IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 319/16

In the matter between:

CUSTOMS MOTORS (Pty) Ltd	Applicant
AND	
ENGEN PETROLEUM LIMITED	1st Respondent
ENGEN PETROLEUM SWAZILAND (Pty) Ltd	2nd Respondent

In Re:

CUSTOMS MOTORS (Pty) Ltd	Plaintiff
AND	
ENGEN PETROLEUM LIMITED	1st Defendant
ENGEN PETROLEUM SWAZILAND	2nd Defendant

Neutral citation: *Customs Motors (Pty) Ltd vs Engen Petroleum Limited & Another (319/16) [2016] SZHC 47(10 March 2016)*

Coram: FAKUDZE, J

Heard: 3 March 2016

Delivered: 10 March 2016

Summary: ***Civil procedure - A party should not confine his or her case on points of law – must answer the merits of the case - where immovable property is a subject of a dispute the court where such property is situate has jurisdiction - cause of action and place of performance of contract also confer jurisdiction – requirements for an interdict (interlocutory) considered – prima facie right, a well grounded apprehension of irreparable harm if interdict not granted, balance of convenience in favour of granting interim relief and absence of any other satisfactory remedy – where all requirements fulfilled, court justified in granting interim interdict – in present circumstances applicant entitled to an interim interdict – application upheld with costs to include those of counsel***

JUDGEMENT

BACKGROUND

[1] Sometime in 2008, Applicant and First Respondent entered into a contract of lease. The lease agreement was to last for a period of seven years from 1st April

2008 until March 2015. By virtue of this lease, Applicant was entitled to operate a service station.

[2] The Lease Agreement contained terms and conditions relevant to the operation of the business and the purchase and supply of Automotive Fuel and products. The agreement is attached to the Notice of Motion marked "annexure A." The terms and conditions of the agreement are contained in schedule 2. Schedule 3 deals with rental and schedule 4 contains provisions in respect of maintenance of the premises and equipment.

[3] The leased property is owned by the Second respondent, Engen (Swaziland) (Pty) Ltd in terms of Deed of transfer 317 of 1994 which is also annexed to the Replying affidavit. There is also provision relating to renewal of the lease agreement.

[4] The Applicant alleges that the agreement was renewed during 2013, alternatively, January 2014, through the exchange of emails between the Applicant and the First Respondent. The Applicant has instituted an Action in respect of its lease agreement of the premises in terms of which He seeks a declaratory order declaring that a lease came into existence for a further period from 1st April, 2015 and for a period of five (5) years on the same terms and conditions as contained in the initial Lease agreement and its Schedules.

PRESENT APPLICATION

[5] The purpose of the present Application is to seek an order which secures the Applicant's right to occupy the premises and to have free and unfettered access to the premises, pending the final determination of the Action proceedings under case no 1521/15. It also seeks an order that the Second Respondent, as First Respondent's nominated or approved supplier, to continue to supply Automotive Fuel and products pending the final determination of the aforesaid Action.

[6] Applicant's prayers are specifically pleaded in the Notice of Motion where Applicant states that -

1. The Application be regarded as urgent and that non-compliance with the Rules of Court relating to service and time periods be and is hereby condoned.

2. Pending the final determination of the Action instituted by Applicant (as Plaintiff) against Engen Petroleum Limited and Respondent as respectively, First and Second Defendants in case number 1521/15,

    2.1 First Respondent be prohibited from and interdicted from evicting Applicant from the premises situated at site number 44 (7WDQ) generally known and referred to as Bypass Road Mbabane, Swaziland (the "premises");

    2.2 First Respondent be ordered as from 20th February, 2016, to give and allow Applicant free and unfettered access to and occupation of the premises on the same terms and conditions as those contained in the Lease Agreement entered into by and between Applicant and First Respondent on 15th May, 2008 (the "Lease Agreement");

2.3 Second Respondent be ordered to, as from 19th February, 2016, as First Respondent's nominated representative and as a registered fuel supplier in terms of the Fuel Levy Act No.1 of 1979, continue to supply and deliver automotive fuel and all other automotive products to Applicant as it has done before and on the same terms and conditions as those that existed in the initial Lease Agreement;

3. First and Second Respondents jointly and severally, the one to pay the other to be absolved, pay the costs of this Application; and

4. Such further and/or alternative relief granted as this Honourable Court may deem fit.

[7] First and Second Respondents have filed their Notice of Intention to Oppose and have also filed their Answering affidavit. Applicant has filed the Replying Affidavit and both parties have filed comprehensive Heads of Argument and the Bundle of authorities. This court remains grateful to the legal representatives of both parties for this commendable job.

