IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE **CIVIL CASE NO. 1896/2020**

In the matter between:

NUR & SAM (PTY) LTD t/a BIG TREE FILLING STATION APPLICANT

And

GALP ESWATINI (PTY) LTD RESPONDENT

Neutral Citation: *NUR & SAM (Pty) Ltd t/a BIG TREE and GALP ESWATINI (Pty) Ltd (1896/2020) [2020] SZHC 240 (17th November 2020)*

CORAM: **Q.M. MABUZA PJ**

DATE HEARD: 9th October 2020

DATE DELIVERED: 17th November 2020

SUMMARY

Civil Procedure: Mandament van spolie – right to be supplied with fuel and fuel products –

Respondent withholds supply – Can such right be vindicated by spoliation proceedings – Respondent ordered to restore the status quo ante by restoring supply of fuel and fuel products to the Applicant.

JUDGMENT

[1] Before me is an application wherein the Applicant seeks an order in the following terms:

1. Dispensing with the usual and normal requirements of the rules of this Court in respect of time limits relating to the institution of proceedings and enrolling this matter to be heard as a matter of urgency;

2. Condoning the Applicant's non-compliance with the Rules of this Honourable Court and allowing this matter to be heard as urgent;

3. The Respondent be and is hereby ordered and directed to forthwith restore the *status quo ante* by restoring supply of fuel and fuel products to the Applicant.

4. That prayer 3 operates with immediate interim effect pending the final determination of this Application.

5. That a *rule nisi* do hereby issue calling upon the Respondent to show cause on a date and time to be

determined by this Honourable Court why prayer 3 above should not be made final.

6. Costs of Suit on the Scale between attorney and client.

7. Such further and alternative relief as the Honourable Court may deem fit.

[2] The Application is opposed by the Respondent (herein after referred to as Galp).

[3] The matter was argued on the 9th October 2020. I made an *extempora* ruling on the 12th October 2020 wherein I granted the order in favour of the Applicant as follows:

a) The points of law raised by the Respondent are hereby dismissed.
b) Prayers 1, 2, 3 of the notice of motion dated 07/10/20 are hereby granted with costs on the ordinary scale.
c) The counterclaim is hereby dismissed with costs on the ordinary scale. The Respondent is at liberty to invoke the arbitration clause in the franchise agreement in respect thereof.

[4] I now render the full judgment hereunder.

The Applicant's case

[5] The Applicant is the owner of the filling station business operating as Galp Filling Station at Big Tree Shopping Complex in Matsapha. The Applicant's business is a franchise which sells petroleum products supplied by the Respondent (Galp) and other products approved by Galp. As a franchise, the business cannot sell any other products except for Galp products and those products approved by Galp. The Applicant's business is operated in terms of a franchise agreement by which Galp licences the Applicant to sell its petroleum products and

other products approved by Galp. A copy of the franchise agreement was attached to the application and marked Annexure "A".

[6] On the 30th September 2020, the Applicant placed an order for the supply of fuel. The Applicant has prepaid for the supply of fuel and has made an advance payment of approximately E3 600 308-75 (Emalangeni Three Million-Six Hundred Thousand-Three Hundred and Eight-Seventy Five cents) which is about seven loads of fuel.

[7] The order placed by the Applicant was not processed by the Respondent who on the 2nd October 2020 advised the Applicant that they will no longer be supplying the Applicant with fuel unless the Applicant agreed to sign a new franchise agreement. This communication is found in Annexure "D" which states:-

> *"Dear Issufo Calu,*
>
> *We acknowledge receipt of your email below and its attachments. We also confirm having received that attached hardcopy letter delivered to our offices in the past hour. As we have always discussed same with you in the past six (6) months of the declared negotiation period, the Franchise Agreement came to an end 30th September 2020 and since you have not signed a new Agreement for renewal, we have no leeway to release orders to Nur and Sam. Orders will be released as soon as we have a signed Franchise Agreement as required by our in-house control processes and procedures.*
>
> *We hope this clears the matter."*

[8] Galp did not supply the fuel and the Applicant no longer has fuel and in turn cannot supply its customers with fuel. The Applicant's business operations have come to a halt given that the sale of fuel and fuel products is its main business. The supply of fuel by Galp to the

Applicant and the sale of the fuel by the Applicant to the public is an incident of the Applicant's possession or control of the property where the filling station operates.

