IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)

Case No: EL809/2024

In the matter between:

TOTALGAZ SOUTHERN AFRICA (PTY) LTD	Applicant
(Registration Number: 1996/006515/07)	
and	
RHYDER INVESTMENTS CC t/a DTB SALES	1st Respondent
(Registration Number: 1996/006515/07)	
DAVID TERRY BENGE	2nd Respondent
(Identity Number: 7[…])	

JUDGMENT

ZONO AJ:

Introduction

[1] The applicant is the owner of the gas cylinders bearing its brand *Total Energies* and or *Total*, which cylinders are orange in colour. The applicant approached this court on *ex parte* basis for a Rule Nisi and an interim relief which was granted on 14 May 2024.

[2] Shorn of wordiness and verbiage, the applicant sought an order interdicting and restraining the first respondent from: receiving or possessing applicant's steel pressurized liquid petroleum gas (LPG) cylinders; filling the said cylinders with LPG and or distributing and or selling the said cylinders to the third parties. A further order was sought against the respondents, seeking to direct the respondents to surrender the cylinders which may come into their possession within 48 hours of the order to the Sheriff of this court. A punitive costs order was sought against the respondents jointly and severally one paying the other to be absolved. Further relief related and was directed to the Sheriff and the applicant.

[3] On 14 May 2024 the applicant obtained the interim relief against the respondents on *ex parte* basis. A Rule Nisi was issued on the said day calling upon the respondents to show cause why the interim relief referred to above should not be made final on the return date. After several extensions of the rule nisi and interim order, the matter came before the opposed motion court as a fully opposed matter. The applicant contended for a final relief, which the respondents opposed.

Factual background

[4] The applicant and the respondents are not strangers. They had a contractual relationship which started on 4 June 2018 and terminated by effluxion of time on 3 June 2023. In terms of the written dealer agreement aforesaid the first respondent, whose sole member in the second respondent, would conduct the business of a Totalgaz dealership, on the terms that are not entirely relevant for purposes of determination of this matter.

[5] The applicant posits a case that it participates in an industry standard cylinder exchange arrangement whereby the applicant would collect its own cylinders and that of its competitors when delivering cylinders to various dealerships, such as the

first respondent. Its competitors would act similarly when collecting their own cylinders from various dealerships. The applicant and its competitors would exchange their respective cylinders so that each respective party would again be placed in possession of its cylinders.

[6] The first respondent, after the expiry of the dealer agreement on 3 Jue 2023, remained in possession of a number of applicant's cylinders. The first respondent failed or neglected to return to the applicant its cylinders as it was obliged to do so. The applicant further contends that the first respondent had no legal right to retain possession of the applicant's cylinders after the termination of the dealer agreement.

[7] An investigation report prepared by Ifalethu Risk Consulting CC was compiled at the instance of the applicant. The investigation was conducted at the first respondent's place of business. Apparently, the investigation was conducted on 15 April 2024, 16 April 2024 and 17 Apil 2024.

[8] The report, in respect of 16 April 2024, reveals that, inside the respondents' premises, there was a designated filling area with various commercially branded cylinders owned by different companies. The second respondent's son arrived at the premises in a bakkie loaded with inter alia applicant's cylinders. The five (5) empty cylinders were exchanged for five (5) 9kg Totalgaz cylinders (applicant's) which were all sealed with what seemed to be legitimate Total Energies plastic seals. They were given to the investigating team and a payment of R1600.00 was made to the first respondent by way of EFT and a receipt was given to the investigating team as proof of payment. Five (5) empty cylinders were off-loaded in exchange for five (5) full Totalgaz (applicant's) cylinders which were loaded into the investigators motor vehicle. The respondents' employees took the empty cylinders into the filling area.

