Reportable:	YES / **NO**
Circulate to Judges:	YES / **NO**
Circulate to Magistrates:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**

IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

CASE NO: M67/2017

In the matter between:

MICAREN EXEL PETROLEUL WHOLESALER (PTY) LTD — **APPLICANT**

And

STELLA QUICK STOP (PTY) LTD — **1ST RESPONDENT**

ELEGANT FUEL (PTY) LTD — **2ND RESPONDENT**

JUDGMENT

NOBANDA A J:

[1] The applicant brought an application seeking in the main, a final order interdicting the First Respondent from purchasing and storing fuel it has not purchased from the Applicant. In the alternative, the Applicant seeks an interim relief on a similar basis, pending an action it intends to institute against the First Respondent within 20 days of delivery of this judgment. No order is sought against the Second Respondent.

[2] The First Respondent is opposing this application on the basis that the agreement that the Applicant is relying upon("The Dealer Agreement") for the order sought, has been cancelled and accordingly that the Applicant has no clear right or *prima facie* right upon which the relief sought is based.

FACTS

[3] It is common cause that the parties entered into a Dealer Agreement on 10 July 2014 in terms of which the Applicant (Distributor) was to sell and deliver fuel to the First Respondent (Dealer) for resale by the First Respondent at the First Respondent's premises. The agreement was to endure for a period of 20 years.

[4] The material terms of the agreement for purpose of this application were *inter alia*:

"3.1 The distributor shall during the existence of this agreement, sell and deliver to the Dealer all Fuel required by the Dealer for resale by it at the premises, at the then ruling price of the Distributor as at date of delivery of the fuel.

3.3 The Dealer may not purchase fuel and store it, if it has not been purchased from the Distributor.

3.4 The Distributor shall sell fuel to the dealer at the ruling price prescribed by the relevant authorities, and the Dealer shall also resell fuel at the prescribed retail price.

PAYMENT

4.1 The Dealer shall place an order for the delivery of fuel to it in writing, which will be delivered to the Distributor electronically, either by telefax o otherwise. Payment will be made by the

Dealer to the Distributor as soon as the order is made, by an electronic transfer into the Distributor's bank account.

6. EQUIPMENT

6.3 It is agreed that the Equipment belongs to Micaren Exel Petroleum Wholesaler (Pty) Ltd which is lending the Equipment to the Dealer. The Dealer will allow the Distributor to install the Equipment in or on the premises in accordance with statutory and other prescription and demands, including SABS 089 manual.

6.4 The Equipment remains the property of Micaren Exel Petroleum Wholesaler (Pty) Ltd and may be used by the dealer only for the sale of Fuel as stated in this agreement. If the Dealer uses the Equipment for any other purpose as those (sic) agreed upon between them, without the prior written consent of the Distributor, the Deale will be liable for damages suffered by the Distributor as a result thereof, including the loss of fuel, subject to 5.2.

6.13 The Dealer will not allow the installation on or near the premises of equipment belonging to another distributor of Fuel subject to the terms of this agreement pertaining to the unavailability of Fuel to be delivered by the Distributor to the Dealer.

8. DEALER'S FAULT

8.1 if the Dealer neglects to perform under this agreement, the Distributor is entitled , without prejudice to any alternative or

additional right of action or remedy available, to remedy the neglect or omission, and to recover from the Dealer damages suffered."

[5] The Applicant claims that the First Respondent breached the terms of the agreement, more particularly, the provisions of the Clauses 3.3 and 6.13 in that, the First Respondent has since 8 January 2017, ceased to order and purchased fuel from the Applicant. Instead, the First Respondent has since 17 January 2017, started purchasing fuel from the Second Respondent and storing it using the Applicant's equipment. As such, the Applicant is seeking an interdict, restraining the First Respondent from purchasing fuel from another distributor other than the Applicant and storing it in the Applicant's equipment.

[6] In its opposition, the First Respondent raised the following defences *in limine*, that:

6.1 The agreement between the parties was cancelled on 25 January 2017, after the Applicant repudiated the agreement which repudiation the First Respondent accepted and thereby cancelled the agreement. The First Respondent alleges that the Applicant has repudiated the agreement by:

(a) failing to deliver fuel ordered, specifically 95 Octane during 2016;

(b) seeking to impose RAS levies charged by a Distributor for expended capital investment in the First Respondent's premises. The First Respondent contends that the Applicant did not expend any capital investment in the First Respondent's premises. In

particular, the sub-terranian tanks installed at the First Respondent's premises do not belong to the Applicant;

6.2 The Applicant has failed to satisfy the requirements of an interim interdict.

[7] For the reasons set out above, the First Respondent seeks this court to find that the Applicant has no clear or *prima facie* right upon which the relief sought is based. Further the First Respondent contends that the procedure adopted by the Applicant to bring this application is inappropriate as the Applicant was aware or ought to have been aware that there was a material dispute of facts, irresolvable on the papers. As such, the First Respondent seeks a dismissal of the application with costs on this point alone.

