IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 211/14

In the matter between:

MIGHTY SOLUTIONS CC t/a ORLANDO SERVICE STATION Applicant

and

ENGEN PETROLEUM LTD First respondent

CONTROLLER OF PETROLEUM PRODUCTS Second respondent

APPLICANT'S HEADS OF ARGUMENT

TABLE OF CONTENTS

INTRODUCTION

[1] In these heads of argument, we intend to focus our submissions on two issues:

a. First, that the first respondent lacks *locus standi* and does not have the right to evict the applicant.

b. Secondly, that the applicant has an enrichment lien over the retail business and the premises.

[2] We respectfully submit that the Court *a quo* erred in finding that the first respondent has *locus standi*. Although a superficial inquiry of our case law would seem to support such a finding, a deeper analysis applied to the facts *in casu* shows that the first respondent indeed lacks *locus standi*.

[3] Regarding the second issue, we respectfully submit that based on the facts of this matter the applicant has an enrichment lien – a real right – over the premises.

BACKGROUND

General

[4] The applicant is a small business, fully owned by Mr Mighty Mwale, a historically disadvantaged South African citizen.

[5] The applicant conducts business as a petroleum products retailer at the corner Highway and Mooki Streets, Orlando East, Soweto (the 'premises').[1]

[6] In 2005, the applicant purchased the petroleum products retail business at the premises as a going concern with goodwill for a purchase price of R1,5 million.[2]

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1 Founding affidavit *a quo* [6] p7 (The page numbers in these footnotes are in terms of the current index filed by the applicant).

2 Affidavit of JM Kotze [3.4] pp86–87. The first respondent states that Mr Zeenat sold the 'service station business to the [applicant] for R150 000' – founding affidavit *a quo* [25] p14.

[7] At that stage, the applicant and the first respondent – a petroleum products wholesaler[3] – entered into a contract ('the contract') that commenced on 1 September 2005[4] and that entailed the following main components:

a. *Sub-lease* of the premises by the first respondent (sub-lessor) to the applicant (sub-lessee)

b. *Licensing* of the use of the first respondent's brand to the applicant

c. *Loan* by the first respondent of its equipment on the premises to the applicant

[8] The applicant holds a petroleum products retail license in respect of the premises,[5] and is accordingly the only person currently entitled to trade in petroleum products from the premises.

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3 Founding affidavit *a quo* [5] p7.

4 Schedule 1 of the contract, p82.

5 Retail licence certificate, p110.

Dispute between the parties

[9] The first respondent sued for *inter alia* the eviction of the applicant from the premises.[6] The first respondent sued for such eviction of the applicant on the grounds that the contract (which included a sub-lease agreement) between the applicant and the first respondent had been cancelled and/or had come to an end.[7]

[10] However, on the first respondent's own version it had leased the premises from the owner of the premises,[8] and its tenure in terms of this head-lease (between the owner and the first respondent) came to an end in 2011.[9]

[11] This is also reflected in the contract, which explicitly states that the head-lease terminates in August 2011.[10]

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6 Notice of motion *a quo* [1] p1.

7 Founding affidavit *a quo* [10] p9.

8 *Ibid* [25] p14.

9 Affidavit of Thulani Edwin Mcicwa [23] p85: 'Applicant [first respondent on appeal] is the lessee of the premises and its tenure shall end in 2011'.

10 Schedule 1 of the contract, p83.

[12] The owner of the premises is the estate of the late Mr Ndlovu.[11]

[13] Despite demand, in terms of a notice in terms of rule 35(12),[12] the first respondent failed and refused to provide a copy of an alleged head-lease agreement.[13]

[14] At the time of the eviction application:

a. The first respondent did not have any lease rights from the owner of the land;[14] and

b. the first respondent did not have any antecedent rights to be holding or dispensing occupational rights to anyone, including the applicant.[15]

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11 Answering affidavit *a quo* [8] p42; Schedule 1 of the contract, p83.

12 Notice in terms of rule 35(12), pp114–117.

13 Affidavit of JM Kotze [3.4.2] p87.

14 Answering affidavit *a quo* [11.4.1] pp46–47.

15 *Ibid* [8.2] p43.

[15] The applicant tendered return of any equipment that belongs to the first respondent; the applicant also tendered return of any trademarks and signage belonging to the first respondent.[16]

[16] The applicant is duly licensed by the Republic of South Africa represented by the Controller of Petroleum Products in terms of and in accordance with the Petroleum Products Act, 120 of 1977:[17]

a. As the only person – to the exclusion entirely of any other person in the Republic – who may conduct retail activity in the sale of petroleum products at the premises.

b. There are certain rights that vest in the applicant in accordance with said retail license. The said retail licence is extant, has not been and will not be surrendered by the applicant, and has not been cancelled by the Controller of Petroleum Products.

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16 Answering affidavit *a quo* [10] pp44–45, [14] p48.

17 *Ibid* [6] pp41–42.

c. The applicant does not need the first respondent's consent or approval in order to conduct retail activity in the sale of petroleum products from the premises. This will transpire without the signage or trademarks of the first respondent.

Goodwill generated by the applicant

[17] Goodwill is a valuable asset and *qua* intellectual property falls within the ambit of section 25(1) of the Constitution.[18] While goodwill can attach to a trademark,[19] goodwill can also – independent of any trademark – attach to a particular business at a particular location.[20]

[18] The applicant invested in his petroleum products retail business both financial and human capital to generate the goodwill of the business.[21] It should be noted, with respect, that the human capital that goes into running

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18 *Phumelela Gaming and Leisure Limited v Gründlingh and Others* (CCT31/05) [2006] ZACC 6; 2006 (8) BCLR 883 (CC) [35]–[38].

19 See for instance: *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* 2006 (1) SA 144 (CC).

20 See: Andries van der Merwe. (2013) Infringement of the right to goodwill; the basic legal principles in relation to South African case law. *De Jure* 1039–1055.

21 Affidavit of JM Kotze [13.6] p97.

and building a petroleum products retail business is irreplaceable,[22] and that the risks involved in retailing petroleum are high, and rest on the shoulders of the retailer.[23]

[19] The standard formula for valuing the goodwill of the business of a petroleum products retailer is 36 times the average monthly gross profit for the last year of trade.[24] The applicant valued the goodwill of his business at the premises at R2 million, being the amount the retailers in the application under CCT 134/13 believe that such business would fetch on the open market and what they might pay for such a business.[25]

Conclusion

[20] It is against the above background that we now proceed to make submissions regarding the two core issues of the case.

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22 Affidavit of JM Kotze [9] p95.

23 *Ibid* [8] p95.

24 *Ibid* [26] p109.

25 *Ibid* [3.14.4] p90.

ISSUE 1: *LOCUS STANDI*

[21] At first glance, it would seem as if the authorities support the conclusion reached by the Court *a quo*, namely that the applicant (*qua* sub-lessee) has no right in law to question the right of the first respondent (*qua* sub-lessor) to occupy a property. The position is stated by the Appeals Court in *Boompret Investments* as follows:[26]

> It is also clear that when sued for ejectment at the termination of the lease it does not avail the lessee to show that the lessor has no right to occupy the property.

[22] However, it is important to investigate the *ratio* for this general contractual principle. In this regard, the Appeals Court stated as follows in the *Hillock* case:[27]

> It seems to me that the rule [that the lessee cannot dispute the lessor's title] may be based upon one or other of two very simple grounds. The first is, that the lessor having performed his part of the contract, and having placed the lessee in

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[26] *Boompret Investments (Pty) Ltd & Another v Paardekraal Concession Store (Pty) Ltd* 1990 (1) SA 347 (A) 351.

[27] *Hillock & Another v Hilsage Investments (Pty) Ltd* 1975 (1) SA 508 (A) at 516E.