MATTERS FOR DETERMINATION

[8] The Applicant wants the court to grant a temporary interdict pending the determination of the main Action in case No 1521/15. Applicant contends that the Second Respondent is a registered supplier of automotive fuel and products in terms of the Fuel Levy Act, 1979 whereas the First Respondent is not. It is therefore only the Second Respondent, as a matter of law, which is permitted to effect the supply of the First Respondent's products in Swaziland. The First Respondent cannot deny that the Second Respondent acts as its approved supplier.

[9] Applicant submits that there is a strong business relationship between First and Second Respondent which might suggest that Second Respondent is a subsidiary of First Respondent. It should be noted that the Lease Agreement was entered into between First Respondent (who happens to be *peregrinus*) and the Applicant who is a Swazi Company. The agreement was signed in Swaziland and the property that is the subject of the lease is registered in the name of the Second Respondent. The property is also situate in Swaziland.

[10] Applicant argues that although the Lease Agreement was signed between Applicant and First Respondent, in terms of Articles 4.1 and 4.2 of Schedule 2 to the Agreement, the Applicant is obliged to purchase <u>exclusively</u> from the First Respondent or its nominated or approved supplier. The Applicant was never informed that Second Respondent is the nominated or approved supplier, but it is evident that it is and that the Applicant could not and did not deal with any other entity in compliance with clauses 4.1 and 4.2.

[11] The Applicant referred this court to various documents (contained in the Book of pleadings) including rent, fuel and automotive product invoices which prove that all the invoices were always made into Second Respondent's bank account. There is further proof which is that in terms of the Fuel Levy Act, 1979, it is only the Second Respondent and not First Respondent which lawfully supplies the Applicant's products in Swaziland. In so far as it may be necessary, it is proper for this court to order both Respondents to continue the supply of fuel pending the determination of the main Action.

[12] Applicant further cements His argument about the strong working relationship between First and Second Respondents by drawing the attention of the court to the words "A PETRONUS SUBSIDIARY COMPANY" on the bottom right of Second Respondent's letter dated 19 February 2015 and directed to Applicant. This letter was on the letterheads of Second Respondent and it is found in pages 136 to 138 of the Book of Pleadings. I will comment on this letter later on in this judgment because it is written on the letter heads of Second Respondent, but signed on behalf of First Respondent at the end. Suffice to say that Applicant alleges that this letter is directed to Applicant and it is written using Second Respondent's letter heads.

[13] Applicant contends that this court has the necessary jurisdiction by virtue of the fact that the Lease Agreement was concluded in Swaziland on 15th May, 2008. The performance and implementation of the terms and conditions of the Lease Agreement, including all the Schedules thereof took place within the jurisdiction of this court including the lease of the premises and the delivery and supply of automotive Fuels and Products. This means that the cause of action arose within the jurisdiction of this court. The leased property is within the jurisdiction of this court and is registered in the name of the Second Defendant.

[14] Applicant submits that the place where the contract was performed, the place of signing of same and the situation of the property (which is the subject of the lease) should be considered in the determination of jurisdiction. Applicant further submits that it is convinced that there exists a lease agreement between Himself and First Respondent by virtue of the offer and acceptance between Applicant and First Respondent's Representative. The extended Lease Agreement is the subject of the proceedings under case no 1521/15. The interests of Applicant must be

secured especially in the light of the Non Renewal Notice from Second Respondent's office dated 19th February, 2015 and that of First Respondent's Legal Advisor dated 16th March 2015 and the threat not to further supply Applicant with automotive Fuel and Products as from the 20th February, 2016.