[9] Hence the Applicant now seeks an order restoring the supply of the petroleum products to its petrol station business at Big Tree Filling Station at Big Tree Complex, Matsapha Industrial Site.

[10] The order sought is a *mandament van spolie* arising from Galp terminating the supply of petroleum products without legal recourse. In short, Galp took the law into its own hands and terminated supply of petroleum products without the Applicant's consent or due legal process.

[11] Applicant thereby seeks to vindicate the right it possesses to be supplied with petroleum products so long as it operates the filling station and pays for the products. Applicant contends that the right to receive supply is an integral part of its ownership of the business and cannot be dispossessed of it without due process. That the right to the supply of fuel is a proprietary right that inheres to the operator of the filling station.

[12] The Applicant contends further that it was in peaceful and undisturbed possession of the right to be supplied with petroleum products and the right is an incident of possession or control of the property where the filling station operates. It is a proprietary right of the Applicant by virtue of being the owner of the business.

[13] Applicant submits that the purpose of the *mandament van spolie* is to restore unlawfully deprived possession at once to the possessor in order to prevent people from taking the law into their own hands, to foster respect for the rule of law and to encourage the establishment and maintenance of a regulated society. If Galp assess that it has a

right it should take recourse to a court of law and not resort to self-help.

[14] The Applicant laments that its business has ground to a halt because the unavailability of petroleum products is detrimental to the continued viability of its business. It has already suffered consirable financial loss which loss is irreparable or irredeemable. Hence the need to approach this Court by way of urgency in seeking the spoliation order as spoliation is a speedy and robust remedy which by its nature is determined by urgent proceedings.

[16] Further, Galp did not want to sub-lease the property from the Applicant because the Applicant was entitled to rentals, rebates and discounts. When the Applicant acquired the property from the Landlord, Galp was advised that from August 2010 it had to pay all site rentals, rebates and discounts to the Applicant. A copy of the letter dated 16 August 2010 from the Landlord confirms that position and reads thus:-

"FED INVESTMENTS (MPHENI DLOMO)
P. O. BOX 3284
MANZINI
16 August 2010

The Managing Director
Galp Swaziland

RE: INFORMATION LETTER (SALE OF BUSINESS)

This is to inform you that we Mpheni Dlomo and Sibusiso Dlomo have sold CB Investments trading as Big Tree Filling Station Matsapha to Issufomia Calu Issufo and Nurane Calu Issufo with effect from 09 August 2010.

We therefore wish to instruct yourselves that as from August 2010 all payments of site rental, rebates, discounts etc are to be made to NUR & SAM (Pty) Ltd.

We further wish to thank you for the relationship we've shared and we hope the same relationship will be maintained with the owners.

Best Regards,

Yours truly

M. DLOMO

Galp and the Applicant entered into a franchise agreement in terms whereof they agreed that their agreement shall endure *"... simultaneous with and upon termination for any reason of the Galp Property Lease Agreement..."*

[17] It is this portion of Agreement that the Supreme Court ordered *"the Franchise Agreement between the Applicant and the Respondent, forming the subject of these proceedings is declared to be in force and to be terminable when the Galp Property Lease Agreement between the Respondent and the Landlord in each such situation terminates."*

[18] The Galp property lease is still in force and the filling station business operates from the premises. The Galp Property Lease has not terminated and was renewed prior to its expiry in November 2019. Galp has since asked the Landlord to change the commencement date from November 2019 to October 2020. The addendum to the lease agreement which has not been signed was attached and marked "I". The lease clearly has not terminated and the filling station continues operating from the premises.

