THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 471/2019

In the matter between:

MICAREN EXEL PETROLEUM WHOLESALER (PTY) LTD **APPELLANT**

And

STELLA QUICK SHOP (PTY) LTD **FIRST RESPONDENT**

ELEGANT FUEL (PTY) LTD **SECOND RESPONDENT**

Neutral citation: *Micaren Exel Petroleum Wholesaler (Pty) Ltd v Stella Quick Shop (Pty) Ltd and Another* (Case no 471/2019) [2020] ZASCA 61 (9 June 2020)

Coram: WALLIS, DAMBUZA and MBATHA JJA and LEDWABA and EKSTEEN AJJA

Heard: This appeal was disposed of without an oral hearing in terms of s19 *(a)* of the Superior Courts Act 10 of 2013

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time of hand-down is deemed to be 10H00 on 9 June 2020.

Summary: Interdict – clear right founded on a contract – whether the contract was repudiated – principles on inquiry into allegation of repudiation re-stated.

ORDER

On appeal from: North West Division of the High Court, Mahikeng (Nobanda AJ, sitting as court of first instance): judgment reported *sub nom Micaren Exel Petroleum Wholesaler (Pty) Ltd v Stella Quick Shop (Pty) Ltd and Another* [2018] ZANWHC 43.

1 The appeal is upheld with costs.

2 The order of the high court is set aside and replaced with the following:

'(i) The first respondent is interdicted and restrained from purchasing and storing fuel at its premises situated at 99 and 100 Market Street, Stella, North West, if it has not been purchased from the applicant.

(ii) The first respondent is ordered to pay the costs of the application.'

JUDGMENT

Dambuza JA (Wallis and Mbatha JJA and Ledwaba and Eksteen AJJA concurring)

[1] The issue in this appeal is whether a fuel dealership agreement concluded between the fuel distributor, Micaren Exel Petroleum Wholesaler (Pty) Ltd (Micaren), and the dealer, Stella Quick Stop (Pty) Ltd (Stella), was repudiated by Micaren. The appeal is at the instance of Micaren. It appeals against an order of the North West Division of the High Court, Mahikeng (Nobanda AJ) (the high court), in terms of which its application for an interdict against Stella, the first respondent, was dismissed. The high court

held that the fuel dealership agreement had been cancelled following repudiation by Micaren. The appeal is with the leave of the high court.

[2] On 1 July 2014 Micaren and Stella concluded a 'dealer agreement' in terms of which Micaren, as a 'distributor', agreed to sell and deliver petrol and diesel fuel to Stella, the 'dealer'. Stella was to sell the fuel from its premises at 99-100 Market Street, Stella, in the North West Province, at the Distributor's ruling price as at the date of delivery. The fuel was to be stored in underground tanks that were to be installed by Micaren at Stella's premises before the effective date of the agreement. In terms of the agreement, Stella was prohibited from buying fuel from any distributor other than Micaren and only the fuel bought from Micaren would be stored in the tanks supplied under the agreement.

[3] More specifically, in the relevant parts, the dealer agreement regulated the relationship between the parties as follows:

'3.2 The dealer is obliged, when requiring fuel, to place an order for the delivery of not less than 20,000 (TWENTY THOUSAND) litres at a time.

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

. . .

4.2 The Distributor shall, within 36 (THIRTY SIX) hours of the placing of the order and the payment of the purchase price, deliver the Fuel to the dealer, free of transport costs, at the premises . . .

. . .

6.1 The Distributor shall install the equipment on the Premises before the commencement date.

6.2 Fuel delivered by the Distributor to the Dealer may only be sold by the Dealer using the 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 prescriptions 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 purposes as those agreed upon between them, without the prior written consent of the Distributor, the Dealer will be liable for damages suffered by the Distributor as a result thereof, including the loss of Fuel, subject to 5.2.

. . .

6.13The Dealer will not allow installation on or near the Premises of equipment belonging to another distributor of Fuel, and will not use the Equipment for storage and sale of any other 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.'

The equipment was described in the agreement as comprising three dual pumps, four underground tanks, and one aboveground tank, the tanks being of various sizes.