[15] Applicant finally avers that he has established a good ground for an interdict by virtue of the fact that he has a *prima facie* right which right arises from the Action proceedings that are pending and the conclusion of the renewed Lease Agreement between Himself and First Respondent's Representative in the person of Zaza Tshabalala. Applicant will suffer irreparable harm in that the service station will be closed and the employees will lose their gainful employment. The balance of convenience requires the grant as rightly pointed in paragraphs 45 to 49 of the Founding Affidavit. Applicant has no other remedy as He thought that the institution of the Action Proceedings would deter Respondents from further threatening Him.

[16] First and Second Respondents' response to what is alleged by Applicant is found in the Answering Affidavit which has been deposed to by First Respondent's Legal Advisor. He deposes to and on behalf of both First and Second Respondents. I must from the onset, point out that First and Second Respondents' contention centres around points of law and legal technicalities. The issue of whether or not Applicant is entitled to the interim interdict has not been canvassed.

[17] First and Second Respondents' attack is directed to the manner in which the prayers have been drafted in the Notice of Motion. With respect to prayer 2.1, First and Second Respondents argue that the relief claimed seeks to interdict and

prevent the First Respondent from "evicting" the Applicant. The Respondents argue that they are entitled at any time to approach a court to seek relief. Once proceedings have been commenced, the Applicant will be entitled to raise whatever defence He has. The net effect of prayer 2.1 is that it is premature and is an attempt to block Engen South Africa Limited from having access to the Swazi courts. It should therefore be dismissed. The Respondents finally argue that the word "evict" does not mean "spoliate" but, alternatively and in the event it is found that "evict" means "spoliate", the Application still fails.

[18] I must point out that in reply, Applicant conceded that His case does not rest on this prayer alone. Abandoning it would not be suicidal to His case. This point was therefore not pursued by the Applicant. I therefore make no ruling on it.

[19] First and Second Respondents' attack is also directed to prayer 2.2 of the Notice of Motion. First and Second Respondents argue that the relief claimed in this clause is clearly spoliatory in nature. The First Respondent is to permit Applicant "free and unfettered access to and occupation of the premises…." First and Second Respondents argue that again there is no spoliation – actual or threatened since the Applicant is currently in peaceful and undisturbed possession. First and Second Respondents aver that since a spoliation argument will fail to substantiate the relief claimed, the Applicant may again have to rely on a liberal interpretation of the wording it has employed. It appears that prayer 2.2 might be argued to be in the form of a declarator. Prayer 2.2 is not susceptible to such an interpretation.

[20] First and Second Respondents further submit on prayer 2.2 that Applicant is currently in peaceful and undisturbed possession of the premises and the existence

of a lease agreement, or otherwise is therefore irrelevant to its current occupation. In any event, the existence of a dispute is already a subject of court proceedings by virtue of Case No 1521/15. Since the Applicant remains in peaceful and undisturbed possession, an interim relief is not necessary. The issuance of such relief will have no practical effect and is therefore moot.

[21] First and Second Respondents go on to say that in so far as prayer 2.2 amounts or seeks the enforcement of the agreement, the above Honourable court lacks jurisdiction because First Respondent is a *peregrinus.* This court has no effective means to enforce contempt proceedings and no attachment of First Respondent's property has been effected to found jurisdiction. First Respondent is not domiciled in Swaziland and has no property in any form whether movable or immovable.

Applicant's reply to prayer 2.2 is that much as Applicant is in peaceful and undisturbed occupation of the leased property, First and Second Respondents have, by means of correspondences dated the 19th February, 2015 and 16th March, 2015 coupled with letters from Lanham Love Attorneys dated 2nd February, 2016 (marked Annexure Q) and 9th February, 2016 (marked Annexure R), been threatening Applicant. The letters of 2nd February, 2016 and 9th February 2016 from Respondents' Attorneys, clearly state that the last day Second Respondent will supply Petroleum products to Applicant will be the 20th February, 2016.

[22] Applicant's reply on the issue of jurisdiction is that since the agreement was performed in this court's area of jurisdiction, the court has exclusive jurisdiction. The claim sought by the Applicant is not in monetary form or value. Attachment is therefore unnecessary. Applicant further states that the property that is the

subject of the lease agreement is situated in Swaziland and it is owned by the Second Respondent.

