**IN THE HIGH COURT OF SWAZILAND**

**(HELD AT MBABANE)**

**CASE NO.: 4/06**

**In the matter between**

**SHELL OIL SWAZILAND (PTY) LTD.** **Applicant**

**and**

**MOTOR WORLD (PTY) LTD. T/A**
**SIR MOTORS** **Respondent**

**HEARD ON: 27TH JANUARY 2006, 8TH FEBRUARY 2006 AND 27th FEBRUARY 2006**

**JUDGMENT DELIVERED ON: 28th APRIL 2006**

**CORAM: P.Z. EBERSOHN J.**

**FOR APPLICANT** **ADV. P. FLYNN**
**FOR RESPONDENT** **ATT. S.A. NKOSI**

**JUDGMENT**

**EBERSOHN J:**

[1] In this matter the applicant applied on an urgent basis for an order declaring that the written Franchise Agreement concluded between the applicant and the respondent on or about 25 February 2003 was validly cancelled alternatively that it terminated on the 31st December 2005 and "is of no further effect and force" and for the ejectment of the respondent from the garage premises in Mbabane.

[2] The respondent opposed the application.

[3] The respondent also gave notice that it intended arguing certain points in limine. [4] The matter came before my brother Mamba J on the 18th January 2006 and after hearing lengthy argument he postponed the matter to the 20th January 2006 to consider whether the matter should be postponed further or not. On the 20th January 2006 he postponed the matter to the 27th

January 2006 and he granted leave to the respondent to file answering papers by the 23rd January 2006 and ordered that the applicant files replying papers, if any, by the 25th January 2006.

[5] For some reason or another the matter landed up before me on the 27th January 2006 before me in the ordinary contested motion court.

[6] Mr. Nkosi, who appeared for the respondent, applied that the matter be further postponed and after hearing argument I dismissed the application and ordered that the matter be proceeded with and both parties argued the points in limine and merits.

[7] It is necessary to relate some background to the matter.

[8] In the founding papers it is alleged that the applicant and the respondent entered into a franchise agreement consisting of some 21 schedules in terms of which the applicant leased certain filling station premises in Mbabane to the respondent and in the numerous schedules they arranged various matters.

[9] It is the case of the applicant that the respondent should be ejected from the premises, **firstly,** in view of the fact that the applicant duly placed the respondent in mora by notice and upon the failure of the respondent to comply with the terms of the notice the agreement was cancelled by the applicant, and , **secondly,** in view of the termination of the franchise agreement, in any case, on the 31st December 2005 by the effluxion of time, whereafter the respondent, so went the applicant's argument, had to vacate the premises.

[10] Upon the respondent's failure to vacate the premises the applicant launched the urgent application to have the respondent ejected and the founding affidavit was deposed to by one Solomon Nkabinde on the 5th January 2006.

[11] In paragraph 3.1.1 ot the founding affidavit the deponent stated that he was duly authorised to bring the application on behalf of the applicant and paragraph 3.1.2 on page 2 of the founding affidavit reads as follows:

> **"I attach a copy of the resolution authorising me so to act on behalf of the applicant marked "A".**

[12] It appears from the resolution, however, that it was only adopted on the 6th January 2006, i.e. the day after he deposed to the founding affidavit.

[13] The respondent responded to this aspect in two ways. **Firstly,** it filed a notice on the 20th January 2006 to the effect that it was raising a legal point in this regard, and, **secondly,** in the answering affidavit the authority of Solomon Nkabinde to have deposed to the founding affidavit was duly challenged. A further point was also raised to the effect that Solomon Nkabinde perjured himself in this regard. It is not for me to decide this aspect here but it is for another court on another occasion to decide the matter if necessary.

[14] It was held on innumerable occasions that an applicant must stand or fall by the founding affidavit. (See **Pounta's Trustee v Lahanas** 1924 WLD 67; **Methodist Church of South Africa v Sokufundumala** 1989(4) SA 1055 at 1057E; **South African Milling Co Ltd. v Reddy** 1980(3) SA 431 (SEC); **Interboard SA (Pty) Ltd. v Van den Bergh** 1989 (4) SA 166(0) at 168B-D and **M&V Tractor & Implement Agencies Bk. v Vennootskap D S** U **Cilliers & Seuns en Andere (Kelrn Vervoer (Edms) Bpk. (Tussenbeitredend)** 2000(3) SA 571 (NK).