> undisturbed possession of the property is entitled to claim that the lessee should also perform his part of the contract and should pay him the rent which he agreed to pay for the use and enjoyment of the premises. The second ground is, that the lessee having had the undisturbed enjoyment of the premises under the lease, and having thus had all for which he contracted, it would be against good faith for him to set up the case that the lessor had no right to let him the property.

[23] *In casu*, this rationale for the general contractual principle is simply not applicable, as the parties ***explicitly agreed*** in their written agreement that the first respondent's head lease with the owner of the Premises – and hence the first respondent's possessory rights regarding the Premises – would expire in August 2011.

[24] Furthermore, no new head lease has been entered into by the first respondent and the owner of the Premises.

[25] Accordingly, with reference to the *Hillock* ratio, it is not *contra* good faith for the applicant to challenge the first respondent's possessory rights after August 2011, as the parties from the outset explicitly agreed that the first respondent's possessory rights regarding the Premises would expire in August 2011.

[26] Given the particular facts *in casu*, the *ratio* for application of the general contractual principle falls away, and accordingly it cannot find application.

[27] We submit that the Court should engage with the actual facts of this matter – in particular that the parties from the outset explicitly agreed that the first respondent's possessory rights regarding the Premises would expire in August 2011.

[28] Accordingly, the first respondent has no *locus standi* or right to evict the applicant.

ISSUE 2: THE APPLICANT'S ENRICHMENT LIEN

[29] As mentioned in the Introduction *supra*, we submit that the applicant has a real right in the premises in the form of an enrichment lien. In the following, we first analyse the relevant legislative framework for the petroleum industry. We then move our focus to the contract and submit that a specific clause that excludes the applicant from claiming compensation for loss of his business due to cancellation of the contract is contrary to the legislation and hence invalid. This opens the door to the third stage of our analysis, which deals with unjust enrichment.

Petroleum Products Amendment Act

[30] The Petroleum Products Amendment Act, Act 58 of 2003 ('the Act'), which came into operation on 17 March 2006, states that it aims to, *inter alia*, promote the transformation of the South African petroleum and liquid fuels industry. The relevant provisions of the Act reads as follows:

> **2A** (1) A person may not—
>
> […]
>
> (b) wholesale prescribed petroleum products without an applicable wholesale licence;
>
> […]
>
> (d) retail prescribed petroleum products without an applicable retail licence,
>
> issued by the Controller of Petroleum Products.
>
> […]
>
> (4) Any person who has to apply for a licence in terms of subsection (1) must—
>
> […]

(c) in the case of retail or wholesale licences be the owner of the business concerned;[28]

[…]

(5) No person may make use of a business practice, method of trading, agreement, arrangement, scheme or understanding which is aimed at or would result in—

(a) a licensed wholesaler holding a retail licence except for training purposes as prescribed, but excludes wholesalers and retailers of liquefied petroleum gas and paraffin.

[…]

2B (2) In considering the issuing of any licences in terms of this Act, the Controller of Petroleum Products shall give effect to the provisions of section 2C and the following objectives:

[…]

(c) the creation of employment opportunities and the development of small businesses in the petroleum sector;

[…]

2C (1) In considering licence applications in terms of this Act, the Controller of Petroleum Products shall—

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[28] It is relevant to note that section 2A(4)(c) was amended by the Petroleum Products Amendment Act, Act 2 of 2005, which deleted the word 'entity' after 'business', making it clear that the petroleum products retail business need not be moulded in the form of a legal entity.

(a) promote the advancement of historically disadvantaged South Africans; and

(b) give effect to the Charter.

[31] The Act draws a sharp line between wholesalers and retailers of petroleum products. It is further clear in its intention to exclude wholesalers from acting in the retail space.[29]

[32] We submit that the legislature's intention to create a 'wall of separation' between wholesalers and retailers of petroleum products is determinative of this (and similar) cases. However, the way in which the Act is determinative is *not* located in a purported change to the common law, but in that contracts between wholesalers (that effectively act as franchisors[30]) and retailers must conform to the letter and spirit of the Act – and that any contractual clause that is contrary to the Act must be declared unlawful and invalid.

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29 s2A(5)(a).

30 See: *Engen Petroleum Limited v Rasebotsa t/a Everon Filling Station* (24051/2014) [2015] ZAGPPHC 284 (6 May 2015) [26]. The Court describes the retailer as a 'franchisee' of the wholesaler.

The contract

An unlawful contractual provision is invalid

[33] Clause 41 of Schedule 2 of the contract reads as follows:

> 41.1 Where the Dealer's tenure is prematurely terminated by the Company in terms of this Agreement, for whatever reason, the Dealer shall not have the right to any compensation in respect of his loss of the Business. The Company shall have the right to appoint a new dealer, and the Dealer shall be entitled to negotiate with such new-dealer the terms or any take-over of stock and/or equipment belonging to the Dealer on the Premises; alternatively the Dealer shall have the right to remove such stock or equipment owned by itself. [Our emphasis.]
>
> 41.2 Should the Company advise the Dealer that it does not intend offering it a new lease in terms of sub-clause 2.2 of the First Part, the Dealer shall be entitled to attempt to sell the Business during the remaining period of the lease, and the Company shall not unreasonably withhold its consent to such sale. Should the Dealer not have sold the Business prior to the expiry of the lease, the provisions of sub-clause 41.1 of this Schedule 2 shall apply.

[34] The effect of this clause is that, if any of the conditions in the two sub-clauses are met (premature termination by the wholesaler, or inability of the

retailer to sell the business prior to the expiry of the lease) the retail business and all the goodwill in it that was generated by the retailer are transferred to the wholesaler *qua* sub-lessor/licensor/lender without any compensation to the retailer *qua* sub-lessee/licensee/borrower.

[35] This creates a situation where a retailer holds a retail licence not (only) for his or her own benefit, but *effectively holds the licence on behalf of the wholesaler*. This situation is clearly *contra* the letter and spirit of the Act.

[36] Accordingly, to the extent that clause 41 of Schedule 2 of the contract excludes the right of retailers to compensation for the loss of the retail business, clause 41 is unlawful and hence invalid.

An additional ground: Contra proferentem

[37] We submit that the same outcome is reached by simply applying the *contra proferentem* rule.

[38] The contract is based on a standard contractual template of the first respondent. Accordingly, should there be any ambiguity in the contract, the

preferred meaning should be the one that benefits the interests of the applicant.

[39] We submit that there is indeed ambiguity in the contract: Clause 39 of Schedule 2 of the contract reads as follows:

> Without limiting the scope of, and subject to the provisions of, sub-clause 35.2 of this Schedule 2, nothing contained in clauses 34 to 41 (both inclusive) of this Schedule 2 shall detract from any right of either of the parties to claim damages from the other as a result of any breach of this Agreement, or to exercise any other right or remedy it may have in terms of this Agreement, or in law, or otherwise. [Our emphasis.]

[40] While clause 41 provides that the applicant shall not have the right to any compensation in respect of his loss of the retail business, clause 39 effectively nullifies this limitation on the rights of the applicant by providing that *nothing* contained in clause 41 (*inter alia*) *shall detract* from the applicant's right to exercise any right or remedy it may have in law, etc.

[41] To the degree that there is a conflict between clauses 41 and 39, the interpretation that is most beneficial to the applicant should be followed, namely that the applicant does indeed have the right to compensation for the loss of his or her retail business.

Unjustified enrichment

[42] As submitted *supra*, the applicant has contributed to the goodwill of the retail business.[31]

[43] Upon cancellation of the contact, the retail business contractually transfers to the first respondent. Although the first respondent may not legally operate the retail business itself, it can in principle enter into an agreement with a third party (a new retailer) to operate the retail business – an agreement from which the first respondent will earn an income in the form of, *inter alia*, an upfront 'licence fee',[32] exclusive supply (sale) of automotive fuel to the retailer,[33] a fixed-amount rental plus a turnover-determined rental,[34] etc.