[8] In response to the First Respondent's point *in limine* that the Applicant has no clear or *prima facie* right for the relief claimed, Applicant contends that it has no merit and should accordingly be dismissed. With regard to the allegation that the Applicant repudiated the agreement which resulted in the cancellation of the agreement, the Applicant disputes that. The Applicant also disputed the cancellation of the agreement as the letter of termination was not annexed to the First Respondent's papers. Applicant further contends that, even if the First Respondent could prove a valid cancellation of the agreement, it would be irrelevant since the First Respondent remains liable to comply with the provisions of Clauses 6.3 and 6.4 of the agreement which would survive such cancellation.

[8] With regard to the issue of ownership of the equipment, in particular the tanks, which is also in dispute, it was contended during

argument by Applicant's Counsel that it was irrelevant for purposes of this application as Clause 3.3 of the agreement prohibits the First Respondent from purchasing fuel from anyone other than the Applicant. Counsel for the First Respondent conceded that the issue of ownership of the equipment for purposes of this application was irrelevant. I will deal with this issue later.

APPLICABLE LEGAL PRINCIPLES

[9] It is said that a plaintiff/applicant who asks for an interdict to prohibit a breach of contract, is in reality asking for specific performance in the negative form of non-performance of the forbidden or inconsistence act, to ensure performance of the contract. As such, the plaintiff/applicant is not required to prove that he will suffer injury or loss if the interdict is not granted, merely that the defendant/respondent is committing or threatening to commit the breach of the contract. Neither is the plaintiff/applicant required to prove that he has no other alternative remedy. The choice of remedy is the plaintiff's, subject to the court's discretion in claims for specific performance by applying *inter-alia*, the undue hardship principle[1].

[11] For any party to bring interdict proceedings, that party (applicant) must first have a right that can be protected by an interdict[2]. Whether the applicant has a right is a matter of substantive law[3]. Accordingly, an applicant seeking a final interdict has to establish at the least, a clear or definite right. Dealing with an application for a final interdict,

[1] Christie's, The Law of Contract in South Africa,(6th ed) at 555
[2] LAWSA 2nd ed, vol. 11 at para 393
[3] Ibid at para 397

Friedman AJP (as he then was), stated as follows **in Minister of Law and Order v Committee of the Church Summit**[4]:

"To obtain a final interdict by way of application, an applicant must establish:

(i) Whether the applicant has a right is a matter of substantive law. The onus is on the applicant applying for a final interdict to establish on a balance of probability the facts and evidence which prove that he has a clear or definite right in terms of substantive law. See Nienaber v Stuckey 1946 AD 1049 at 1053 -4; Mosii v Motseoakgomo 1954(3) SA 919(A); De Villiers v Soetsane 1975 (1) SA 360 (E) at 362; see also Law of South Africa (supra at paras 317 – 8). The right which the applicant must prove is also a right which can be protected. This is the right which exist only in law, be it at common law or statutory law".

[12] Accordingly, in order to establish a clear right, the applicant has to prove on a balance of probabilities, facts which in terms of the substantive law, establish the right relied upon[5]. Based on the order sought by the Applicant in casu, that is, prohibiting the First Respondent from committing a breach of the Dealer Agreement, the Applicant must therefore prove on a balance of probabilities, the existence of the agreement the Applicant is relying upon and seeks to enforce.

[4] 1994 (3) SA 89 at 97E-98D-E
[5] Ibid

[13] Initially, when the papers were filed, there was a dispute regarding whether or not the agreement had been cancelled, as the First Respondent had omitted to annex the cancellation letter in its answering affidavit. This letter was subsequently filed by the First Respondent after the court granted it leave to file supplementary answering affidavit to that effect. The Applicant also filed a supplementary replying affidavit thereafter.

[14] After the filing of the Supplementary affidavits by both parties, it became evident *ex facie* the documents filed that the agreement had been cancelled on 25 January 2017. It is important to quote this letter as it encompasses the First Respondent's entire defence. The letter is from the First Respondent's attorneys to the Applicant dated 25 January 2017 (annexure M?) and it reads as follows:

"Dear Sir/Madam

1…..

