2014] ZACC 28; 2015 (1) SA 1 (CC).

had been advised not to communicate with them further and not to sign their proposed agreement, the site had already been handed over to Engen, the franchisor.

[31] However, it is not clear why Mnaka proceeded to hand over its retail licence for the site to the Controller for Thrive to successfully apply for its own before receiving payment. There is no evidence suggesting Mnaka acted recklessly or negligently. Its explanation that, in good faith, it believed Engen's request could be acceded to as part of the sale process could not be challenged as the matter was not defended. This court has no ground not to accept such an explanation.

[32] Mnaka averred in its particulars of claim that after taking possession of the site, Engen sabotaged the sale by advising Thrive not to sign the written agreement between Mnaka and Thrive. Acting on this advice, Thrive defaulted on the agreement.

[33] Mnaka, through its counsel, Adv Fourie, argued that Mnaka surrendered its business premises and petroleum retail licence on the insistence of Engen under the guise that same was necessary for the sale of the business to Thrive. Engen was the sole cause of the business sale between Mnaka and Thrive not being finalised. As a result of Engen's actions, Mnaka no longer had any business entity, stock, or petroleum retail licence to sell. The direct damages suffered by Mnaka due to Engen were the proposed purchase price for Mnaka's business being R6.8 million, the stock at hand being R500 000 and the costs of this action.

[34] Mnaka's case was that Engen's conduct in sabotaging the sale agreement constituted unfair and unreasonable contractual conduct under the equitable standard, which conduct was directly responsible for the loss of business and sale thereof, and that Mnaka was entitled to be compensated the fair value of the retail potential of the business and the stock at hand at the time of the handover of the site to Engen.

[35] In my view, Engen's demanding the premature handover to itself instead of Thrive induced Mnaka to act the way it did, thereby causing harm to Mnaka. That conduct resulted in Mnaka losing the sale and stock prices as Thrive did not sign the agreement and never made payment.

[36] Engen made demands to Mnaka, which were intended for Mnaka to act upon. Mnaka did act upon such demands. Such demands were not warranted in terms of the agreement, and same caused Mnaka to suffer pure economic loss. The process of concluding the sale would have been for the handover to Thrive upon Thrive's payment of the selling price and the stock value on the day of the handover.

[37] Although, Thrive had not made the payments to Mnaka. Mnaka reasonably played its role when it acceded to Engen's request to hand over the site to Engen and surrendered its retail licence to the Controller to allow Thrive to apply for its own successfully.

[38] Consequently, Engen concluded a transaction with Thrive after Mnaka handed the site to Engen. In my view, Mnaka's claim against Engen for the payment of R6.8 million for the selling price and R500 000 for the stock on hand at the time of handover ought to succeed.

[39] I, accordingly, make the following order:

Order:

1. The application for default judgment by Mnaka against Engen is granted.

2. Engen is to pay R6.8 million and R500 000 to Mnaka with interest at the legal rate calculated from the date the summons was served on Engen to the date of final payment.

3. Engen will pay the costs of suit.

[redacted]

NGM MAZIBUKO

Acting Judge of the High Court of South Africa

Mpumalanga Division, Mbombela

This judgment was handed down electronically by circulation to the parties' representatives by email.

Representation

For the plaintiff:	Adv H F Fourie
Attorneys for the plaintiff:	Murray Kotze & Associates
For the defendant:	No appearance
Attorneys for the defendant:	
Hearing date:	27 August 2024
Delivery date:	20 November 2024