[9] On 17 April 2024, the investigating team went back to the respondents' business premises with two (2) empty cylinders belonging to other companies. On their arrival they observed a road tanker truck delivering gas into the bulk tank. Another 6-ton truck was observed carrying different empty cylinders of various brands. Cylinders of various brands were stacked inside and just outside the filling area. The second respondent advised the investigators that they had an electricity

problem, and he could not fill the cylinders, and he did not have full 19kg or 48kg cylinder. However, he told the investigators to wait for a moment as he was trying to resolve the problem. After some time, the second respondent came with two full cylinders, 19kg of which belonged to the applicant, that he collected from an alternative area and gave them to the investigators. After a tax invoice was given to the investigators for an amount of R2 165.00, an EFT payment was made for the same amount.

[10] The applicant concludes by stating that it had never provided its consent or permission to the first respondent to fill, distribute and / or sell the applicants' cylinders. There is no legal basis that would justify the first respondent to be in possession of applicant's cylinders for such purposes. The applicant assets that the first respondent's conduct, especially the filling of the applicant's cylinders without the prior written consent of the applicant is in contravention of Pressure Equipment Regulations of the Occupational Health and Safety Act, 1993 as amended. The first respondent's conduct poses a serious safety threat to the lives of customers and members of the public who are supplied with the applicant's cylinders unlawfully filled and distributed by the first respondent. The applicant lastly submits that it has a right and an obligation to ensure that its cylinders are returned to it without delay.

[11] The respondents' case is quite straight forward. It renders a lot of issues a common cause. The respondents assert that they are participants in the gas distribution industry together with the applicant. The respondents accept that the gas distribution industry is governed by an industry cylinder exchange arrangement, which enables or allows the participants thereto to collect its own cylinders when delivering to various dealerships. The very nature of the exchange arrangement in the industry permits a temporary possession until sufficient cylinders are gathered together for an exchange.

[12] Participants in the industry commence by acquiring gas cylinders with their own specific identifiable colours. They fill their specific-coloured cylinders in their depots. The cylinders belonging to distributors with their own depots are filled exclusively at those depots by those distributors.

[13] A member of the public who may wish to purchase a gas cylinder, approaches the distributors' depot and transacts to obtain possession of that distributor's cylinder. In doing so he may bring an empty cylinder belonging to another distributor. In those circumstances a distributor will be left in possession of another distributor's empty cylinder. It is virtually impossible for any distributor not to be in possession of cylinders belonging to its competitors or other distributors.

[14] An empty cylinder is ascribed a value of R345.00 regardless of its size. If a customer brings in an empty cylinder, he will have to pay for the gas in the filled cylinder. If the customer has no empty cylinder to present to the distributor, the customer will have to pay an extra R345.00 for the cylinder he leaves with. The respondents posits a case that when the applicant delivered its cylinders to the first respondent, the first respondent had to pay the required deposit of R345.00 per cylinder in terms of their dealer agreement.[1] The dealer agreement makes provision for the refund of the deposit upon termination of the agreement.[2] The respondents laments that, when the applicant's 107 cylinders were repossessed, the applicant never repaid or refunded the deposit. The respondents contends that they were lawfully entitled to possess those cylinders.

[15] About the five (5) sealed cylinders adverted to in the investigation report, (about the events of 16 April 2024) the respondents contend that they purchased them from applicant's local distributor, *Marius Engelbrecht* of *E-Gas*, who provided the second respondent with sealed cylinders, with branded *Total Energy* plastic seals. With regard to the event of 17 April 2024 referred to in the investigation report about 19kg applicant's sealed and apparently full cylinder, the respondents pleaded that that was an exception and an isolated incident as their employees were instructed not to fill the applicant's cylinders, filling of the applicant's cylinder occurred contrary to the second respondent's instructions. The respondents have taken a precaution of reminding their staff members of the instruction and that the isolated incident will not occur again.

Discussion and analysis

[1] *Clause 7.1.1 of the Dealer Agreement*.
[2] *Clause 7.3 ad 7.5.1 of the Dealer Agreement*.