2. We are instructed by our client, inter alia, that:-

2.1 Our client concluded a dealership agreement with you, on certain terms and conditions;

2.2 the terms and conditions confers upon you certain obligation which include, but are no limited to, the supply of automotive petroleum products required by our client to conduct the business of a fuel dealership;

2.3 You have failed and or neglected to meet your obligations in terms of the agreement, which obligation go to the root of the agreement, in that you have

neglected to supply to our client the petroleum products required by it to conduct its business. In addition, you have unilaterally, and unlawfully, included regulatory fees not agreed upon by our client and to which you are not entitled to;

2.4 Your conduct as aforesaid, constitute a clear repudiation of the agreement between the parties, which repudiation our client accept. Our client has elected to cancel the agreement with you, notice of which is hereby afforded to you;

2.5 In addition to the aforegoing, and without derogating from our client's recorded election, it appears in any event that you have made a material misrepresentation to our client specifically pertaining to ownership of the assets installed on the dealership site. Our client has ascertained that you do not, as previously represented, own any of the installed sub-terranean tanks listed in the dealership agreement and, moreover, that the tanks so listed do not even exist in certain instances…"

[15] On perusal of the papers filed, it became evident that the order sought by the Applicant, both for the final and interim interdict, is two-pronged, namely:

(a) Restraining the First Respondent from purchasing fuel from any other distributor other than the Applicant; and

(b) Restraining the First Respondent from storing fuel it had been purchased from the Applicant.

I shall deal with restraint separately.

Restraining the First Respondent from purchasing fuel from any other distributor other than the Applicant.

[16] This relief is premised on Clause 3.1 of the agreement, which appears to give the Applicant the sole right to sell fuel to the First Respondent. It is common cause that the First Respondent has been purchasing fuel from Second Respondent since January 2017. Applicant contends that the First Respondent's purchase of fuel from the Second Respondent is prohibited and violates the express provisions of Clauses 3.3 and 6.13 of the agreement. Clause 3.3 is rather vague. It is not clear whether it prohibits First Respondent from storing fuel not purchased from the Applicant or prohibits First Respondent from purchasing fuel from other distributors other than the Applicant and storing it. In my view, Clauses 3.3 and 6.13 do not deal with the purchase of fuel but the storage of fuel not purchased from the Applicant. That Clause the Applicant seeks to enforce hereunder appears to originate from Clause 3.1 of the Agreement. Regardless, even if Clause 3.3 prohibits First Respondent from purchasing fuel from other distributors other than the Applicant as contended by the Applicant, for the Applicant to succeed with the relief claimed hereunder, the Applicant has to prove on a balance of probabilities that that right seeks to enforce exist.

[17] As indicated above, it appears *ex facie* the documents filed that the agreement has been cancelled. As such, the Applicant has failed to

discharge the onus that it has a right that it seeks to enforce. In the result, the First Respondent's point *in limine* insofar as it relates to the Applicant not having a clear and/or a prima facie right for the relief sought under a) above is upheld. Absent the agreement, the Applicant cannot enforce clause 3.1 or that part of Clause 3.3 of the Agreement. Accordingly, the order sought under a) above is dismissed.

Restraining the First Respondent from storing fuel it had not been purchased from the Applicant:

[18] Part b) of the order sought relates to prohibiting First Respondent from storing fuel First Respondent has not purchased from the Applicant. Paragraph 18 of the founding affidavit reads as follows:

> *"18. By purchasing and storing fuel from another distributor, such as the second respondent, the first respondent also infringes upon the rights of the applicant pertaining to the equipment which it installed at its costs at the premises for the commercial benefit of both parties. It is evident that the investment made by the applicant in this regard is severely compromised if first respondent breaches the agreement by purchasing fuel elsewhere and using the applicant's equipment for the storage thereof."*

It appears the Applicant is relying on Clause 3.3 read with inter alia, Clauses 6.3, 6.4 and 6.13 of the agreement for this order. These clauses prohibit the First Respondent from storing fuel it had not purchased from the Applicant in the equipment that belongs to the

Applicant. The Applicant contends that these clauses survive the cancellation of the agreement. First Respondent disputes that that equipment belongs to the Applicant. To that end, First Respondent contends as follows in paragraph 12 of its answering affidavit:

"12.1 The STELLA SOUTPAN EIENDOM (PTY) LTD, of which company I am a director, acquired the premises from where the 1st Respondent trades as fuel retailer prior to the conclusion of the agreement annexed as JF2. This property was purchased from a previous petroleum retailing business. Copy of the agreement, in terms whereof the premises was acquired, is annexed hereto marked "M2".