[44] The legal question is therefore whether the goodwill that the applicant contributed to the retail business constitutes unjustified enrichment. In the following, we analyse each of the criteria for unjustified enrichment.

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31 [17]–[19] *supra.*

32 Schedule 2 of the contract, clause 2.

33 *Ibid*, clauses 4–5.

34 Schedule 3 of the contract.

Enrichment

[45] Goodwill is an intellectual property asset, and contributes to the value of a business. As already submitted,[35] the applicant valued the goodwill of his business at the premises at R2 million. This is the amount that the retailers in the application under CCT 134/13 believe that the applicant's business would fetch on the open market and what they might pay for such a business.

[46] Accordingly, should the first respondent appoint a new retailer, the first respondent would be able to ask R2 million for the goodwill of the business, whether as part of a sale of the business, an up-front licence fee, amortised over a number of months as part of a fixed lease tariff, or structured in any other way.

[47] Accordingly, the first respondent has been enriched to the value of R2 million.

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[35] [19] *supra*.

Impoverishment

[48] Goodwill results from the complex interaction and synergetic effect of a number of entrepreneurial components that are involved in the functioning of a business.[36] We therefore submit that a traditional approach of attempting to place a monetary value on out-of-pocket 'expenses' that contributed towards goodwill is accordingly not applicable.

[49] Furthermore, we submit that goodwill *qua* subject-matter of enrichment does not lend itself to the traditional rigid classification as either 'necessary' or 'useful'. Goodwill is to a business as the rule of law is to the Court – it is *essential*. However, an entrepreneur would typically always strive to perpetually *increase* – and not merely preserve – goodwill. We submit that the traditional classifications in our common law ('necessary' or 'useful') was developed as tools to assist the Courts to reach equitable results; however, when dealing with the novel concept of goodwill as subject-matter of enrichment, these common law tools offer little assistance and can only lead to an exercise in artificial classification. Instead, we submit that the Court be guided by the general principle of equity that underlies all enrichment law.

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[36] See: Van der Merwe *op cit* note 20 *supra*.

[50] Applied *in casu*, we submit as follows: Had the applicant been afforded the opportunity, it – rather than the first respondent – could have sold the retail business on the open market, with the goodwill component of the business fetching R2 million. This is the only reasonable and realistic way to value the entrepreneurial activity that resulted in the goodwill.

[51] Accordingly, the applicant has been impoverished to the value of R2 million.

Enrichment at the expense of the applicant

[52] The enrichment of the first respondent is clearly at the expense of the applicant.

Sine causa

[53] There is no valid *causa* for the enrichment.

[54] The contract is completely silent on the issue of goodwill and does not mention it once.

[55] Clause 7.1 of the First Part of the contract deals with alterations to the premises and reads as follows:

> 7.1. The Dealer shall not make any alteration or addition to the Premises, whether structural or otherwise, without the prior written consent of the Company. Should the Company grant such consent, the Dealer shall not be entitled to any compensation whatsoever for any such alteration or addition, regardless of the reason therefore, and shall, if so required by the Company upon termination of this Agreement, forthwith remove such alterations or addition and reinstate the Premises to their previous condition, at the Dealer's own cost.

[56] We submit that this clause clearly only contemplates *tangible* alterations to the premises, and not intangible improvements such as the generation of goodwill. To illustrate: goodwill that accrues to the retail business and indirectly to the premises cannot simply be 'removed' from the premises upon request by the first respondent. Moreover, it would be absurd to require the applicant to first obtain the first respondent's written permission before starting to generate goodwill. The generation of goodwill is inherent to any

entrepreneurial business activity,[37] including the running of a petroleum products retail business.

Conclusion on unjustified enrichment; retention right

[57] All the general requirements for enrichment liability being present, unjustified enrichment is established.[38]

[58] Accordingly, the applicant is entitled to exercise an enrichment lien over the retail business and the premises (to which the retail business is inextricably linked).

[59] An enrichment lien is a real right and enforceable against the whole world.[39]

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37 See: Van der Merwe *op cit* note 20 *supra*.

38 *McCarthy Retail Ltd v Shortdistance Carriers CC* [2001] 3 All SA 236 (A) [25].

39 *Goudini Chrome (Pty) Ltd v MCC Contract (Pty) Ltd* 1993 (1) SA 77 (A) 85.

Postscript on unjustified enrichment

[60] The Court is respectfully referred to the recent judgement of the Court of Appeal of British Columbia in *Haigh v Kent*.[40] In this case, Mr Haigh over a period of twenty years contributed to a resort business that was operated from the Kents' land. During this time, Mr Haigh lived on the land for free, and was not fully paid for his services. The trial judge held that Mr Haigh contributed to the business in various ways, *inter alia* by generating *goodwill*.[41] The trial judge further held that the business and the land on which it was operated are intertwined as a matter of objective fact.[42] Finally, the trial judge held that Mr Haigh unjustly enriched the Kents and that a 25% constructive trust in the land, rather than a monetary award, was appropriate.[43] Both cross-appeals against the judgement *a quo* were dismissed.[44] We submit that the principles underlying this judgement can find fruitful application *in casu*.

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40 *Haigh v Kent* 2013 BCCA 380.

41 *Ibid* [23].

42 *Ibid* [40].

43 *Ibid* [1]–[8].

44 *Ibid* [69].

LEAVE TO APPEAL

[61] Regarding the applicants' application for leave to appeal, the following considerations are relevant: First, given our submissions on the merits of the case above, we submit that the appeal has a strong chance of success. Secondly, the proper interpretation of the Act – in particular with regard to the degree to which wholesalers (such as the first respondent) can be involved in the business of retailers (such as the applicant) – has been the subject of litigation in the lower courts.[45] As such, we submit that the authoritative interpretation by this Court would enhance legal certainty in this regard, which is in the public interest.

[62] While the Act aims to promote transformation through, *inter alia*, prohibiting wholesalers from entering into schemes that would have the effect of the wholesaler *de facto* being a holder of a retail licence, we submit that the first respondent (*qua* wholesaler) is engaging in exactly such a scheme through the non-compensation provision of clause 41 of Schedule 2 of the contract. We

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[45] For instance: *Engen Petroleum and Gundu Services Station* (16333/2012) ZAGPJHC; *Shell South Africa Marketing (Pty) Ltd v Exclusive Access Trading 431 (Pty) Ltd* (5434/2014) ZAGPJHC.

respectfully refer the Court to our analysis of this offending clause.[46] Such non-compensation provisions in wholesaler–retailer agreements in the petroleum industry are matters of law that are of general public interest.

CONDONATION FOR LATE FILING OF THE STATEMENT OF FACTS

[63] The applicant respectfully requests the Court to condone the late filing of the documents[47] in terms of Direction 2(a) of the Directions of the Court dated 25 March 2015.[48] The applicant was required to file the documents by Friday, 29 May 2015, but only served said documents on Monday, 1 June 2015.

[64] We respectfully refer the Court to the reasons for the late delivery, as set out in detail in the applicant's condonation application.

[65] We submit that the first respondent is not prejudiced by the applicant's late filing. The first respondent has in fact filed its statement of facts, and there

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46 [30]–[36] *supra.*

47 Such documents are the statement of facts, the index and the portions of the record relevant to the impugned findings (the 'documents').

48 Condonation application, notice of motion, pp1–3.

can be no allegation that the late delivery of the documents by the applicant prejudiced or delayed the first respondent at all.

[66] Accordingly, we submit that the applicant has made out a proper case for the condonation sought, and respectfully request the court to condone the late filing of the documents as sought by the applicant.

CONCLUSION

[67] In these heads of argument, we make two main submissions:

a. First, that the first respondent lacks *locus standi* and does not have the right to evict the applicant.

b. Secondly, that the applicant has an enrichment lien over the retail business and the premises.