[19] The Galp Property Lease is still in force and the filling station business operates from the premises. The Galp Property Lease has not terminated and was renewed prior to expiry as evidenced by a copy of

page 3 of the lease between Galp and the Landlord which is attached to the Replying Affidavit and marked Annexure "H". This indicates that the lease was renewed in November 2019. Annexure "H" is reproduced hereunder:

"TERM: INITIAL PERIOD: FIVE (5) YEARS

OPTION PERIOD: THREE (4) YEARS 11 MONTHS

COMMENCEMENT DATE: 01 NOVEMBER 2019

BASIC RENT (per month) (See Annexure "A" Clause 2)

The Basic Monthly rental shall be:

FROM: 01 NOVEMBER 2019 TO: 31 OCTOBER 2020 MONTHLY: E 77, 966.00

FROM: 01 NOVEMBER 2020: TO: 31 OCTOBER 2021 MONTHLY: E 84, 204.00

FROM: 01 NOVEMBER 2021: TO: 31 OCTOBER 2022 MONTHLY: E 90, 940.00

FROM: 01 NOVEMBER 2022: TO: 31 OCTOBER 2023 MONTHLY: E 98, 215.00

FROM: 01 NOVEMBER 2023: TO: 31 OCTOBER 2024 MONTHLY: E106, 072.00

ESCALATION: 8% per annum compounded

TURNOVER RENTAL (See Annexure "D"): N/A

ADDITIONAL CHARGES (per month)"

[20] Galp has since asked the Landlord to change the commencement date from November 2019 to 1 October 2020. An addendum to the lease agreement was attached and marked Annexure "I". It too is reproduced hereunder:

"WHEREAS the Lessee has requested the Lessor to vary the commencement date as contained in the Lease;

AND WHEREAS: the Lessor has agreed to do so;

AND WHEREAS: the parties have agreed to amend the Lease Commencement Date as contained in the Lease.

NOW THEREFORE: THESE PRESENTS WITNESS THAT:-

1. *The initial period of the Lease shall be and is hereby commencing 01 October 2020 and terminating 30 September 2025.*

2. *Page 3 of the Lease shall be amended by the deletion of commencement date 01 November 2019 and the insertion in its stead the commencement date 01 October 2020.*

3. *That with effect from 1st October 2020, monthly rental shall be as follows:*

FROM: 01 OCTOBER 2020: TO: 31 SEPTEMBER 2021 MONTHLY: E 83, 684.00

FROM: 01 OCTOBER 2021: TO: 31 SEPTEMBER 2022 MONTHLY: E 90, 379.00

FROM: 01 OCTOBER 2022: TO: 31 SEPTEMBER 2023 MONTHLY: E 97, 609.00

FROM: 01 OCTOBER 2023: TO: 31 SEPTEMBER 2024 MONTHLY: E105, 418.00

FROM: 01 OCTOBER 2024: TO: 31 SEPTEMBER 2025 MONTHLY: E113, 851.00"

[21] The Applicant says that the addendum has not been signed. The point the Applicant makes is that he lease has not terminated and the filling station continues operating from the premises. That being the case, this accords with the declaration by the Supreme Court set out in paragraph 17*supra*.

The Respondents case

[22] The Respondent is an oil distribution company and it operates its business under a franchise system and has various operators in the country which include the Applicant. The business model of the Respondent is that it engages with landlords to secure leases and then sublets the premises to the operators (or "franchise").

[23] Even with regard to the Applicant, the Respondent secured a lease agreement ("lease") with Ncamase Investments (Pty) Limited (being the "landlord") on the 7th of October 2010. The lease was for a period of nine (9) years eleven (11) months.

[24] The Respondent then entered into a franchise agreement with the Applicant on the 20th July 2011 which was for a period of three (3) years. However, when the period for renewal arrived, the Applicant

approached the above Honourable Court for an order declaring that the franchise was not expiring in 2015. It argued that the franchise agreement will expire once the property lease expires.

Ultimately the matter went to the Supreme Court on review and that Court ruled that the franchise agreement of the Applicant will terminate when the Galp lease terminates. Even though it was to terminate on the 31st October 2019 by same agreement of convenience it was decided that it terminate on the 30th September 2020.

[25] The property lease has since come to an end on the 30th September 2020 and therefore following the Court judgment the franchise agreement has come to an end.

[26] The Respondent has tried to engage the Applicant with a view to enter into a new arrangement wherein it will agree on the terms of the sublease so that the Respondent could then conclude the main lease with the landlord. This was prefaced by letters exchanged with the Applicant from March 2020 to June 2020. Thereafter there were meetings between the Applicant and the Respondent's representatives.

[27] The aforesaid meetings did not yield any result and hence Galp advised the Applicant that if the parties could not reach agreement they will have to separate. On the 23rd September 2020 the Respondent through an email advised the Applicant that if the parties do not reach agreement by the 30th September 2020 they will have to separate and the Applicant confirmed receipt of this email.