[23] The last attack by the First and Second Respondents relates to prayer 2.3. First and Second Respondents argue that Applicant has no substantive right as against the Second Respondent. The effect of prayer 2.3 is to seek an order for specific performance as against the Second Respondent. First and Second Respondents argue that it is common cause that the Second Respondent did not enter into any written agreement with the Applicant and consequently, the relief claimed in this prayer cannot be substantiated with reference to any written agreement. As between the Applicant and the Second Respondent, the so called "terms and conditions" never existed. The rights that Applicant seeks to enforce are unclear.

[24] First and Second Respondents further aver that in law there cannot be any liability accruing to an agent. Where a contract is concluded by one person as representative of another person, the rights and obligations arising from the contract inure to the person represented and not the representative. The contract comes into being by the expression of will of the representative, but the rights and obligations arising out of the contract are the principal's and not the agent's. In the event the order sought is granted, it will result in an order compelling Second Respondent to do the impossible.

[25] Applicant in reply states that since the Lease Agreement came into existence, Second Respondent has always been responsible for executing it. The non joinder of Second Respondent will make the whole agreement a nullity because there will no implementer of it. After all, Articles 4.1 and 4.2 provide that the Applicant will

exclusively buy the Product of the First Respondent. It is common cause that First Respondent's representative in Swaziland is the Second Respondent. If Applicant wants to buy Petroleum products from another supplier in terms of paragraph 4.3, He must seek authority from First Respondent. Applicant states that the rights he is seeking arises from a contract of lease.

APPLICABLE LAW AND APPLICATION TO FACTS

[26] In considering the applicable law and the application of same to the facts of this case, we will deal with the rights that are created by a contract of lease. We will thereafter deal with the way these rights are enforced in a court of law. The issue of jurisdiction especially where there is a dispute pertaining to immovable property will also be considered. Finally, the requirements for the granting of an interdict *pendente lite* will be considered. The issue of whether a lease agreement exists between the Applicant and the First Respondent will be a matter for determination in the main Action under Case No. 1521/15.

[27] **A.J. Kerr on The Law of Lease** says in page 124 of His book:-

> *"The right of a lessee does not prevail if, in the case of a short lease, the lessee is in occupation or in the case of a long lease, registration has taken place. It follows that the rights of a lease in such circumstances is a real right. It has been described by the courts on numerous occasions but descriptive phrases are often used e.g a temporary real right, a modified and exceptional real right, a qualified real right. It is suggested that nothing more than the simple statement that the right is a real right needed. In the case of a short term lease, the lessee has a real right when he has*

gone into occupation of the property; in the case of a long lease he has it after registration." See paragraphs 1 and 2.

[28] From what has been said above, it is clear that a contract of lease creates a real right. The Learned author goes on to describe the use and enjoyment of this right when He says in page 3 of His book:-

> *"The subject matter of a contractual lease is not the leased property itself but the use and enjoyment thereof. It is of essence of the contract of lease that there be a certain enjoyment or a certain use of a thing which the lessor undertakes to cause the lessee to have during the period agreed upon, and it is actually that which constitutes the subject and substance of the contract."*

[29] It is common cause that First Respondent and Applicant entered into a Lease Agreement. The leased property belongs to Second Respondent. The lease had conditions attached to it in the form of Schedules. By virtue of Applicant and First Respondent signing it, it created a real right in favour of Applicant. Applicant has always been enjoying the fruit thereof.

[30] The well known principle of law that "where there is a right there is a remedy," leads us to consider the issue of enforcement of the right.

The Learned Authors, **Silberberg and Schoeman on The of Property**, have this to say on pages 146 and 147 of their book:-

> *"A mandament van spolie is aimed only at the recovery of lost possession and <u>does not lie where there is a mere disturbance of possession or a threat that possession will be disturbed. In this latter circumstances the</u>*

possessor may apply for a prohibitory interdict instead; that is a judicial order in terms whereof some or other person is prohibited from committing a threatened wrong or from continuing an existing one. The interdict may be final or pendent lite."