[68] In our analysis of the relevant legislation, we point out that the legislature clearly intended to protect petroleum product retailers – who are supposed to be small businesses and/or historically disadvantaged South Africans – from *de facto* control by petroleum product wholesalers; the intention of the legislature is that retailers should *not* be mere agents or

employees of the wholesalers. However, these legislative intentions are critically undermined when wholesalers act as lessors/licensors/lenders vis-à-vis retailers as lessees/licensees/borrowers that can be deprived of their retail businesses by the wholesalers *without compensation*. This effectively renders retailers nothing more than agents or employees of the wholesaler. We respectfully request the Court to set a precedent that such non-compensation clauses are not legally tenable in the petroleum industry.

[69] Our submission that goodwill can be the subject-matter of enrichment is novel in the South African context, but solidly grounded in case law that recognises it as a valuable asset and as intellectual property that falls within the ambit of section 25(1) of the Constitution. The application to the law of enrichment is therefore a logical next step that is supported by relevant foreign case law.

[70] In the premises, we respectfully submit that a proper case has been made for the relief sought in the applicant's notice of motion.

[71] Lastly, a note regarding costs. Clause 28.2 of Schedule 2 of the contract provides as follows:

28.2 Should any award of costs be made by any court against either party with respect to any matter arising out of or in connection with this Agreement, subject to any contrary direction which such court shall give, such costs shall be taxed and paid on the scale as between attorney and own client.

[72] We submit that this clause is applicable, given that the first respondent's application to evict the applicant clearly arises out of the contract. Accordingly, we respectfully request the cost order in this Court to include the cost of two counsel on a scale of attorney and client.

Christopher Woodrow Donrich Jordaan

Co-counsel for the applicant

TABLE OF AUTHORITIES

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3 *Engen Petroleum Limited v Rasebotsa t/a Everon Filling Station* (24051/2014) [2015] ZAGPPHC 284 (6 May 2015)

4 *Goudini Chrome (Pty) Ltd v MCC Contract (Pty) Ltd* 1993 (1) SA 77 (A)

5 *Hillock & Another v Hilsage Investments (Pty) Ltd* 1975 (1) SA 508 (A)

6 *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* 2006 (1) SA 144 (CC)

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FIRST RESPONDENT'S HEADS OF ARGUMENT

TABLE OF CONTENTS

INTRODUCTION

1. The Applicant was a retailer of petroleum products. It concluded a written lease with the first respondent ("Engen") in September 2005 to conduct a service station business on premises which Engen let to it ("the premises"). That written lease was to terminate in March 2008 or on one month's written notice.[1]

2. The Applicant remained in occupation of the premises after March 2008. The written lease was cancelled on or about 10 July 2009 but the Applicant remained in occupation of the premises, using Engen's underground tanks and other fuel dispensing equipment, and trading under the brand name and signage of Engen without any permission to do so.

3. By the time that Engen brought the current eviction application

    3.1. it was common cause that the Applicant had no common law right to occupy the premises because the original written lease and all subsequent lease arrangements alleged by the Applicant had been terminated,[2] and

    3.2. the Applicant had been in occupation of the premises using Engen's equipment and trading in products other than Engen products under the brand name and signage of Engen for a period of 4 to 5 years without paying any rental to Engen.[3]

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1 Joint practice note p 149 paras 15-16

2 Joint practice note pp 150 para 20.

3 High Court Judgment p 166 lines 6-9. (See also Joint practice note pp 149-151 paras 16-20; and Founding Affidavit p 54 paras 57 and 59 and Answering Affidavit p 70 para 23).

4. In the High Court, counsel for the parties concluded a joint practice note which narrowed the issues and set out the facts on the basis of which these issues were to be determined. In terms of the practice note, the only issues which the Court was called upon to consider were:

   4.1. *"whether the Applicant* [ie Engen] *has locus standi (at common law) to move for an eviction order*"; and

   4.2. *"whether the Respondent* [ie the Applicant in this Court] *may rely on "possessionary rights" arising from its fuel retail licence as read with the Petroleum Products Act as amended"*[4]

5. In relation to the second issue, the Applicant relied exclusively on a legal argument which it had advanced in the papers in an unsuccessful application for direct access to this Court in Case no CCT 134/13 and which concerned possessory rights allegedly flowing from the Applicant's retail licence. It was expressly agreed in the joint practice note that the contents of the application in Case no CCT 134/13 were to be treated only as argument.[5]

6. The High Court rejected the Applicant's defence based on the argument it had advanced in Case no CCT 134/13 and granted Engen an order evicting the

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[4] High Court Judgment p 156 lines 17-19. Joint Practice Note pp 146-7 paras 6 and 8 to 8.2.

[5] Joint Practice Note p 152 para 27 read with fn 21 at p 153. This agreement was important for Engen because, in its absence, Engen would have applied to strike out the incorporation of application CCT 134/13 on the grounds that it had been irregularly incorporated into the answering affidavit through the irregular incorporation of an affidavit in a postponement application which, in turn, had irregularly purported to incorporate the entire contents of the application in CCT 134/13. See Answering Affidavit p 70 para 24 read with Replying Affidavit pp 77-78 paras 19-21 and p 84 para 46.

Applicant from the premises.[6] Leave to appeal was refused both by the High Court and the Supreme Court of Appeal and the sheriff executed the writ of ejectment on 21 November 2014.[7]

7. The Applicant then applied for leave to appeal to this Court. It did so solely on the basis of the legal argument that it had set out in Case no CCT 134/13.[8]

8. Once the Applicant's application for leave to appeal was set down for hearing by this Court, the Applicant sought to change the basis of the case it had advanced in the High Court and in the Application for leave to appeal. Thus

   8.1. In its statement of facts served out of the time allowed in terms of the directions of this Court it impermissibly sought to expand the facts beyond the confines of the joint practice note that had served to limit the facts considered by the High Court,[9] and

   8.2. In its heads of argument, it appears to have all but abandoned the primary argument it advanced before the High Court and the only argument on which it sought leave to appeal to this Court, and instead to have premised its case on an argument about an alleged lien over the commercial premises through the enhancement of the goodwill of the business that it had operated from the premises.[10]

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6 High Court Judgment p 166 lines 15-18.

7 Application for Leave to Appeal Founding Affidavit p 6 paras 5.2 – 5.3.

8 See Application for Lleave to Appeal Founding Affidavit pp 8-18.

9 See Applicant's statement of facts pp 10-14 and Applicant's extracts from the record pp 24-134 read with Respondent's statement of facts pp 143-144 paras 4 – 4.5.

10 Applicant's heads of argument pp 20 – 26 paras 42 - 60

8.3. The new argument advanced in the heads of argument is, moreover, was an argument that has no basis whatsoever in the papers - the only suggestion of a lien raised by the Applicant on the papers:[11]

8.3.1. concerned an alleged lien over Engen's **movable** property (ie its tanks and equipment), not over the premises themselves, and

8.3.2. was not linked to goodwill in any way, but rather to a vague claim of having spent unparticularised costs on the care, custody and preservation of Engen's movable property.

8.4. It is also an argument that has no prospects whatsoever, *inter alia* because it was raised for the first time **after** the Applicant had been ejected from the premises[12] and accordingly at a time when the Applicant no longer had any possession upon which to found a lien.[13]

9. In these heads of argument

9.1. First we set out the material facts.

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11 Founding affidavit pp 62-3 para 10

12 The lien was raised for the first time in heads of argument filed on 23 June 2015. On the applicant's own version, the sheriff arrived at the property to execute the writ of ejectment on 21 November 2014. If there had been any suggestion of a lien in the application for leave to appeal, Engen would have produced evidence (including the return of service of the writ of execution) to show that the applicant was ejected on 21 November 2014 and no longer had any possession upon which to found a lien.