[28] The Respondent opposes this application on the following basis: First, it argues that the application is not urgent, second, on the merits it is clear from the facts stated above that there is a contractual dispute between the parties. Consequently the remedy of spoliation is not

available to the Applicant as it now seeks to use same to compel specific performance of a contractual or personal right.

[29] On the merits, the Respondent denies that the remedy sought in terms of the *mandamant van spolie* is competent in the circumstances for the following:

(a) The Applicant derived the right to be supplied with the fuel due to the fact that it had a franchise agreement with the Respondent. The franchise agreement has since elapsed as the lease came to an end on the 30th September 2020; and

(b) The right of the Applicant to be supplied with the fuel is a personal right arising from the franchise agreement. As the contract has now expired, the failure of the Respondent to supply the fuel does not constitute depriving the Applicant possession. Consequently, it is submitted that the spoliation remedy is not applicable in this matter.

(c) Ancillary to the above, the parties have failed to agree on the terms of the sublease and the new franchise agreement, the Applicant cannot use the spoliation proceedings to enforce personal or contractual rights which are disputed.

[30] The Applicant was aware that after the 30th of September 2020 no fuel would be supplied as there was no contractual agreement between the parties and hence it was mischievous of the Applicant to place orders with the Respondent for a further supply of fuel. In this regard, the Respondent tenders to return the funds paid by the Applicant and it must just furnish the Respondent its banking details.

[31] Additionally in the Supplementary Affidavit it is stated by the Respondent that since the Applicant was cognisant of the position of the Respondent that if no agreement was concluded by the 30th of September 2020 the parties would have to separate, it was within its contemplation that there would be no petroleum products supplied after the 30th of September 2020. Therefore, the fact that the public and business are no longer being supplied should not come as a surprise to the Applicant and cannot be a basis for urgency.

[32] And on the merits (in the Supplementary Affidavit) that in an application where the mandament is being invoked the court is enjoined to examine the nature of the right to determine whether the right is deserving of protection afforded under this bastion, because if it is not, relief based on the mandament cannot be granted.

[33] It is denied that the supply of fuel by the Respondent is concomitant to the Applicant's possession. The Applicant is still enjoying the possession of the property and it is its right which is protected by the mandament. The supply of fuel is a personal right and does not relate to the actual possession of the immovable property. Consequently, such a supply is not protected by the mandament.

[34] It is further reiterated that the right to be supplied with fuel is a personal right arising out of the contract and it is not protected by the mandament. The mandament protects the possession which is not in issue in this matter as the Applicant is still occupying the premises in an undisturbed manner.

[35] And finally that the application is devoid of merit and must be dismissed with costs.

[36] In addition the Respondent filed a counterclaim in which it claims the following:-

(a) Evicting the Applicant from the site at Big Tree Filling Station as identified in the lease agreement;

(b) An order that the Applicant handover the keys to the Big Tree Filling Station to the Respondent's Sales Manager forthwith upon the grant of the eviction order;

(c) Costs at attorney and own client scale.

[37] The Applicant's response to the counterclaim is that -

(a) The counterclaim simply has no merit. In terms of the franchise agreement a dispute arising between Galp and the Applicant must be resolved through arbitration. Galp is obliged to seek resolution of any dispute it has through arbitration.

(b) In any event no case was made for eviction of the Applicant from the premises and in light of the decision of the Supreme Court eviction is not competent and more importantly eviction would amount to the deprivation of property without compensation which would be contrary to section 19 of the Constitution.

(c) For these reasons the counterclaim has no merit.

Applicant's arguments

[38] It is the Applicant's arguments that the relief claimed with the mandament is restoration of possession *ante omnia*. In support of this argument they proffer the following:

> *"If the application succeeds, the spoliator will be ordered to restore the position before spoliation occurred (status quo ante), notwithstanding the fact that the spoliator is entitled to possession, for example on the basis that the person has ius*

possidendi. This implies restitution of the whole thing or in the case of equal possession that the Applicant must be permitted to exercise his or her professed right. Where the Applicant was only despoiled of a part of a thing, restitution of that specific part would be ordered."