[4] It was common cause, both in the high court and in this court, that from 17 January 2017 Stella started buying fuel from the second respondent, Elegant Fuel (Pty) Ltd, and that it was storing such fuel in the tanks installed on the premises. This resulted from events that started in November 2016, when Micaren stopped delivering fuel to Stella. On 22 November 2016 Stella admitted liability to Micaren, in writing, for R504 455.36 in respect of fuel that had been delivered previously. Thereafter it made certain payments, reducing this amount to R449 720.39. On 22 January 2017 Micaren sent to Stella a reconciliation of Stella's account, showing an outstanding payment of R504 455.36. The reconciliation was followed, on 24 January 2017, by a

notice issued in terms of s 345 of the Companies Act 61 of 1973 by Micaren's attorneys to Stella, demanding payment of R449 720.39. The notice also advised of Micaren's intention to have Stella wound up if payment was not received within 21 days thereof.[1] On the following day (25 January 2017) Stella's attorneys addressed a letter to Micaren, alleging repudiation of the dealer agreement by Micaren in failing to supply to Stella the 'petroleum products' it had ordered; and by unilaterally, and unlawfully, imposing RAS levies[2] not agreed upon by Stella and to which Micaren was not entitled.

[5] In terms of that letter Stella accepted the repudiation and cancelled the dealer agreement. On 7 February 2017 Stella's attorneys responded to the s345 notice, disputing the correctness of the balance owing on Stella's account and tendering payment of R66 541.52 which, according to Stella, was the balance owing to Micaren. However, already on 28 January 2017 Micaren had approached the high court seeking an order that Stella be interdicted and restrained from buying fuel from any distributor other than itself.

[6] Stella's *in limine* response, that Micaren should have sought an order of specific performance, was correctly rejected by the high court as the interdict sought was, in fact, a prayer for specific performance. As regards the merits of the application, Stella contended that it had cancelled the dealer

[1] Section 345 of the Companies Act 61 of 1973 deems a company unable to pay its debts if a creditor, who is owed not less than R100, has served on the company's registered office a demand requiring the company to pay and the company has, for three weeks thereafter, neglected to pay or to secure or compound the debt to the reasonable satisfs ion of the creditor. In light of item 9 of Sch 5 of the Companies Act 71 of 2008 this provision still applies under the Companies Act 71 of 2008, despite the repeal of the 1973 Companies Act.

[2] Described by Stella as a system that sets forth the cents per litre of automotive fuel that would from then on be payable as operating expenditure and capital expenditure. Stella asserted that the system was not applicable in this case as Micaren had not spent any capital investment on its (Stella's) premises.

agreement pursuant to the repudiation thereof by Micaren and Micaren's unilateral imposition of RAS levies on Stella's account, for capital investment expended in respect of the equipment installed on the premises.

[7] Despite the express terms of the agreement, Stella maintained that the fuel tanks were its own property and not the subject of the dealer agreement. It asserted that they had already been installed on the premises when it acquired the property and that Micaren's claim thereto was a misrepresentation. In sum, the basis of Stella's opposition to Micaren's application for an interdict was that, because Micaren had repudiated the dealer agreement, as a result of which it was cancelled, and because the tanks were its own property, the requirements for an interdict had not been met.

[8] Although both parties were in agreement in the high court that ownership of the tanks was not an issue in the resolution of their dispute, in its reply Micaren gave a detailed historical account of its ownership of the tanks, over a period of more than two decades, during which the premises had changed many hands until acquisition thereof by Stella in 2014.

[9] The high court found that the relevant clauses (clauses 3.3 and 6.13) of the agreement only prohibited the storage of fuel purchased from third party suppliers and not the purchase thereof from third parties. It also found that it was 'evident ex facie the documents filed' that the dealer agreement had been cancelled and that, for that reason, there was no basis for the interdict sought by Micaren. The application for an interdict to stop the purchasing of fuel from other suppliers was accordingly dismissed. Despite the agreement by the

parties that ownership of the tanks was irrelevant to the issues, the high court referred the issue of ownership of the tanks for oral evidence.

[10] On appeal Micaren insisted, as it did in the high court, that it had never repudiated the dealer agreement. It maintained that its conduct in not delivering the fuel ordered by Stella was consistent with the terms of the contract, as Stella had not paid for the fuel it sought to have delivered and it owed money for fuel that had been delivered previously. Micaren maintained that the alleged repudiation and purported cancellation of the agreement had to be considered within the context of events that preceded the alleged repudiation letter dated 25 January 2017. According to Micaren, when raising the alleged repudiation and cancellation of the agreement, Stella failed to disclose these events to the court. It (Micaren) also rebuffed as a baseless conclusion of fact the assertion that it had imposed regulatory levies on Stella's account.