[16] During the hearing of the matter, the applicant abandoned the relief set out in paragraph 1.1 of the notice of motion. The relief has been abandoned after it had been made to form part of the interim relief granted on *ex parte* basis on 14 May 2024. For the sake of completion, the relief is worded thus:

> *"1.1 that the first and second respondents are interdicted and restrained from receiving or being in possession of steel pressurized liquid petroleum gas ("LPG") being the applicant's brand "Total Energies" and or "Total", and which cylinders are orange in color, and which cylinders belongs to the applicant."* The interim relief seems to have been implemented and complied with.

[17] It would then appear that this relief is relevant only for the determination of costs. There will be no need for the court to decide who the winner is, as the merits of the relief have become academic. To that end I must have regard to all the affidavits filed towards the merits of the relief and the application.[3] The proper approach is to utilize the material available and decide the issue of costs on broad general lines that would not necessitate a full hearing of the merits that have already been settled.[4] In the circumstances the universal rule that a party who succeeds should be awarded costs cannot apply. In the exercise of the court's discretion, the court has to consider the manner in which the parties have conducted themselves in this application, both before and after the application was brought.[5] The court must also consider which of the parties took unnecessary steps or adopted a wrong procedure, any misconduct by a party and any other relevant factors.[6]

[18] The starting point should be the common cause fact that the applicant and the first respondent are participants in an industry standard cylinder exchange agreement. The applicant asserts that in terms of this exchange arrangement it

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[3] *Gamlan Investments (Pty) Ltd and Another v Talion Cape (Pty) Ltd and Another* 1996 (3) SA 692 (C) at 700G-J.
[4] *Nkume v Firstrand Bank Limited t/a First National Bank* 2012 (4) SA 121 (ECM) para 9.
[5] *Nxumalo and Another v Mavundla and Another* 2000 (4) SA 369 (D) at 355F; *First National Bank of Southern Africa t/a West bank v First East Cape Financing (Pty) Ltd* 1999 (4) SA 1073 (SE) at 1079 – 1080.
[6] *De Villiers v Union Government (Minister of Agriculture)* 1931 AD 206 at 214.

would collect its own cylinders and that of its competitors when delivering cylinders to various dealerships, such as the first respondent. The first respondent takes this argument further and contends that the customary exchange arrangement or practice renders it impossible for participants in the gas industry not to be in possession of cylinders of competitors when they are brought in by customers to be exchanged for filled cylinders.

[19] Two things arise from the practice of industry standard cylinder exchange arrangement. Firstly, a participant is entitled to collect its own cylinders from its competitors. Secondly, a participant is entitled to receive and be in possession of its competitors' cylinders. The step of approaching court and obtaining an interim relief interdicting the receipt and possession of the cylinders was wholly unnecessary. A remedy is provided by the standard cylinder exchange arrangement that, if one participant's cylinders were received and were in possession of its competitor, the participant is well entitled to approach its competitor to collect its cylinders.

[20] The respondents' counsel argued that it was unnecessary for the present proceedings to be instituted. The applicant should have exhausted the remedy provided by the practice of standard cylinder exchange arrangement. I have no hesitation in finding that an industry standard cylinder exchange arrangement is an arrangement between the participants or competitors *inter se* which constitutes an agreement or contract between them. When a participant or competitor joins the industry, it quintessentially enters into an agreement to be bound by the industry standard cylinder exchange arrangement operating between the participants in the industry. In terms of this agreement, it is permissible to receive and be in possession of a competitor's cylinder. It is further legally permissible too, for a participant to collect its cylinders from its competitors.

[21] The applicant's counsel countered an argument that the applicant should have simple approached the respondents with a view to collect its cylinders. He stated that for a remedy to qualify to be an adequate alternative remedy it must be a

legal remedy. He accordingly relied for that proposition on the judgment of Rhodes University[7] per Lowe J.