From **Silberberg and Schoeman's The Law of Property 6th edition page 346 paragraph 13.2.1.5**; and

"A spoliation order is available where a person has been deprived of his or her possession of movable or immovable property or his or her quasi possession of an incorporeal. A fundamental principle at issue here is that nobody can take the law into their own hands. In order to preserve order and peace in society the Court will summarily grant an order for restoration of the status quo ante where such deprivation has occurred and it will do so without going into the merits of the dispute."

[39] They further make the point that –

"*the mandament van spolie as a possessory remedy offers only temporary relief, is regarded as a robust and speedy remedy and is not aimed at the restoration of rights... it offers interim relief only and it is preliminary to the suit on the merits."* And *"accordingly, being an interim measure only, it can never have the effect of possession persons permanently. Once possession has been restored, follow up proceedings dealing with the merits of the matter specifically are warranted. As far as possession is concerned, the Applicant need not prove a ius possidendi and thus the lawfulness of his or her possession is irrelevant... The*

Court will not investigate the rights of the parties in terms of the contract of lease or the question of ownership. Likewise, with regard to the act of spoliation, the fact that the spoliator was indeed entitled to possession or believed in good faith that he or she was, is irrelevant" (their emphasis)

[40] The Applicant in *casu* seeks to enforce a right of supply which accrues to it by virtue of being owner of the filling station business. The filling station business is a proprietary right. The ownership of the business arises from a franchise agreement.

[41] The right of supply is an incident of possession and control of the franchise business and the property where it operates. This argument they muse is supported by the case of **First Rand t/a Rand Merchant Bank v Scholtz 2008 (2) SA 503 SCA paragraph 13** which reads:-

"Mandament does not have a catch – all function to protect quasi-possessio of all kinds of rights irrespective of their nature....[it is not an appropriate remedy] where contractual rights are in dispute or specific performance of contractual obligations is claimed. The right held in quasi possession must be a 'genbruiksreg' [right of use] or an incident of possession or control of property" (their emphasis)

[42] As contended, a franchise filling station can only sell products supplied by the franchisor. The dispossession of supply is in effect the dispossession of the filling station business. This is no mere contractual right dispossessed but a right of ownership. The filling station business is a proprietary right. Spoliation would thus amount to the taking away or dispossession of an externally demonstratable, such as a use, from or bound up on the right concerned.

[43] The *mandamant van spolie* is a possessory remedy by which a person who has been deprived of his possession is restored to this possession before the merits of the dispute regarding the lawfulness of his possession are inquired into.

See: **Shoprite Checkers LTD v Pangbourne Properties LTD 1994 (1) SA 616**

[44] The Respondent's remedy would have been to approach Court or arbitral tribunal to declare the franchise agreement terminated. It was not open for the Respondent to take the law into its own hands.

[45] An example of a case where mandamus was granted in respect of supply is that of **City of Cape Town v Marcel Mouzakis Strumpeher (104/2011) [2012] ZASCA 54**. In that case the Supreme Court of Appeal of South Africa per Mthiyane J the Court granted supply of water to the Respondent on account that there was no due legal process that was followed before the water supply to the Respondent's property was shut off.

Respondent's Arguments

[46] The Respondent raised a point of law that of lack of urgency with regard to the application. That a party seeking to have a matter heard on an urgent basis must give proper reasons and why it delayed in bringing the application. The fact that the relief sought is spoliation does not automatically make the matter urgent.

[47] On the merits, the Respondent argues that this Court cannot use the mandament to enforce specific performance of a contract. Respondent states that the mandament remedy is based upon the fundamental principle that person should not be permitted to take the law into their own hands to seize property in the possession of others. In short the

Applicant all has to prove that he was in possession of the thing and he was illicitly despoiled.