[31] In the present case, Applicant is seeking an interdict *pendent lite.* He argues that His right to unfettered occupation and access to the leased property is being threatened by the First Respondent by virtue of the letters dated 19th February, 2015, 16th March, 2015 coupled with those from Respondent's Attorney dated 2nd February, 2016 and 9th February, 2016 referred to earlier in paragraph 21 of this judgment. Applicant further argues that the threats are persistent notwithstanding the instituted Action proceedings in Case No. 1521/15. First and Second Respondents hold the view that Applicant is in peaceful and undisturbed possession of the premises and therefore an interim relief is unnecessary. First and Second Respondents argue that this is matter fit for spoliation. It is this court's considered view that there is a disturbance or a threat to Applicant's occupation and access to the leased property. This is compounded by the threat that the petroleum products which are central to the operations of Applicant's business will no longer be delivered after the 20th February, 2016. The only remedy available to the Applicant is to apply for a prohibitory interdict pending the determination of the merits of case no1521/15.

[32] This court also holds the view that not only has Applicant established a *prima facie* right, but has gone further to establish that he has a clear right pending the outcome of the civil Action referred to above. A prohibitory interdict is the right remedy available to the Applicant as Silberberg and Schoeman rightly pointed out that, "a *mandament van spolie* is aimed only at the recovery of lost possession and

does not lie where there is a mere disturbance of possession or a threat that possession will be disturbed."

[33] The next issue of enquiry is whether or not the court has jurisdiction to deal with the present Application given that the First Respondent is a Foreigner and that she is the one who entered into the contract with Applicant. There are various principles that apply in the determination of the issue at hand. Suffice to say that **Herbstein and Van Winsen – The Civil Practice of the Superior Courts in South Africa,** 3rd edition, tells us in page 35 that :-

> *"The court will exercise jurisdiction by reason of a claim arising out of a contract (ratione contractus) which was entered into or was to be performed, whether wholly or in part, within the courts area of jurisdiction or out of a delict (ratione delicti) committed within such area. Such jurisdiction is known as jurisdiction rei gestae."*

[34] The principle the Learned Author is alluding to is that jurisdiction is conferred by reason of a claim arising out of a contract which was entered into or was to be performed, whether wholly or in part within the court's area of jurisdiction. In the case before this court, Applicant has clearly established this point in paragraphs 9.3, 9.3.1 and 9.3.2. These paragraphs state that -

> *"9.3. I specifically plead that this Honourable Court has the necessary jurisdiction as the cause of action arose within the jurisdiction of this Honourable Court when:*
>
> *9.3.1 The Lease Agreement was concluded on 15th May, 2008 at Matsapha, Swaziland.*

9.3.2 The performance and implementation of the terms and conditions of the Lease Agreement took place within the jurisdiction of this Honourable Court, that is, the lease of the premises and the delivery and supply of Automotive Fuels and Products."

[35] In the light of what the Learned Author, **Herbstein and Van Winsen** (supra), says about jurisdiction founded upon the place where the contract was entered into and where it was performed, whether wholly or in part, the court is inclined to agree with Applicant that this court has jurisdiction to hear and determine this Application. This is so notwithstanding that First Respondent is a *peregrinus*.

[36] The Learned Author **Herbstein and Van Winsen** (supra), raises the bar to a higher level when He educates us on jurisdiction in respect of property. He says in page 43:-

"*Generally speaking, it may be said that in any action relating to property, the court within whose territorial jurisdiction the property is situated (i.e. the forum rei sitae) will have jurisdiction to entertain claims relating to such property. It will not matter whether the defendant is an incola or peregrinus, nor that he is not physically present within the area over which the court exercises jurisdiction."*

[37] The Learned Author goes on to tell us what happens with respect to immovable property when He says:-

"The court within whose territorial limits the property is situated will have exclusive jurisdiction in proceedings involving title to

immovable property including those claiming ownership or possession, or a declaration that the property is subject to or free from a real right less than ownership e.g. a servitude."

Erasmus on Superior Court Practice, volume 1 adds weight to what Herbstein and Von Winsen say when He states at page 11 that -

" in action in connection with immovable property, whether in rem or in personam, the court in whose area of jurisdiction the immovable property is situate has jurisdiction to entertain the claim and it is immaterial whether the defendant / respondent is an incola or a peregrinus. Consequently, an attachment to confirm jurisdiction is unnecessary."