> *"86. The existence of an adequate alternative remedy is such that it must be such as to afford the injured party, in this case the university, a remedy that gives similar protection to an interdict against the injury that was occurring or apprehended. That alternative remedy must be a legal remedy that is one that a court may grant and if need be, enforce by execution or contempt of court. That the problem may be resolved by extra-curial means is no justification for refusing to grant an interdict. It is the purpose of an interdict to put an end to the conduct in breach of applicant's rights and seek enforcement of this. The alternative remedy and suggestion that there must be prior arrangement is thus misconceived. I should say specifically that to engage constructively maybe desirable or even preferable, but whilst this may be encouraged it is most certainly not a bar to the granting of an interdict."*

[22] A remedy provided by the law is a legal remedy. A remedy provided and or created in the contract between the parties is equally a legal remedy. The applicant is enjoined to exhaust the remedies provided in the contract. On the application of the doctrine of privity of contract the applicant is bound by the contract.[8] Parties are bound by the contracts they make with each other.[9] I conclude in this regard that the applicant was contractually and legally obliged to engage with the first respondent before approaching this court about the receipt and possession of its cylinders by the respondents.

[23] The parties are *ad idem* about the fact that a value of R345.00 is ascribed to an empty cylinder regardless of its size. The respondents posit a case that they paid for applicant's empty cylinders as indicated in clause 7.1.1 of the dealer agreement they had. The dealer agreement provides for payment and refund when the cylinders were to be collected or returned.[10] The respondent contend that the total value of the

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[7] *Rhodes University v Student Representative Council of Rhodes University and Others* 2017 (1) All SA 617 para 86.
[8] *Gugu and Another v Zongwana and Others* 2014 All SA 203 (ECM) para 21.
[9] *RH Christie: The Law of Contract in South Africa, 5th Edition*, page 260.
[10] *Clause 7.3 and 7.5.1 of the Dealer Agreement*.

applicant's cylinder repossessed is R36 915.00 and same was not paid to the respondents. No averment is made by the applicant to suggest that an amount of R36 915.00 was paid to the respondents prior to coming to this court on *ex parte* basis. It goes without saying that in the absence of payment for the value of the applicant's cylinder retained by the respondents, the respondents were not in an unlawful possession of applicant's cylinders. The respondents would only be in unlawful possession if the respondents were engaged with a view to collect the cylinders and the universally known value for the cylinders is paid, but not withstanding those endeavors the respondents refuse to release the cylinders. I therefore find that the step of approaching this court for the relief that has since been abandoned belatedly was wholly unnecessary.

[24] The applicant's conduct of approaching this court on *ex parte* basis in these circumstances was unwarranted. The applicant sought to obtain an unfair advantage to subdue respondents' resistance and enforcement of the contractual terms relating to the payment of R345.00 for each cylinder. However, this is not the end of the case.

[25] The applicant assails the respondents' conduct of filling, distributing and or selling applicant's cylinders. The respondents concede that their staff members or employees mistakenly filled in 19kg cylinder belonging to the applicant. However, the respondents assert that such an incident was an isolated incident, which did not necessarily mean that it happened before, and it will happen in the future. It was one slip in the net, so they say. The respondents contend that they have taken a precautionary step of reminding their employees of an instruction not to fill applicant's cylinders. Reliance in this regard was placed on the case of *Burman*[11] where the court held thus:

> *"It seems to me that if, in addition, the defendant has given a bona fide undertaking not to repeat the infringement, that is an important factor which will influence the court in refusing the interdict"*

[11] *Performing Right Society Limited v Burman* 1966 (2) SA 355 at 357 F – G.

[26] On the other hand the applicant strongly contends that the filling, distribution and or selling of the cylinders belonging to a competitor is prohibited by the statute. For that contention the applicant relies on various Health and Safety Standards and the Regulations promulgated in terms of section 43 and 44 of the Occupational Health and Safety Act 85 of 1993 ("Act"). In what follows I briefly deal with pressure equipment regulations promulgated in terms of section 43 of the Act.