[15] During argument this first point in limine was duly argued by Mr. Nkosi. He also In this regard also referred to **Thelma Court Flats (Pty) Ltd. v Mc Swigin** 1954 (3) SA 457(E) and **Pretoria City Council v Meerlust Investments Ltd.** 1962(1) SA 321 (A) at

325(D) where **Ogilvy Thompson JA,** as he then was, considered the question of the authority of the Town Council's Town Clerk to prosecute, in this instance, an appeal on behalf of the City

Council and stated:

> **"The question of authority having been raised, the onus is on the petitioner to show that the prosecution of the appeal in this Court has been duly authorised by the Council, that it is the Council which is prosecuting the appeal and not some unauthorised person on its behalf (cf. Mall (Cape) (Pty) Ltd. v Merino Ko-operasie Bpk. 1957 (2) SA 347 (C) at pp. 351-2). As was pointed out in that case, since an artificial person, unlike an individual, can only function through its agents, and can only take decisions by the passing of resolutions in the manner prescribed by its constitution, less reason exists to assume, from the mere fact that proceedings have in fact been authorised by the artificial person concerned. In order to discharge the above-mentioned onus, the petitioner ought to have placed before the Court an appropriately worded resolution of the Council."**

[16] I find that the legal position in Swaziland is the same as in South Africa as is set out in the authorities I have quoted above. It must be noted that ordinarily, a deponent to an affidavit does not need anybody's authority to depose to an affidavit but where a deponent on behalf of an artificial body initiates any legal proceedings or make an affidavit on behalf of the artificial body and where his authority to do so is challenged, it is incumbent upon the deponent to prove his authority by producing the appropriately worded resolution or other proof empowering him.

[17] The applicant belatedly and too late tried to meet this aspect in the replying and a supplementary affidavit but did not cure the defect and more doubt as to the structure of the applicant was created and not resolved. The applicant for instance attempted to verify that one V. Mavuso was indeed a director of the applicant and that there thus was a quorum on the 6th January 2006 when the board of directors of the applicant purported to resolve that Solomon Nkabinde be authorised to bring the application on behalf of the applicant, yet in paragraphs 3.3 and 3.4 of the replying affidavit (p. 85 of the record) he stated that where the letterhead, annexure "J" on p. 183 of the founding papers, stated that the "V. van Hagt", referred to therein as a director, was no longer a director and that he was replaced by the said V. Mavuso although, according to him, such change was not yet registered in the company's office. A court cannot work with and rely on such material. The referral to annexure "Rl" being a letter from the majority shareholder as proof of the appointment of Mavuso as director is also not proof thereof

that he in fact was a director at the point in time.

[18] I find that this point in limine should also be decided in favour of the respondent.

[19] Furthermore, I have a vast problem with clause 20.2 of the Franchise Agreement, annexure "C" to the founding affidavit. It reads as follows:

> **"20.2 If the Franchisee is a company, close corporation or business trust, this Agreement shall be of no force or effect unless and until every shareholder or member or trustee of the Franchisee has signed the "Undertaking" in Schedule 18."**

It is common cause that only one director of the respondent namely one Veloso has signed the "undertaking" and that another director, who is also a shareholder, did not sign it.

[20] Mr. Flynn in this regard argued that the applicant waived it's rights in this regard. No proof e.g. by way of resolution or even a letter by applicant to this effect, was produced by the applicant. In this regard counsel's assertion was not sufficient.

[21] I am compelled to find, on the material before me, that the "Franchise Agreement" accordingly did not come into operation. It is for another court, clearly a trial court, to later establish the legal position between the parties perhaps then also dealing with the aspect of damages claim by the parties against each other.

[22] I must, in conclusion, refer to a point in limine taken by Mr. Nkosi to the effect that in terms of the provisions of **THE DISPOSAL OR USE OF PETROL REGULATIONS, 1974,** the applicant had no locus standi in the matter. I have researched this aspect from all possible angles for days on end to no avail and find that there is no substance in this point at all.

[23] Furthermore, on the assumption that I am wrong with regard to the Franchise Agreement not coming into operation then the applicant is faced with the provisions of paragraph 32 .1 of the

Franchise Agreement requiring that the matter be referred to arbitration. With regard to clause 32.2.3 I have already found the matter not to be urgent. The applicant seems to be in the wrong forum.

[24] Under the circumstances I make the following order:

"The application is dismissed with costs."

**P.Z. EBERSOHN**
**JUDGE OF THE HIGH COURT**