[38] In paragraphs 27 and 28 of this judgment, I indicated that a lease agreement creates a real right and this right involves title to immovable property. The kind of title it confers relates to possession and occupation of an immovable property. A declaration that the property is subject to or free from a real right less than ownership can be sought by any party affected thereby.

[39] In paragraph 9.4 of the Replying Affidavit, Applicant states that:-

"I furthermore point out that it is Second and not First Defendant/Respondent, who is the owner of the leased premises in terms of the provisions of the Deed of Transfer attached hereto as Annexure "A." The title deed number is illegible. In terms there of which the premises was ceded and transferred to the Second Defendant as to successor in the title on the 1st July, 1994."

[40] In paragraph 13 of the Founding Affidavit, Applicant clearly states where the property that was leased by the First Respondent is situated. Applicant says that:-

> *"13. On May 2008 at Matsapha, Swaziland, Plaintiff and First Defendant entered into a written agreement of lease in terms whereof Plaintiff rented from First Defendant, premises situated at site 44 (7WDRQ), generally known and referred to as Bypass Road, Mbabane, Swaziland. ("the Lease Agreement").*

[41] I have noted that nowhere in the papers has the First and Second Respondents, disputed the situation and location of the immovable property that is the subject of the Lease. Further authority that where there is a dispute relating to immovable property, the court where the property is located has exclusive jurisdiction is found in the case of **Eilon V Eilon 1965 (1) SA 703 (A), Sonia (Pty) Ltd V Wheeler 1958 (1) SA 555 (A), and Jackaman and Others V Arkell 1953 (3) SA 31 at 34.**

In the light of all what has been said above, this court is inclined to agree with the Applicant that this court has jurisdiction to hear the present Application by virtue of the fact that (1) the contract was entered into in Swaziland; (2) the performance of the contract was wholly implemented in Swaziland by Second Respondent who is the supplier of First Respondent's products in this country; (3) the immovable property that is the subject of the dispute is situated within the jurisdiction of this court; and (4) the cause of action arose within the jurisdiction of this court.

[42] Before we deal with whether the requirement for a temporary interdict have been met, we will consider one last point of law that First and Second Respondents raised in their papers. This pertains or relates to the joinder of Second Respondent

in the proceedings before this court. First Respondent argues that the Lease Agreement of the 15th May, 2008 was entered into between First Respondent and the Applicant. Consequently, the relief claimed in prayer 2.3 of the Notice of Motion cannot be substantiated with reference to any written agreement. As between the Applicant and the Second Respondent the so called "terms and conditions" never existed.

First Respondent goes on to argue that specific performance particularly if Second Respondent is ordered to continue to supply and deliver automotive fuel and all other automotive products to Applicant as it has done before and on the same terms and condition as those that existed in accordance with the terms and conditions contained in the Lease Agreement, is an impossibility. First Respondent further argues that even if this court would hold that Second Respondent is First Respondent's agent, it is trite law that where a contract is concluded by one person as representative of another person the rights and obligation arising from the contract inure to the person represented and not the representative. First Respondent finally argues that Second Respondent is an independent legal person.

[43] Applicant's response to the argument that is raised by First Respondent is that in as much as Applicant and First Respondent entered into the Lease Agreement, the court must pierce the corporate veil which piercing will result in the realisation that Engen Petroleum Limited and Engen Swaziland (Pty) Ltd are basically one entity. Applicant avers that the following instances bear testimony to this truth:-

(1) The leased property belongs to Second Respondent although it was leased by the First Respondent;

(2) The performance and implementation of the Lease Agreement is the responsibility of the Second Respondent by virtue of Article 4.1 of the 2nd Schedule which Article points out that the Dealer will exclusively purchase

from the company or the approved suppliers, the Dealer's entire requirements of Automotive Fuel marketed by the company….." Article 4.2 further states that "the Dealer shall purchase exclusively from the company or the company's nominated or approved suppliers."

(3) In so implementing the Lease Agreement, Applicant has been receiving automotive fuel products only from Second Respondent.

(4) Applicant has been using Second Respondent's bank to honour all his financial obligations towards First Respondent and First Respondent has never objected to this arrangement.

(5) The Notice of Non Renewal of the 19th February, 2015 (which is captured in pages 136 to 139 of the book of pleadings) was written on the letterheads of Second Respondent although it was signed by and on behalf of Engen Petroleum Limited at the end.