13 *Marinus v Taljaard* 1952 (1) SA 49 (C) at 54A-E; Cape Tex Engineering Works (Pty) Ltd v SAB Lines (Pty) Ltd 1968 (2) SA 528 (C) at 531A

9.2. Then we address the interests of justice against granting leave to appeal in the light of the Applicant's unlawful occupation of the premises and unlawful use of Engen's equipment and trademarks, its conduct of the litigation before the High Court and this Court, and its feeble prospects on the merits.

9.3. We consider the only two substantive issues that this case actually raises:

9.3.1. the locus standi of Engen to apply for the ejectment of the Applicant without proving ownership of the premises or rights of occupation over the premises under an extant lease, and

9.3.2. the possessory rights asserted by the Applicant on the basis of its retail licence (to the limited extent that the Applicant still seeks to place any reliance on such alleged rights).

9.4. Finally we address the belatedly raised and not pleaded defence of an enrichment lien.

THE FACTS

10. From the joint practice note and the judgment, the material facts can be summarised as follows:

10.1. Engen applied to evict the Applicant from the premises which it had let to the Applicant.

10.2. Engen is a licensed wholesaler and distributor of petroleum products to its nationwide network of independently operated and owned dealers, who operate *"Engen"* branded service stations. These dealers in turn sell the said products to the public through their *"Engen"* branded service stations;[14]

10.3. These service stations are, by virtue of their get-up, signage, marks and colours, unmistakably part of the Engen's network and are recognised and identified by the public as such;[15]

10.4. Engen generally installs its own underground tanks and pumps and other equipment necessary to store and dispense petroleum products at a service station. It invests considerable amounts of money in developing a service station.[16] It earns a return on its investment at a service station by supplying its network of service stations with all their petroleum product requirements on which sales it makes a profit;[17]

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14 Joint practice note p 147 para 9

15 Joint practice note p 147 para 10

16 The allegation in the founding papers is that it costs on average R10 000 000 to build a service station (Founding affidavit p 29 para 16). There is nothing in the answering affidavit to raise a proper dispute in relation to this allegation. See Answering Affidavit p 16 para 11. So even if the parties are not to be confined to the Joint practice note, this allegation would have to be accepted.

17 Joint practice note p 148 para 11

10.5. Engen consequently enters into expansive written agreements with its dealers[18];

10.6. There are several possible arrangements subject to which Engen contracts with its dealers. One such arrangement (as was the case in the present matter) is that Engen hires a property from the registered owner of the property and in turn, sublets the property (having erected an Engen Service Station on it) to the dealer. The dealer then conducts the Engen branded service station at the property, in terms of and subject to the provisions of an agreement of lease and operation of service station (generally known as an operating lease);[19]

10.7. On or about 5 September 2005, Engen and Applicant concluded such an operating lease in respect of the premises which are situate at corner Soweto Highway and Mooki Street, Orlando East, Soweto.[20] It was headed Agreement of Lease and Operation of Service Station;[21]

10.8. The lease commenced on 1 September 2005 and was to to terminate in March 2008 or on one month's written notice;[22]

10.9. Pursuant to this lease, the First Respondent granted the Appellant occupation of the premises, including the Engen branded service

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18 Joint practice note p 148 para 12

19 Joint practice note p 148 para 13

20 Joint practice note p 150 para 17

21 Joint practice note p 149 para 14

22 Joint practice note p 149 para 15

station situated thereat, and the Appellant commenced operating the service station, using Engen's equipment and Engen's signage under its trademarks[23];

10.10. The written lease was cancelled on or about 10 July 2009;[24]

10.11. However, the Applicant remained in occupation of the premises and when the eviction application was brought it was common cause that the Applicant had been continuously in occupation of the premises since September 2005; [25]

10.12. At the time that the eviction application was brought it was common cause that the Applicant no longer had any common law right to be in occupation – because both the original written lease agreement and any subsequent lease arrangements had been validly cancelled;[26]

10.13. Moreover, at the time that the eviction application was brought, the Applicant had, for a period of four to five years, occupied the premises conducting the "Engen" branded service station business with Engen's equipment for commercial gain without paying any rental to Engen, the property owner or anyone else; [27]

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23 Joint practice note p 149 para 16

24 Joint practice note p 150 para 19

25 Joint practice note p 150 para 20

26 Joint practice note p 150 para 20

27 Judgment p 166 lines 6 – 14.

10.14. Its own counsel, described it as having been *"squatting on the premises"*;[28]

10.15. The Applicant sought to resist Engen's application for its eviction by challenging Engen's *locus standi* and by asserting possessory rights based on its status as a licensed retailer for the site. In regard to the latter it contended that

10.15.1. It is a duly licensed retailer of petroleum products;[29]

10.15.2. Its licence was issued to conduct the sale of petroleum products at the premises;[30] and

10.15.3. Its retail licence coupled with its possession of the site were sufficient to defeat Engen's eviction suit[31].

THE INTERESTS OF JUSTICE

Introduction

11. It is trite that the Applicant is not entitled to leave to appeal unless it can persuade this Court that it is in the interests of justice for leave to appeal to be granted.[32]

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28 Judgment p 166 lines 11.

29 Joint practice note p 151 para 23

30 Joint practice note p 151 para 24

31 Joint practice note p 151 para 25

32 *Fraser v Naude and Others* 1999 (1) SA 1 (CC) at para 7

12. Engen submits that there are three reasons why it is not in the interests of justice for the Applicant to be granted leave to appeal:

12.1. First, the Applicant has no reasonable prospects of success on the merits;

12.2. Second, the Applicant has conducted itself in a flagrantly unlawful manner in relation to its occupation of the premises and is accordingly not entitled to the exercise of any discretion in its favour; and

12.3. Third, the Applicant has conducted this litigation in a manner that has no regard to the agreements reached by its legal representatives in the High Court and which now requires this Court to sit as court of first and last instance

12.3.1. over issues which were not considered by the High Court,

12.3.2. on the basis of facts which, by agreement between the parties, the High Court was expressly requested not to consider, and

12.3.3. in relation to issues which were not ever raised on the pleadings.

No Prospects of Success

13. The prospects of success are addressed below. For present purposes we merely submit that the Applicant has no reasonable prospects on the merits.

The Conduct of the Applicant

14. In relation to the conduct of the Applicant we submit that the interests of justice enjoin this Court not to come to the assistance of an applicant who, on its own version, has conducted its affairs in a brazenly unlawful fashion. As set out above, it is common cause that when Engen brought the current eviction application:

    14.1. the Applicant had no common law right to occupy the premises because the original written lease and all subsequent lease arrangements alleged by the Applicant had been terminated,[33] and

    14.2. the Applicant had been in occupation of the premises, using Engen's equipment and trading in products other than Engen products under the brand name and signage of Engen for a period of 4 to 5 years without paying any rental to Engen.[34]

15. The Applicant is a commercial company. It did not in its papers suggest any plausible basis on which it might lawfully be entitled, without paying any rental, to occupy commercial premises owned by a third party and to trade from those premises under the brand name and signage of Engen for more than four years. It did not make any payments to Engen or the landowner for its lengthy unauthorised occupation of the premises for its private commercial gain.[35] For years on end, in the words of its own counsel, it remained

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33 Joint practice note pp 150 para 20.

34 Judgment a quo p 166 lines 6-9. (See also Joint practice note pp 149-151 paras 16-20; and Founding Affidavit p 54 paras 57 and 59 and Answering Affidavit p 70 para 23).

35 Judgment p 166 lines 6 – 14.

"squatting on the premises"[36] for commercial gain and at Engen's risk regarding environmental legislation and the like. It resisted ejectment and continued to trade from the premises by raising a spurious claim to do so based on its retail licence.