[48] However, as it was stated in the case of **First Rand t/a Rand Merchant Bank v Scholtz NO and Others 2008 (2) SA 503 (SCA) at 510-D**:-

> *"The mandament van spoile does not have a 'catch-all function' to protect the quasi-possessio of all kinds of rights irrespective of their nature. In cases such as where a purported servitude is concerned the mandament is obviously the appropriate remedy,* ***but not where contractual rights are in dispute or specific performance of contractual obligations is claimed****: Its purpose is the protection of quasi-possessio of certain rights. It follows that the nature of the professed right, even if it need not be proved, must be determined or the right characterised to establish whether its quasi-possessio is deserving of protection by the mandament. Kleyn seeks to limit the rights concerned to 'gebruiksregte' such as rights of way, a right of access through a gate or the right to affix a nameplate to a wall regardless of whether the alleged right is real or personal. That explains why possession of 'mere' personal rights (or their exercise) is not protected by the mandament. The right held in quasi-possessio must be a 'gebruisreg' or an incident of the possession or control of the property'."*

[49] A mere personal right means the right that arises from a contract, not from some other limited right (such as a servitude). As a result of this the mandament does not protect mere rights and cannot be utilized to enforce specific performance of a contract. See: **Dotcom Trading 849 CC (supra), para 10** AND **Dynamic Emergency Medical Services CC v Government Employees Medical Scheme & Others, Case No.466/2016, paras 37-38**.

[50] That the possession which is protected by the mandament is the actual possession of movables or immovable (such as the case of a lessee refusing to vacate a property after the lease had been cancelled where the landlord cannot evict the tenant without a court order). The question of supply of products such as fuel, electricity, water does not constitute possession as these are rights which flow from a contractual nexus between the parties and they are insufficient as they are purely personal. See: **Chantelle Gladwin-Wood (supra), page 4, Eskom Holdings (supra), paras 19-22** AND **ATM Solutions (Pty) Ltd v Olkru Handelaars CC & Another, Case No. 739/2007, paras 9-10**

[51] The Respondent submits that in *casu* the mandament relief is not competent for the following reasons:

a) Firstly, as stated in the legal principles the mandament is available where possession has been despoiled. In this case the Applicant is still occupying the premises where the filling station was trading and hence the relief sought has no application.
b) Secondly, the supply of the fuel is a personal right arising from the franchise agreement (the "contract"). As the Respondent takes the position that the franchise agreement in question expired, the Applicant cannot then seek to compel the delivery of the fuel through the mandament as this remedy is not to be used where there are contractual disputes. If the Applicant contends that the franchise agreement was unlawfully terminated, its remedy is to proceed through arbitration, it cannot seek to enforce a disputed franchise agreement through the mandament.
c) Thirdly, the Respondent contends that following the Applicant's contention that the lease agreement was terminating on the 30th of September 2020, by this date having failed to enter in to

another franchise agreement with the Applicant, the franchise agreement did not survive from the 30th September 2020.

d) Fourthly, if the Applicant is now denying that it stated that the lease was expiring on the 30th September 2020, then the franchise agreement terminated on the 31st of August 2019 and this confirmed by it in the court application in paragraph 15.3.1 where it stated that, “as far as the first Applicant is concerned in the present situation, it believes the Respondent who had subsequently taken over the lease agreement also agreed that the period of the lease was to be effective until the 31st of August 2019 as per annexure “G2”. Further the Applicant in paragraph 15.5 further submitted that, “at paragraph 2.1.1 which clearly states that the lease of the premises shall be for a period of 9 years 11 months effective from the 1st September 2011 shall be the proper interpretation of the termination date of the franchise agreement”. In light of this, there is no doubt that the Applicant was aware that the franchise agreement was going to terminate on the 31st of August 2019.

e) Fifthly, in the Replying Affidavit the Applicant makes a bizarre submission that because the Respondent then signed another lease agreement with the landlord in July 2019, the franchise agreement still subsists, this has no merit for the following:

1. the Respondent’s contention in the earlier proceedings was that the franchise agreement was for three years and hence it was terminating in 2014. It was the Applicant who stated clearly that the franchise agreement will terminate on the 31st of August 2019 and it cannot then seek to change its position when it suits; and
2. if it now denies that it was given the opportunity to have the franchise agreement extended to the 30th September 2020, it cannot then say because the landlord signed another

agreement, then the franchise agreement also was extended. The Supreme Court judgment was clear that the franchise agreement terminated when the 2010 Galp property lease was terminating. It never said that the franchise agreement will then operate perpetually as long as Galp had a lease with the landlord; and

3. it is submitted that it is in light of the above conceptions that the Applicant refused to negotiate a new franchise agreement and made demands such as imposing its own rental, refused to accept the escalation, was only prepared to sign a new franchise agreement if Galp partnered with it. That it is the Applicant which has shown sheer arrogance of making demands to a franchisor on the basis that it has a court order and hence it is under no obligation to sign a new franchise.