(6) The words "A PETRONAS subsidiary company" inscribed on Second Respondent's letterheads (see the right hand corner thereof) imply that Engen Swaziland (Pty) Ltd is a subsidiary of the First Respondent.

[44] Applicant argues that all the above mentioned factors are indicative of the fact that Engen Swaziland (Pty) Ltd and Engen Petroleum Limited are one entity. Alternatively, if they are separate legal entities, there is very close and intimate working relationship between First and Second Respondents which is best known by these two entities.

[45] This court holds the view that there is merit in what Applicant is saying. This is further confirmed by the following indications or indicators as drawn from the parties' papers that have been filed of record:-

(1) In the Answering Affidavit (which is in pages169 to 192 of the books of pleadings), the Respondents have this to say in paragraph 11:-

"*11. Finally I will demonstrate that the Second Respondent Engen Swaziland is a totally separate legal entity with <u>limited authority to act on behalf of Engen South Africa doing so essentially as a contractor delivering fuel and receipting the sale proceeds</u>."*

The underlined words confirm what Applicant is saying in paragraph 43 (2) and (3) of this judgment. The limited authority referred to by the Respondents in their Answering affidavit is the heartbeat and nerve of the business Applicant and First Respondent entered into when they signed the 15th May, 2008 lease agreement.

(2) The Respondents do not deny that for purposes of the Oil Levy Act, 1979, Second Respondent is responsible for paying the levy. No one else is recognised to do such by the Government of Swaziland for and on behalf of First Respondent.

(3) The Answering Affidavit has been deposed to by one Lefika Morobe who is Legal Advisor of First Respondent. Mr Morobe does so on behalf of both Engen Petroleum Limited and Engen Swaziland (Pty) Ltd. By virtue of this deposition, He is saying that He knows about all the operations of Second Respondent notwithstanding that Second Respondent has its own legal existence. If the argument that First and Second Respondents are separate entities holds true, then what Morobe says about Engen Swaziland in the Answering Affidavit has the potential of amounting to hearsay evidence.

(4) The Notice of Non Renewal of the 19th February, 2015 is on the letterheads of Second Respondent and signed by the Representative of Engen Petroleum Limited who does not disclose who he/she is. When counsel for

Respondents was asked by this court about this state of affairs, He responded by saying that First Respondent can choose to use any of Engen's letterheads. This amounts to an admission that the two entities have a strong corporate bond which can be best explained by the two entities.

(5) The Non Renewal letter dated 16 March 2015(contained in pages 232 to 234 of the book of pleadings) that is signed by Lefika Morobe, Legal Advisor, Engen Petroleum Limited is written on the letterheads of Engen Petroleum Limited, Johannesburg (and not Cape Town). This shows that Engen Petroleum Limited, Cape Town and Engen Petroleum Limited, Johannesburg are some how inter-related. As indicated in paragraph (4), the Notice of Non Renewal of the 19th February, 2015 leaves a lot of unanswered questions regarding the operations of First and Second Respondents.

For purposes of this proceedings, it suffices to say that Applicant is justified in joining the Second Respondent in these proceedings. Second Respondent is responsible for implementing the agreement. This court holds in favor of Applicant on this point and the First and Second Respondents have no leg to stand on.

REQUIREMENTS FOR AN INTERLOCUTORY INTERDICT

[46] The requirements for the granting of an Interdict on interlocutory basis were touched upon by **His Lordship Cloete J.A, in the Civil Appeal Case of Iveanah Johnston V Christopher Johnston and Another Case No. 78 of 2014**. His Lordship indicated that for party to succeed in obtaining an interlocutory interdict, he or she must prove that (a) he or she has a *prima facie* right; (b) there shall be

irreparable harm if the interdict is not granted; (c) the balance of convenience favors such grant; and (d) there is no other satisfactory remedy available.