12.2 at the time of that acquisition, several sub-terranean tanks, were already installed on the premises and formed part of the merx purchased in terms of the agreement…

12.3 as such, these tanks were not installed at the instance of the Applicant, were never owned by the Applicant and should not have formed part of the agreement later concluded between the 1st Respondent and the Applicant;"

[19] During argument, Applicant's Counsel contended that the issue of ownership of the equipment is irrelevant for purposes of this application. This is astonishing as the Applicant is also seeking an order restraining the First Respondent from storing fuel it has not purchased from the Applicant in the equipment allegedly owned by the Applicant. First Respondent's Counsel conceded that the issue of ownership is irrelevant as contended by the Applicant's Counsel. This concession by First Respondent's Counsel is not surprising

because it is beneficial to the First Respondent's case. However, if the issue of ownership of the equipment is no relevant as contended by the Applicant's Counsel, what then is the basis of the Applicant seeking an order under this subheading?

[20] The Applicant states in its replying affidavit that the provisions of Clauses 6.3 and 6.4 of the agreement survive the purported cancellation. Clauses 6.3 and 6.4 relate to the ownership of equipment by the Applicant. I therefore agree with the Applicant's Counsel that these clauses and I might add, read with Clause 3.3 at least insofar as storage of fuel is concerned, survive the cancellation of the agreement. As such, the issue of ownership of the equipment, especially relating to storage of fuel, is very relevant.

[21] First Respondent disputes that the Applicant owns that equipment. First Respondent alleges that that equipment was already there when the agreement was entered into and the Applicant did not install any equipment at its premises, hence the dispute of having to pay RAS levies which form part of the reasons for the cancellation of the agreement. Applicant disputes this and goes into detail in its replying affidavit of hoe the equipment came about and how the RAS levies are determined and calculated. This issue of the ownership of equipment raises material dispute of facts which cannot be determined on the papers as they stand.

[22] Counsel for the First Respondent argued that the Applicant must have foreseen that the application was going to be riddled with factual disputes but Applicant elected to proceed by way of application notwithstanding. Accordingly, that since the Applicant

has failed to bring an application to refer the matter to the trial, the application sought to be dismissed with costs on this point alone.

[23] Uniform Rule 6(5) (g) provides:

> *" Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.*"

This court is accordingly empowered by the subrule to make such order as it deems fit with a view to ensuring that a just and expeditious decision is made[6]. The court's discretion to refer a matter to oral evidence or trial is very wide- even in the absence of an application by the applicant to that effect[7]. Accordingly, notwithstanding that the Applicant failed to bring an application to refer the matter to trial, it would be just and expeditious to refer the

[6] Nkwentsha v Mimister of Law and Order 1988 (3) SA 99 (A) at 1177C
[7] Santino Publishers v Waylite Marketing 2010 (2) SA 53 at 56F

issue of the ownership of the equipment, in particular the tanks, to trial for determination.

[24] I would be remiss if I do not address the issue of costs. First Respondent alleges that the Applicant was advised of the cancellation of the agreement prior to the launching of this application. The cancellation letter referred to above is dated 25 January 2017. The First Respondent was served with the application on 15 March 2017. First Respondent filed its answering affidavit in April 2017 raising material dispute of facts. Subsequently, First Respondent filed a supplementary affidavit during October 2017, annexing the cancellation letter which it had omitted to annex in its answering affidavit. Notwithstanding, the Applicant failed to bring an application for the matter to be referred to trial, even on the day of the hearing. Accordingly, it would be unjust to expect the First Respondent to be out of pocket under the circumstances. In any event, the First Respondent has substantially succeeded in opposing this application. Accordingly, it is entitled to costs of this application.

ORDER

[25] In the result, I make the following order:

1. The prayer for an interdict restraining the First Respondent from purchasing fuel from other distributors other than the Applicant is dismissed.
2. The issue of ownership of the equipment on the First Respondent's premises is referred to trial for determination;

3. The Applicant is ordered to file its declaration within 20 days of this order;
4. The First Respondent is ordered to file its plea within 10 days of receiving the Applicant's declaration;
5. The Uniform Rules of Court pertaining to pleadings are applicable *mutatis mutandis*;
6. The Applicant is ordered to pay the costs of this application.

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PL NOBANDA

ACTING JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING	:	**31 MAY 2018**
DATE OF JUDGMENT	**:**	**20 SEPTEMBER 2018**
COUNSEL FOR THE APPLICANT	**:**	**ADV BH SWART SC**
COUNSEL FOR THE RESPONDENT	**:**	**ADV J GREYLING**