[52] That in light of the above there is no basis for granting the relief sought by the Applicant as the franchise agreement terminated on the 30th of September 2020 and alternatively on the 31st of August 2019 if the Applicant is now denying that it was the one which stated that the lease agreement will terminate on the 30th September 2020.

[53] The Applicant's right to be supplied fuel arose from the franchise agreement (the contract) not from either being the owner of the filling station, or being in possession of the site, or through a statutory right; and

[54] The franchise agreement has terminated through effluxion of time or unilaterally by the Respondent and this Court has not been asked to make a declaration on the validity or invalidity of the termination. Therefore, if there is no contract in place, the Applicant cannot seek to enforce the contract through the mandament as the legal authorities make it clear that it cannot be done once the contract is terminated; and

[55] If the Applicant was contending that it was not agreeing with the termination of the franchise agreement by the Respondent on the 30th of September 2020, its remedy was to bring an interdict against the Respondent pending arbitration, or a declaration of the rights as it did in terms of High Court Case No.111/2015; and

[56] Having failed to bring the interdict proceedings and the franchise terminated on the 30th of September 2020, *'the horse has bolted'* and hence the above Honourable Court should not allow the Applicant to misuse the mandament proceedings to enforce contractual rights which are in dispute. If the Applicant does not accept the Respondent's new franchise agreement which is offered to it to be able to continue operate the filling station and receive fuel, its remedies are to refer the matter to arbitration, or the Court and sue the Respondent for damages.

[57] And in conclusion that the application be dismissed with costs.

Conclusion

[58] The empty bowzers created an urgent need to be filled up and supplied with fuel and sundry products in order for the business to operate without interruption. Hence the urgent application which I condoned by enrolling the matter.

[59] In addition there is an arbitration clause in the franchise agreement which is found at clause 30 which provides that

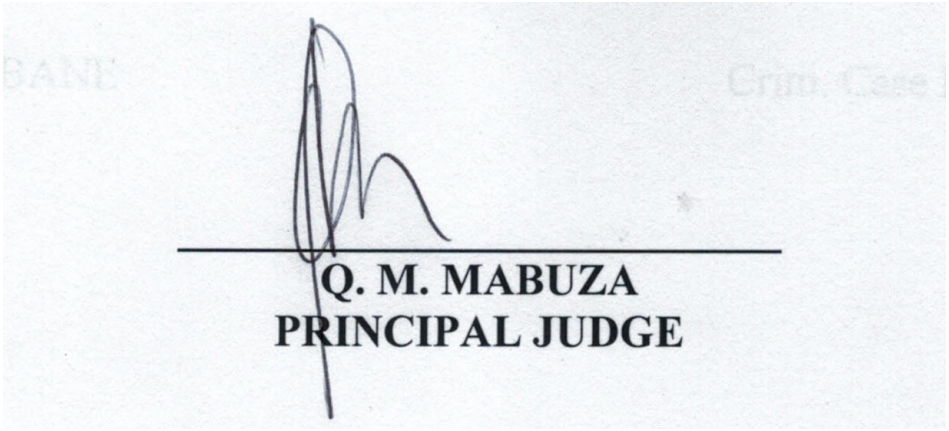
> *"30.1 In the event of a dispute arising between the parties in relation to any matter connected with this Agreement of the Schedule hereto (including but not limited to the interpretation of this Agreement, the enforcement of any provision of this Agreement, the breach by any party of any provision of this Agreement, the validity of this*

Agreement or any part thereof, the enforceability of any provision of this Agreement, or the validity of any notice given hereunder) the parties agree that dispute shall, subject to the provisions of Clause 31.4 below, be referred to arbitration before an arbitrator agreed to by the parties or failing agreement appointed by President of the Law Society of Swaziland in which the Premises are situated....”

[60] It is a trite principle of law that where a contract destructs the arbitration clause survives. The expectation therefore is that should negotiations fail either party is at liberty to invoke the arbitration clause.

[61] This they can do because as Mr Magagula pointed out the order granted in his client’s favour is not permanent.

[62] In the event the orders granted herein on the 12th October 2020 are hereby confirmed.



For the Applicant: Mr M. Magagula

For the Respondent: Mr K. Motsa