[47] **Buckle and Jones**: **Civil Practice of the Magistrates Courts in South Africa** Vol 1 also states the requisites for the granting of an interlocutory interdict when He says:-

> *"The requirement which an applicant for an interim or interlocutory interdict has to satisfy are the following:*
>
> *(i) A prima facie right.*
>
> *(ii) A well grounded apprehension of irreparable harm if the interim relief is not granted;*
>
> *(iii) A balance of convenience in favour of the granting of the interim relief; and*
>
> *(iv) The absence of any satisfactory remedy."*

The learned Author further observes that –

> "*These factors should not be considered separately or in isolation but in conjunction with one another in order to determine whether the court should exercise its discretion in favour of the grant of the interim relief sought."*

[48] As I indicated earlier in paragraph 16 of this judgment, Respondents' case seems to rest on points of law. Nothing much has been said on whether Applicant is entitled to an interim Relief or not pending the Finalisation of Case No. 1521/15. I will now consider whether or not Applicant has made a sufficient case to satisfy the requirements for the grant of an interlocutory interdict.

[49] In paragraph 43 of the Founding Affidavit, Applicant states that:-

"*43. I respectfully submit that the Plaintiff has a prima facie right to approach this Honourable Court for the necessary relief. I dealt with the fact of the partly oral and partly written agreement that came into existence in the exchange of emails correspondences between me and Tshabalala. This aspect need be adjudicated upon in a court of law after the leading of evidence and consideration of all the facts in order to reach a comprehensive and well informed decision.*"

[50] In this Court's humble view, the above mentioned paragraph makes a good ground for establishing a prima facie right.

On the issue of balance of convenience and irreparable harm, Applicant has this to say in paragraphs 45 to 49 -

"45. I respectfully submit that the prejudice which Plaintiff will stand to suffer in the event that this court does not grant the relief therein far outweighs that of the Respondent should the order not be granted as requested in the Notice of Motion. It would simply mean that Plaintiff's business which consists exclusively of the selling of automotive fuel and related products will come to a complete stand still.

46. This will in fact mean the commercial end of Plaintiff will be final and will cause irreparable harm. On the contrary and should an interim order be granted, the disputes and issues between the parties can be properly ventilated and adjudicated upon after the leading of evidence, subjecting the witnesses to cross examination.

47. If the order is granted, it will simply mean that

Plaintiff may continue with its operations whilst complying with its obligation, as it has all along been doing, the First and Second Defendants would receive payment of the rental based on the turnover calculated in terms of the agreed upon formulas. Consequently neither First nor Second Defendants would suffer any financial or any other prejudice or harm.

48. I further more respectfully submit that neither First nor Second Defendants will be unfairly prejudiced by the granting of the order, while the converse and the consequences for Plaintiff is simply too ghastly to contemplate.

49. In the circumstances I respectfully submit that it is clear that real and substantial justice requires that the relief sought herein be granted."

[51] It is this court's humble view that Applicant has made a good case on the issue of balance of convenience and irreparable harm. The court respectfully concludes in favour of Applicant on this point as well.

On the issue that there is no other satisfactory remedy, Applicant states in paragraphs 50, 51 and 52 of the Founding Affidavit that-

"50. I submit that there is no other satisfactory remedy
available to Plaintiff should the order not be granted, and should the litigation continue and it later transpired that the Plaintiff was correct, the damage would have been done and no amount of damages awarded in monetary terms could provide adequate compensation.

51. In fact, not to grant the relief sought, would simply mean that Plaintiff must close its doors and thereafter, without any form of income, do battle with, in all probability, with some of the financially strongest opponents who can afford to litigate at their leisure. I respectfully submit that Defendants fully well know this and simply bided their time and gave notice only on 9 February, 2016 that occupation will be given and automotive fuel supplied only until 20 February, 2016. This is to say least smacks of economic opportunism."

[52] It is this court's considered view that Applicant has established that he has no other satisfactory remedy available to him should the interim order be refused by this court.

[53] In the light of all what has said above, this court makes the following order:

1. Prayers 1, 2, 2.2 and 2.3 of the Notice of Motion are hereby granted.
2. The First and Second Respondents are jointly and severally, the one to pay, the other to be absolved, to pay costs of this Application, including include those of counsel in terms of Rule 68 of the Rules of this Court.

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M. R. FAKUDZE

JUDGE OF THE HIGH COURT

For Applicant: Advocate P Flynn instructed by Henwood and Company.

First and Second Respondents: Advocate C Vanderspuy instructed by Robinson Bertram.