16. Now that it has finally had to defend that spurious claim before this Court, it has effectively abandoned the claim and raised an entirely new claim based on an enrichment lien that was not even asserted in the High Court. Even it had an enrichment lien (which, as we show below, it did not) the enrichment lien would not have entitled it to trade from the premises, still less to do so under Engen's signage and using Engen's equipment, because a lien holder may not make use of the property which s/he holds as security.[37] So, on its own version, it has acted unlawfully at the expense of Engen's rights.

17. We submit that this Court should not countenance lawless and opportunistic behaviour of this nature and that, on this basis alone, the application for leave to appeal should be refused.

The Conduct of the Litigation

18. Although the facts relating to the conduct of the litigation have been set out above, they bear repeating.

19. In the High Court, counsel for the parties concluded a joint practice note which narrowed the issues and set out the facts on the basis of which these issues

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36 Judgment p 166 lines 11.

37 *Rekdurum (Pty) Ltd v Weider Gym Athlone (Pty) Ltd T/a Weider Health & Fitness Centre* 1997 (1) SA 646 (C)

were to be determined. In terms of the practice note, the only issues which the Court was called upon to consider were:

19.1. *"whether the Applicant* [ie Engen] *has locus standi (at common law) to move for an eviction order*"; and

19.2. *"whether the Respondent* [ie the Applicant in this Court] *may rely on "possessionary rights" arising from its fuel retail license as read with the Petroleum Products Act as amended"*[38]

20. We submit that the terms of the joint practice note are clear and that by agreeing to the joint practice note, the Applicant waived any right to rely on

20.1. any defences outside the two issues identified in the joint practice note, and

20.2. any factual allegations relevant to those issues other than facts that were contained in the joint practice note or referred to in the footnotes cited in the joint practice note.

21. In this regard, we emphasize the following:[39]

21.1. The joint practice note was agreed by counsel for both parties at the High Court hearing and was handed in above both of their names.[40]

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38 High Court Judgment p 156 lines 17-19. Joint Practice Note pp 146-7 paras 6 and 8 to 8.2.

39 See Engen statement of fact pp 143-4 paras 4 – 4.5

21.2. In relation to the status of the facts agreed in the joint practice note and the relevance of the original application papers, the joint practice note stated the following:

> *"1 This joint practice note will provide the basis for adjudicating the matter. ... The joint practice note is submitted by agreement between the parties and replaces the paginated and indexed files currently before Court.*
>
> *2. Although those files will be cross-referenced, it is not necessary to read them prior to the hearing.*
>
> *…*
>
> *5. The parties have compiled an agreed set of facts extracted from File 1. These will again be cross-referenced but it is not necessary to read File 1 in any detail.*
>
> *6. The issues for determination have also been agreed and these may be adjudicated with reference to the attached common cause facts."*[41]

21.3. After setting out the common cause facts in paragraphs 9 to 25, the practice note stated in paragraph 26:

> *"Against this factual background, the arguments of the parties may be assessed."*[42]

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40 High Court Judgment p 156 lines 3-5; Joint Practice Note p 154

41 Joint practice note pp145-146

42 Joint practice note p 152

21.4. It was not suggested at the hearing of the application that the High Court should have regard to any facts (as opposed to legal argument) outside the facts contained in the joint practice note.[43]

21.5. It is clear from its judgment, that the High Court confined itself to the facts in the joint practice note. [44]

22. Even if the joint practice note did not amount to a formal waiver (although we submit it clearly did) of the Applicant's rights to rely on issues and facts other than those covered by the joint practice note, it was clearly understood in those terms by the High Court and the judgment confined itself accordingly.[45]

23. Nowhere in the application for leave to appeal did the Applicant suggest that the High Court misdirected itself by confining itself to the facts and issues set out in the joint practice note.

24. Accordingly, if the Applicant is now going to be allowed to expand the issues and factual allegations beyond those set out in the joint practice note, this Court will be required to sit as court of first and last instance in relation to such issues. This Court has repeatedly emphasized that this is not in the interests of justice and that litigants should not invite it to consider arguments that were not advanced *a quo.*[46]

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43 Engen statement of facts p 144 para 4.4

44 Judgment p 156 line 2 – p 159 line 20 and p 162 line 17 – p 163 line 4.

45 Judgment p 156 line 2 – p 159 line 20 and p 162 line 17 – p 163 line 4.

46 *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) at para 64; *Satchwell v President of the Republic of South Africa and Another* 2003 (4) SA 266 (CC) at para 6; *Dormehl v Minister of Justice and Others* 2000 (2) SA 987 (CC) at para 5; *Christian*

25. But that is precisely what the Applicant invites this Court to do because while it persists in its challenge to Engen's *locus standi*, it now appears to have abandoned the defence which was the only other defence it advanced before the High Court and the only other defence upon which it sought leave to appeal – namely the contention articulated in Case CCT 134/2013 that its retail licence affords it rights of possession that entitle it to resist an ejectment application.

26. Instead, it now raises a new defence based on an alleged enrichment lien. Apart from not having been raised in the application for leave to appeal, this defence is not a defence that was identified in the issues noted on the joint practice note. Nor is the factual substratum for this defence to be found anywhere in the joint practice note, or even in the affidavits that served before the High Court. The facts now relied upon by the Applicant in this regard have been assembled exclusively on the basis of stray allegations drawn impermissibly from the application papers in Case no CCT134/2013.[47]

27. This mining of the application papers in Case no CCT134/2013 for allegations to support a new enrichment lien defence was wholly inconsistent with the agreement in the joint practice note.[48]

Education South Africa v Minister of Education 1999 (2) SA 83 (CC) at para 12; *Bruce and Another v Fleecytex Johannesburg CC and Others* 1998 (2) SA 1143 (CC) at para 8.

47 See Applicant's heads of argument pp 9-10 para 18 - 20 and p 21 paras 45-47

48 Apart from the fact that the joint practice note identified the issues to be determined by the High Court in terms which did not include the new enrichment lien defence asserted by the Applicant, it expressly requested the High Court to treat the application papers in Case no CCT134/2013 as comprising **only argument.** So the High Court was not to have recourse to allegations of fact in the application papers in Case no CCT13/2014. See Joint Practice Note p 152 para 27 read with fn 21 at p 153. This agreement was important for Engen because, in its absence, Engen would have applied to strike out the application in CCT 134/2013 on the grounds that it had been irregularly incorporated into the answering affidavit through the irregular incorporation of an affidavit in a postponement application which, in turn, had irregularly purported to

28. So the defence now advanced as the centrepiece of the Applicant's case is one that was never considered by the High Court because the case before it was confined by the joint practice note to terms that did not permit of any enrichment lien defence.

29. It was also not a defence on which leave to appeal was sought by the Applicant.

30. In fact, the problem goes much further, because the enrichment lien defence now advanced by the Applicant was not a defence that was even pleaded before the High Court. As has been set out above, the only suggestion of a lien raised by the Applicant on its papers:[49]

    30.1. concerned an alleged lien over Engen's **movable** property, not over the premises themselves, and

    30.2. was not linked to goodwill in any way, but rather to a vague claim of having spent unparticularised costs on the care, custody and preservation of Engen's movable property.

31. This Court has repeatedly emphasized that issues brought to it on appeal must have been properly pleaded and that it cannot be expected to trawl through allegations in affidavits on the papers in the hope of finding a way to assist an applicant.[50] It would plainly not be in the interests of justice to allow

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incorporate the entire contents of the application in CCT 134/2013. See Answering Affidavit p 70 para 24 read with Replying Affidavit pp 77-78 paras 19-21 and p 84 para 46.

49 Founding affidavit pp 62-3 para 10

50 See for example *Minister of Local Govt, WC v Lagoonbay Lifestyle Estate (Pty) Ltd* 2014 (1) SA 521 (CC) at para 35; *Khumalo and Another v MEC for Education, KwaZulu-Natal* 2014 (5) SA 579 (CC) at paras 90-91.

the Applicant to subject this Court and Engen to the process of engaging with a defence that was never pleaded or pursued in the High Court.