[11] The traditional approach to an inquiry into an allegation of repudiation is to examine the objective intention of the repudiator and the response or acceptance thereof by the aggrieved party. The question is whether the conduct of the repudiator or non-performing party, when fairly considered by a reasonable person in the place of the aggrieved or innocent party, demonstrates an intention no longer to be bound by the contract.[3] Needless to say, such conduct must be viewed comprehensively. All material aspects thereof must be taken into account. In *Nash v Golden Pumps (Pty) Ltd*[4] Corbett JA described repudiation as follows:

[3] RH Christie & GB Bradfield *Christie's Law of Contract in South Africa* 7 ed (2016) at 613.
[4] *Nash v Golden Pumps (Pty) Ltd* 1985 (3) SA 1 (A) at 22C-F.

'Where one party to a contract, without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention no longer to be bound by the contract, he is said to "repudiate" the contract . . . Where that happens, the other party to the contract may elect to accept the repudiation and rescind the contract. If he does so, the contract comes to an end upon communication of his acceptance of repudiation and rescission to the party who has repudiated . . .'

[12] In a sense, repudiation is itself breach of the agreement and acceptance thereof by the innocent party is exercise of the right to terminate the contract.[5] The conduct from which repudiation is inferred must be clear and unequivocal.[6]

[13] Evidently, the dismissal of Micaren's application by the high court was based solely on the letter dated 25 January 2017. The court simply accepted Stella's assertion that Micaren's failure to deliver fuel to Stella constituted repudiation. The full context of the matter as set out in Micaren's reply to Stella's repudiation allegation was not considered by the high court. In this regard the high court erred. The correct approach was to consider the full conduct of both parties, particularly the outstanding payments starting from November 2016, the acknowledgment of indebtedness, and the recurring failure to make payments. All of this would have weighed with the innocent party, Stella, when considering non-delivery of the fuel by Micaren.[7] Also relevant was the fact that Micaren's refusal to deliver fuel to Stella had persisted over a period of at least two months. Yet, it was only when the s 345 notice was issued that Stella alleged that the non-delivery of fuel constituted

[5] *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA) para 1 and the other authorities cited therein.
[6] *Datacolor* ibid para 18.
[7] *Datacalor* ibid para 19.

repudiation. Also relevant is the fact that Micaren had clearly communicated its intention to hold Stella to payment of moneys owing under the agreement by repeatedly demanding payment and threatening legal action. At no point did Micaren demonstrate an intention not to be bound by the agreement. On the contrary, its actions were strictly in accordance with the agreement.

[14] In the end the evidence shows that a reasonable dealer in Stella's position, having considered all of these aspects, would not have concluded that Micaren was repudiating the contract. The allegation by Stella that Micaren had repudiated the contract was therefore unfounded. The agreement remained extant. Instead, it was Stella who had breached its obligation under the contract by purchasing fuel from third party distributors. Its conduct was to Micaren's detriment. Micaren had satisfied the requirements for a final interdict. The appeal must therefore succeed.

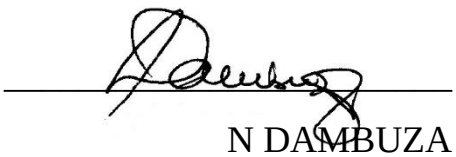
[15] The following order shall issue:

1 The appeal is upheld with costs.

2 The order of the high court is set aside and replaced with the following:

'(i) The first respondent is interdicted and restrained from purchasing and storing fuel at its premises situated at 99 and 100 Market Street, Stella, North West, if it has not been purchased from the applicant.

(ii) The first respondent is ordered to pay the costs of the application.'



N DAMBUZA

JUDGE OF APPEAL

Appearances:

For appellants:	Adv B H Swart SC
Instructed by:	Japie van Zyl Attorneys c/o Van Rooyen Tlhapi Wessels, Mahikeng
	Symington De Kok, Bloemfontein
For respondent:	Adv P J Greyling
Instructed by:	Shabort Potgieter Attorneys c/o Smit Stanton Inc., Mahikeng
	Rossouw & Conradie Inc., Bloemfontein