[27] Regulation 17 deals with Gas Recirculation Equipment and Systems. Subregulation 1 (a) provides thus:

> *"17(1) No person shall –*
>
> *(a) handle, store or distribute any gas in any manner, which includes the filing of a container, other than in accordance with their relevant health and safety standard incorporated into these regulations under section 44 of the Act"*

[28] The relevant Health and Safety Standard 9.5 of SANS 10019 of 2008 find application in this matter. They provide as follows:

> "*9.5 Persons competent to fill containers*
>
> *No person shall fill a portable container with gas unless he is competent to fill containers with the gases he handles and unless:*
>
> *(a) …*
>
> *(b) …*
>
> *(c) …*
>
> *(d) Permission to fill the container has been granted by the owner of the container, in writing, except where the cylinder is owned by the end user. This requirement is for safety reasons, since the cylinder containment history is an essential reference for correct filling"*

[29] The aforesaid safety standards were conceptually reshaped in September 2011 as follows:

"Permission to fill shall be obtained from the owner of the pressure receptacle in writing, except where the pressure receptacle is privately owned by the end user, this requirement is for safety reasons. The pressure receptacle containment history is an essential reference for safe filling"

[30] The provisions restricting a person's competency to act are peremptory.[12] The safety standards and regulations are clearly imposing restrictions on the competence of a person to fill the container or receptacle. A statutory requirement construed as peremptory usually needs exact compliance for it to have the stipulated legal consequences.[13]

[31] The filling and distribution of a container or receptacle without the written permission of the owner is prohibited. The act of filling and distribution is unlawful if it is done without the consent or permission of the owner of the container or receptacle. A jurisdictional fact or precondition for a lawful filling and the distribution of the container or receptacle is the written consent of the owner thereof. In the absence of such preconditions a person has no right at all to fill and distribute the container or receptacle.[14]

[32] It is a fundamental principle of our law that everything done contrary to the direct prohibition of the law is void and of no effect.[15] The law cannot and does not countenance an ongoing illegality. The court has a concomitant duty to uphold the doctrine of legality, by refusing to countenance an ongoing statutory contravention.[16] In our democratic order, it is the duty of courts to apply and enforce the legislation.[17] If the validity of legislation is not impugned, there is no justification for not enforcing it, let alone giving effect to prohibited conduct.[18]

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[12] *LAWSA Vol 25 second edition, page* 401.

[13] *Shalala v Klerksdorp Town Council and Another* 1969 (1) SA 582 (T) at 587 A – C.

[14] *Paola v Jeeva NO 2004 (1) SA 396 (SCA) para* 11, 14 and 16.

[15] *Schierhoat v Minister of Justice* 1926 AD 99 at 109.

[16] *Lester v Ndlambe Municipality* 2014 (1) All SA 402 (SCA); 2015 (6) SA 283 (SCA paras 23, 27 and 28.

[17] *Section 165 (2) of the Constitution.*

[18] *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) para 99.

[33] In addition to the filled applicant's cylinder in their respondents' premises that was sold to the investigators, there were five (5) other filled applicant's cylinders which were allegedly purchased from *Maruis Engelbretcht*. Although these cylinders were not filled in the respondents' premises or by the respondents, they were purchased for purposes of distribution or sale, which act is prohibited. The respondents clearly contravened the law and there is no justification for that contravention.

[34] The only outstanding issue now is that of costs. I have found that there was no basis for the applicant to approach this court on *ex p*arte basis. There was also no basis for the relief sought in paragraph 1.1 relating to the receipt and possession of the applicant's cylinders by the respondent. The applicant would have failed in its pursuit for that relief. That relief was made an order of court on 14 May 2024. That interim order deserves to be discharged. With regard to the relief relating to the filling and distribution of the applicant's cylinders, the applicant would have been successful. There is obviously no winner or loser. Accordingly, there is no party that is entitled to costs.

[35] In the result I make the following order:

35.1 The interim orders set out in paragraph 1.1, 1.4 and 1.5 of the *rule nisi* obtained by the applicant on 14 May 2024 are hereby discharged.

35.2 The interim order set out in paragraph 1.2 of the *rule nisi* obtained by the applicant on 14 May 2024 is hereby confirmed.

35.3 There shall be no order as to costs.

AS ZONO

JUDGE OF THE HIGH COURT (Acting)

Appearances

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