32. The course of action adopted by the Applicant is not only inconvenient to this Court and Engen, it is highly prejudicial to Engen because:

32.1. As we point out below, even on its own terms, the enrichment lien contention now advanced by the Applicant does not make out a prima facie defence. However, because the enrichment lien defence was never pleaded in the High Court (or even in the application for leave to appeal), Engen was never given the opportunity to respond to it on the papers. So it is not possible for this Court to assess what may, or may not, have remained of this defence if it had been canvassed on the papers.

32.2. Quite apart from the merits (or lack thereof) in relation to the belatedly raised enrichment lien defence, by pursuing the course of action that it has pursued, the Applicant has deprived Engen of an important procedural right it would have had before the High Court to avoid any lien defence. In this regard, even if (in a properly pleaded case) the High Court may have considered that the Applicant was able to make out a defence based on an enrichment lien, it would always have been open to Engen to invite the High Court to put an end to the Applicant's unlawful occupation of the premises by

ordering its ejectment against a tender of security for any enrichment claim that the Applicant might prove.[51]

THE RIGHT TO EVICT AT COMMON LAW AND THE FAILURE OF THE LOCUS STANDI DEFENCE

33. It has long been settled law that when sued for ejectment at the termination of a lease, it does not avail the lessee to show that the lessor has no right to occupy the property.[52]

34. The logic underlying this principle is obvious:

34.1. One of the *naturalia* of the contract of lease is that the lessee is obliged to restore vacant possession of the let property to the lessor at the end of the lease.[53]

34.2. So a lessor has a contractual right to demand the ejectment of the lessee at the end of the contract of lease irrespective of whether or not the lessor has any real or personal rights that entitle it to occupy the property.

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51 *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA) at para 31; *Duncan v Roets* 1949 (1) SA 226 (T) at 229.

52 *Boompret Investments (Pty) Ltd v Paardekraal Concession Store (Pty) Ltd* 1990 (1) SA 387 (AD) at 341H. See also *Crause v Ryersbach* 1882 (1) SC, at 50; *Ebrahim v Pretoria Stadsraad* 1980 (4) SA 10 (T) at 14 A-D; *Loxton v Le Hanie* 1905 (22) SC 577; *Clark v Norse Mines Limited* 1910 TPD 512 at 520; *Kala Singh v Germiston Municipality* 1912 TPD at 155.

53 *Manjra v Desai* 1968 (2) SA 249 (N) at 255H

34.3. The position of a sublessor would be untenable if s/he could not eject his/her sublessee at the end of the contract of lease without showing title to the property:

34.3.1. S/he would be contractually bound to the head lessor to restore vacant possession of the property to him/her, but

34.3.2. S/he would be unable to remove a sub-lessee to facilitate compliance with this contractual obligation to the head lessor

34.3.3. S/he would accordingly be exposed to claims from the head lessor for contractual damages for holding over and other losses without any way of remedying the situation.

34.4. In the particular context of leases for service stations for the sale of petroleum products (which involve flammable products), the position of a sublessor would be aggravated because his/her lease with the head lessor will invariably oblige him/her to restore the property to its original state by removing all environmental risks created by the service station and its equipment. S/he will also have statutory duties under the Water Act 36 of 1998 and the National Environmental Management Act 107 of 1998 to prevent and remedy environmental risks but, on the Applicant's version, will have no readily available means of discharging these contractual and statutory obligations. Moreover, as potential sources of contamination and hazards, the installation, modification and

Decomissioning of underground storage tanks, pumps, dispensers and pipework at service stations are also subject to strict criteria imposed by South African National Standard.

34.5. In any event, it is trite under South African law that a lessor (like a seller) does not warrant title to the property which is the subject matter of the contract of lease.[54] All that the lessor is obliged to do is to secure undisturbed use and enjoyment of the property for the lessee. If s/he is able to do so, the lessee has no right to complain about his/her lack of title to the property.

35. At para 21 of its heads of argument the Applicant acknowledges the principle that a lessee sued for ejectment cannot question the title of the lessor by quoting the following from the *Boompret* judgment:

> *"It is also clear when sued for ejectment at the termination of a lease it does not avail the lessee to show that the lessor has no right to occupy the property*".[55]

36. The Applicant then attempts to question the applicability of this principle by suggesting that the rationale for the principle is inapplicable to the present case. It claims[56] that the rationale was set out as follows by the Appellate Division in the *Hillock v Hilsage* case[57]

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54 *Frye's (Pty) Ltd v Ries* 1957 (3) SA 575 (A) at 581

55 *Boompret Investments (Pty) Ltd & Another v Paardekraal Concession Store (Pty) Ltd* 1990(1) SA 347 (A) at 351 H-I

56 Applicant's heads of argument at pp 11-12 para 22

57 *Hillock v Hilsage Investments (Pty) Ltd* 1975 (1) SA 508 (A)

> *"It seems to me that the rule [that the lessee cannot dispute the lessor's title] may be based upon one or other of two very simple grounds. The first is, that the lessor having performed his part of the contract, and having placed the lessee in undisturbed possession of the property is entitled to claim that the lessee should also perform his part of the contract and should pay him the rent which he agreed to pay for the use and enjoyment of the premises. The second ground is, that the lessee having had the undisturbed enjoyment of the premises under the lessee, and having thus had all for which he contracted, it would be against good faith for him to set up the case that the lessor had no right to let him the property."*

It then contends that this rationale is inapplicable, in a case like the present where the original lease between the parties indicated that Engen's headlease with the landowner was to expire in 2011.[58]

37. The Applicant is wrong on several counts:

37.1. First, the passage quoted above is not from *Hillock v Hilsage* (which merely stated the rule without investigating its rationale at all)[59] but rather from *Clark v Nourse Mines*.[60]

37.2. Second, both *Clark v Nourse Mines* and *Hillock v Hilsage*, concerned cases of lessors suing for payments due under a lease.

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58 Applicant's heads of argument at p 12 para 23

59 *Hillock v Hilsage Investments (Pty) Ltd* 1975 (1) SA 508 (A) at 516E

60 1910 T.P.D. 512 at p 520 per Solomon J.

Neither of them concerned the case of a sub-lessor who was suing for ejectment after termination of a sub-lease where the obvious rationale for the rule has been set out above.

37.3. In any event, there is nothing inconsistent with the rationale in the passage quoted from *Clark v Nourse Mines* in applying the principle to a case where a sub-lessor who may no longer contractually be entitled, as against the owner of the property, to occupation of the property, sues to enforce his/her contractual right against the sub-lessee to be restored with vacant possession of the property.

37.4. Finally, we point out that the rationale is wholly consistent with the long established principle of the South African law of lease that a lessor does not warrant title to the property which is the subject matter of the contract of lease[61] - s/he merely undertakes to secure undisturbed use and enjoyment of the property for the lessee during the period of the lease.

38. It follows that there is no substance to the Applicant's challenge to the *locus standi* of Engen and that defence must be rejected.

THE DEFENCE BASED ON POSSESSORY RIGHTS ALLEGEDLY CREATED BY THE APPLICANT'S LICENCE

39. It appears from the heads of argument that this defence is no longer being advanced by the Applicant.

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61 *Frye's (Pty) Ltd v Ries* 1957 (3) SA 575 (A) at 581

40. In any event, the defence has no substance and has, to the best of our knowledge, been rejected in every other case in which it has been raised.[62]

41. The argument that a dealer's licence gives possessory rights over immovable property that entitle the resistance of ejectment at the instance of a lessor is untenable and misconceives the nature of a licence.

    41.1. At common law, there were no restrictions on the right to sell petroleum products.

    41.2. Prior to the 2003 Amendments to the Act, the Act itself did not impose any requirement of a licence to sell petroleum products or to develop a site for the retailing of petroleum products.

    41.3. The 2003 Amendments through the insertion of section 2A into the Act introduced prohibitions against wholesaling or retailing petroleum products without a wholesale or retail licence respectively and against holding or developing a site for the retailing petroleum products without a site licence.[63]

    41.4. Section 2A therefore introduced a prohibition which was subject to relaxation under licence. It did no more than that. In particular, there is nothing in section 2A that purports to vest a licensee with any proprietary rights over the property in respect of which s/he was

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62 See *Engen Petroleum Limited v Gundu Service Station CC and 2 Others*, Judgment of the High Court of South Africa, South Gauteng Division, case number 16333/12; *Blue Dot Properties (Pty) Limited v Engen Petroleum Limited and 4 Others*, judgment of the High Court of South Africa, Eastern Cape, Port Elizabeth, case number 2505/12; *Engen Petroleum Limited v Sagewise 1068 CC*, judgment of the South Gauteng High Court, case number 47215/12; *Shell South Africa Marketing (Pty) Ltd v Exclusive Access Trading 431 (Pty) Ltd* Judgment of the High Court of South Africa, South Gauteng Division, case number 5434/14.

63 Sections 2A(1)(b) to (d) of the Act.

granted a licence and it does not purport to interfere with the common law rights of the owner or lessor of that immovable property.

42. In this respect, the structure of the Act is similar to much other licensing legislation. By way of example, the Liquor Act[64] contains features very similar to the Act:

42.1. It imposes a general prohibition on the manufacture or distribution of liquor unless it is licensed under the Liquor Act itself.[65]

42.2. It distinguishes manufacturers from distributors and retail sellers.[66]

42.3. In a manner similar to that followed by the Act, the Liquor Act prohibits vertical integration and creates a hierarchical structure of licensed participants in the market being licensed manufacturers, licensed distributors and licensed retail sellers.

42.4. Yet it could never be contended that a liquor licence vests the licensee with possessionary rights in respect of any leased premises that are sufficient to resist an ejectment suit at the instance of his/her landlord when his/her lease over the licensed premises has come to an end.

43. A host of other Acts contain licensing provisions which effect a general prohibition of specified conduct subject to the exception provided by a duly

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64 Act 59 of 2003.

65 Section 4(2).

66 Section 4(6)(a).

issued license.[67] It has never been suggested that these licenses somehow create possessionary rights in respect of immovable property.

44. Quite apart from the absence of anything in the Act to suggest that a lessee is permitted to remain in occupation of premises let to it by a site licence holder after termination of the lease, there are strong reasons of policy why the Act would never have intended such an outcome:

44.1. First, an oil company that develops a site is subject to a strict regulatory regime to ensure that no pollution or other environmental harm is caused from the site. Thus it is subject to continuing obligations and potential liabilities under section 19 of the Water Act 36 of 1998 and section 28 of the National Environmental Management Act 107 of 1998. It would frustrate the performance of those obligations and create a risk if the oil company could not recover the site from a retail licence holder whose lease had expired;

44.2. Second, the Act recognises that one of the objects of the licensing regime is to facilitate *"an environment conducive to efficient and commercially justifiable investment"*.[68] It also includes transitional provisions to secure the position of parties like Engen who have developed sites based on leases from the owners of the sites.[69] As has been pointed out above, the development of sites costs millions of rands. It is manifestly inimical to the encouragement of such

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67 See for instance The Explosive's Act, 15 of 2003 and the Fire Arms Control Act, 60 of 2000.

68 Section 2B(2)(a).

69 Section 2D(2) and (4).

investment to allow a situation to arise like that which has arisen in the present case: Engen, the site licence holder, has been unable to evict the Applicant from the site after the Applicant's lease has expired and the Applicant has now traded under Engen's signage and using Engen's equipment for years without paying any rental to Engen.

THE ALLEGED ENRICHMENT LIEN

45. The primary objection to the Applicant's enrichment lien defence has been discussed above:

    45.1. This defence was not pleaded in the High Court proceedings or even in the applications for leave to appeal;

    45.2. It depends, moreover, on allegations of fact which were clearly not open to the Applicant to make, having regard to the provisions of the joint practice note; and

    45.3. In the circumstances, it would be unfair and prejudicial to Engen for this Court even to entertain this unpleaded and unsubstantiated defence.

46. We point out that even on its own terms, the alleged defence is unsustainable:

    46.1. First, on the facts as they appear in the application for leave to appeal and as they would have been conclusively proven had any enrichment lien been in issue, the sheriff executed the writ of

ejectment before any enrichment lien had been raised.[70] So the lien was asserted for the first time at a point when the Applicant had no possession of the premises upon which to base its alleged lien.[71]

46.2. Second, there is no precedent in South African law for treating goodwill attaching to a business as an asset in the estate of the owner of the property from which the business traded. On its own version, the case of the Applicant requires the recognition of a completely new species of enrichment for which there is no evidentiary basis in the papers.

46.3. Third, the alleged enrichment lien is manifestly inconsistent with the provisions of clause 41 of schedule 2 to the operating lease between the parties which are quoted at para 33 of the Applicant's heads of argument. As the Applicant recognises in its heads of argument, it can accordingly contend for its lien defence only if it proves that clause 41 was unlawful and invalid. There is, however, nothing unlawful or invalid about the clause which allows the dealer a right to sell its business if its lease is not going to be renewed but does not afford it any right of compensation if its lease is terminated for breach.

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70 The lien was raised for the first time in heads of argument filed on 23 June 2015. On the applicant's own version, the sheriff arrived at the property to execute the writ of ejectment on 21 November 2014. If there had been any suggestion of a lien in the application for leave to appeal, Engen would have produced evidence (including the return of service of the writ of execution) to show that the applicant was ejected on 21 November 2014 and no longer had any possession upon which to found a lien.

71 *Marinus v Taljaard* 1952 (1) SA 49 (C) at 54A-E; Cape Tex Engineering Works (Pty) Ltd v SAB Lines (Pty) Ltd 1968 (2) SA 528 (C) at 531A

46.4. fourth, there is no proof on the papers (still less any admissible proof) of the value of the goodwill that the Applicant claims it will lose. The value of R2 million alleged in the heads of argument is based exclusively on an allegation in CCT134/2013 to the following effect:

> *"The Applicants evaluate the goodwill value of their businesses, being what they believe the businesses would fetch in the open market and free of coercive influences and being also what they themselves might pay for such a business, as follows*
>
> *…*
>
> *3.14.4 Fourth Applicant Orlando R2 million"*

46.4.1. This bald allegation does not amount to evidence of the actual value of the goodwill in the Applicant's business

46.4.2. Moreover, as set out above, the parties expressly agreed in the joint practice note that the contents of this affidavit were to be treated only as legal argument.[72] So the bald allegation of a R2 million value cannot be elevated to a fact upon which any enrichment lien can be based.

46.5. Fifth, any goodwill in the business would enrich Engen only if Engen actually let the premises to a third party dealer on terms which effectively provided for the lessee to compensate Engen for such

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[72] See Joint practice note p 152 para 27 read with fn 21 at p 153.

goodwill. There is no evidence even to suggest that such an outcome is likely.

46.6. Finally, having regard to the finding of the High Court that at the time of the eviction application the Applicant had been operating commercially from the premises for 4 to 5 years without paying any rental or other compensation to Engen or the property owner,[73] the overwhelming likelihood was that the only party to have been enriched in the process was the Applicant, not Engen.

CONCLUSION

47. For the reasons set out above, Engen asks that the application for leave to appeal be dismissed with costs, including the costs of two counsel.

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30 June 2015

[73] High Court Judgment p 166 lines 6-9. (See also Joint practice note pp 149-151 paras 16-20; and Founding Affidavit p 54 paras 57 and 59 and Answering Affidavit p 70 para 23).

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